

*Against Method:*

*Liberal Halakhah Between Theory and Practice\**

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[p. 17] I find the topic of this volume both fascinating and frustrating. It is fascinating because, well, this is what we liberal halakhists *do*. Much of our work, perhaps even its essence, centers upon the effort to go “beyond the letter of the law,” to work toward a more exalted understanding of the halakhic tradition, a vision of *halakhah* that is more lenient, flexible, affirmative of contemporary values and morally uplifting than that promulgated in the halakhic writings of non-liberals. It is our guiding conviction that the stringent *pesak* or *pesikah* (halakhic decision making) of today’s Orthodox rabbinate, a trend that we associate with the “letter” of the law, represents neither the only nor the best available interpretation of Jewish legal thought on a host of important questions. To borrow a word or two from our teacher Moshe Zemer, to whom we pay tribute in these pages, we liberals believe in an “evolving” and “sane” *halakhah*,<sup>1</sup> one that is fully capable of yielding answers and guidance that cohere with our highest conceptions of religious truth.

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\* To Moshe Zemer, whose life in *halakhah* and in its instruction is an example for us all.

1. Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law* (Woodstock, VT: Jewish Lights Publishing, 1999). This is the translation of Rabbi Zemer’s *Halakhah Shefuyah* (Tel Aviv: Devir, 1993)—*i.e.*, a “sane” *halakhah*. In this way, he teaches us that Jewish law can remain sane or healthy only so long as it is free to respond in a positive way to the changes in outlook, technology, and social reality that occur in every age.

Our topic is frustrating because we can't get anyone to listen to us. We liberal halakhists occupy a middle ground between two groups of Jews who respond to our work with a mixture of apathy and disdain. To our left stand those Jews who dismiss traditional Jewish law as at best irrelevant and at worst positively injurious to our most deeply cherished liberal values. Jewish law, they claim, supports doctrines and teachings that inevitably contradict our intellectual and ethical commitments on issues such as human freedom and autonomy, social justice, gender equality, and the relations between Jews and the non-Jewish world. No approach to Jewish law, however "liberal" it might be, can successfully alter its parochial and backward-looking [18] nature; Jewish religious liberals thus have little use for halakhic thinking and should not waste their time trying to reform, re-read, or otherwise "kasher" the recalcitrant texts of the Jewish legal tradition. To our right are those in the "orthodox" camp who, deeply devoted to the halakhic process, reject our liberal halakhic conclusions as uninformed, misguided, or just plain wrong. As they see it, our "evolving" or "sane" *halakhah* is not *halakhah* at all but a pastiche of liberal political and cultural values masquerading as *halakhah*. The decisions we render in its name violate the correct interpretation of the sources and texts of Jewish law. And since no authentic Jewish practice exists outside the framework of *halakhah*, it follows that our practice is not and cannot be considered as authentically Jewish.

Oddly enough, for all that separates the religious outlook of these two groups, they are at one in their definition of Jewish law. Both see *halakhah* as a body of objectively correct legal decisions. That is, there exists something that one can identify as "the" *halakhah*, a collected mass of rulings, interpretations, and behaviors that comprise the authoritative core and content of Jewish legal teaching. This core and content, it turns out, are identical with the understanding of

Jewish law presented in contemporary Orthodox *pesikah* so that, according to both groups, “the” *halakhah* is whatever today’s Orthodox rabbinate says it is. From this, it follows that any ruling, interpretation, or behavior that differs from contemporary Orthodox *pesak* deviates from the true *halakhah*. Our critics to both our left and our right therefore consider the term “liberal *halakhah*” an oxymoron: any suggestion that we might arrive at a conception of an “evolving” or “sane” *halakhah* through the study and application of the sources of Jewish law is but a snare and a delusion. There is no *halakhah* other than the currently-existing body of substantive rulings, interpretations, and behaviors that bear the name.<sup>2</sup> Our choice is simply to accept or reject this body of rules in toto. On that point, the two groups diverge; they are united, however, in denying any intellectual justification to our efforts to derive a liberal *halakhah*.

[19] This criticism, which goes to the heart of our enterprise, rests upon the assumption that it is possible to determine the objectively correct answers to all or most questions of Jewish law, so that answers that differ are by definition incorrect or deviant. And if it is possible to determine objectively correct answers to questions of Jewish law, there must be a proper *method* by which to make that determination. After all, halakhic decisions are based upon the interpretation of the literary texts and sources of Jewish law, the Talmud and the vast corpus of commentaries, codes, and responsa devoted to the Talmud’s elucidation. Since legal sources are famously open to differing readings and understandings, there must be some procedure by which to weed out those interpretations that are incorrect. That procedure is the “halakhic method” of

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2. Yitzchak Englard takes a similar view of Jewish law from the perspective of academic jurisprudence: there is no “Jewish law” apart from the actual decisions of the rabbis. For discussion and critique of his position, see Bernard S. Jackson, *Modern Research in Jewish Law* (Leiden: Brill, 1980), especially the articles by Englard, Menachem Elon, and Bernard S. Jackson in that volume.

Orthodox *pesak*, a set of rigorous techniques of textual interpretation that, when applied to the literary sources of Jewish law, distinguish objectively “right” understandings from “wrong” ones.<sup>3</sup> The belief in the existence of such a method and its identification with Orthodox *pesak* allows our critics on both the left and the right to identify that *pesak* as “the” *halakhah* and our own interpretations, which deviate from it, as incorrect, as wrong, as not-*halakhah*.

I want to offer a challenge to this assumption. I argue that there is no such thing as the one objectively correct answer to a question of *halakhah*. I argue this because I do not believe in the existence of some procedure or set of techniques called the “halakhic method” that works as a formula to produce the right interpretations of Jewish legal texts. The appeal to such a method allows for the claim that *halakhah* is like mathematics or the hard sciences, a discipline governed by fixed and rationally-discoverable rules of procedure that, if properly applied, do yield objectively correct answers. The resort to “method” as a way of explaining the halakhic process resembles nothing so much as the doctrine of legal formalism,<sup>4</sup> once the reigning theory of law–

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3. I use the term “method” in the sense that Edward L. Rubin uses the term “methodology.” See his “The Practice and Discourse of Legal Scholarship,” *Michigan Law Review* 86 (1988), 1838, n. 21: “‘Methodology’...means any independent, systematic set of arguments or criteria which claims to arrive at a true or accurate account of the subject matter under consideration.” Rubin’s “true” and “accurate” parallel my term “objective”: a conclusion is “objectively” correct when its correctness can be satisfactorily determined by the application of criteria that are internal to the particular discipline, such as law or *halakhah*.

4. It is difficult to define “legal formalism” with absolute precision, since it is used in the scholarship to refer to a number of different phenomena. The common denominator that runs through all the descriptions is that legal decision is a matter of decision by rule. Formalists hold that all valid legal decision flows from a complex of authoritative legal rules that are themselves grounded in some authoritative legal principle. These rules and principles comprise a system that is sufficiently comprehensive to answer any and all questions that arise under the law; this system—the “law”—dictates the ruling of a judge in a contested case. The decision of the judge, who must rule in accordance with the “law” rather than with his or her personal predilections, takes the form of a deductive application of the rules and the principles of the relevant legal institutions. The decision is “correct” because it is determined by the workings of an objective set of techniques that constrain the judge’s discretion and lead to the one right outcome; it is determined, that is, by legal method. For extensive discussion, see: Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Boston: Little, Brown, 1985), 167-169; Neil Duxbury, *Patterns of American Jurisprudence*

the “orthodoxy” of jurisprudence-- in the United States.<sup>5</sup> By now, however, generations of scholars have dismantled that [20] doctrine, and other accounts of legal reasoning and judicial decision have replaced it.<sup>6</sup> I contend that, just as legal “method” is no longer viewed as a mechanism that produces objectively right answers in law, so we ought to abandon the notion of a method that distinguishes between objectively right and wrong interpretations of the *halakhah*.

As the title of this essay proclaims, therefore, I am “against method” as a description of the process of halakhic decision making.<sup>7</sup> This does *not* mean that I define the halakhic process as a kind of anarchy, in which the halakhist derives whatever lessons he (or she) wishes to derive from the texts without having to pay attention to rules, principles, procedures, and the like. I readily concede that rules, principles, and procedures are an integral aspect of the practice of *halakhah*; indeed, *halakhah* could hardly be a “practice”—that is, an organized intellectual discipline--without such things. How I understand the term “practice” and how I apply it to

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(Oxford: Clarendon Press, 1995), 10; Gary Minda, *Postmodern Legal Movements* (New York: New York University Press, 1995), 13-16; and Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca NY: Cornell University Press, 1982), 137ff.

5. Thomas C. Grey, “Langdell’s Orthodoxy,” *University of Pittsburgh Law Review* 45 (1983), 1-53.
6. See, in general, the works cited in note 4. The attack on formalism has assumed a number of different names: legal realism, legal skepticism, instrumentalism, legal pragmatism, critical legal theory, and others. In their more radical manifestations, these approaches conceive of “law” as nothing more than politics (or sociology, or ideology, or economics, or ethics) conducted by legal officials, so that “legal decision” as a separate and distinct mode of thought does not exist and that “law” as such does not formally constrain the choice of the decision maker. Not-so-radical versions of these approaches concede that logic and formal reasoning do play a role in law and judicial decision but that they do not dictate the outcome in some deductive or mechanical way.
7. I have lifted the title of this essay from Paul Feyerabend, *Against Method* (Revised edition. London: Verso, 1988). Feyerabend claims that the scientific method, which almost everyone thinks of as the *sine qua non* of true scientific research, in fact stultifies and limits the creativity of researchers. The best results, he argues, have always been obtained by scientific “anarchists” who followed their own lights to important discoveries. Whether Feyerabend is right or wrong about the desirability of renouncing “method” in the hard sciences is a controversial subject into which I am certainly not qualified to intervene. I do think, though, that his insights apply with telling force to inquiry in the social sciences, humanities, law, and—by extension—*halakhah*.

*halakhah* are questions I will address in the latter part of this article. At the outset, though, it is enough to say that I do not believe that “method” is a proper or accurate description of that practice. To put this differently, while rules, principles, and procedures figure prominently in what the halakhist does, they do not determine the conclusions that the halakhist draws.

In order to develop this argument, I want to look at a particular example of halakhic practice—a body of halakhic interpretations and rulings that were actually put forward by Jewish legal authorities over a significant period of time--that displays two important characteristics. First, it is a “different” *halakhah*. These teachings and rulings, that is, deviate substantially from the previously existing trends in mainstream Orthodox *pesikah* to the extent that, as I shall argue, they warrant the descriptive labels “innovative” and “progressive.” Second, the practitioners of this innovative *halakhah* were all “orthodox” rabbis whose halakhic bona fides could not be questioned. Their work, in other words, cannot be summarily dismissed as the product of Reform or Conservative rabbis who are [21] declared by rabbinical fiat to be *apikorsim*, heretics who by definition exclude themselves from the halakhic circle.<sup>8</sup> What we have therefore is a case study in halakhic pluralism: two widely divergent, contradictory approaches to *pesak* that coexist within a common intellectual structure, so that the advocates of both approaches claim that theirs is “correct” *halakhah*, a valid form of halakhic practice. This claim, we shall see, is not based upon any appeal to a halakhic “method” that, when properly followed, yields indisputably right answers. I argue, rather, that the existence of these two schools of halakhic thought demonstrates that no such method exists. The fact of halakhic pluralism and the claim of both sides that their

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8. On this topic, see J. David Bleich, *Contemporary Halakhic Problems, Volume 3* (New York: Ktav/Yeshiva, 1989), 91, at note 6; Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986), 71-74; and Mark Washofsky, “Responsa and the Art of Writing,” in Peter S. Knobel and

view is the “correct” understanding of Jewish law suggests that we need another, more accurate explanation of the halakhic process.

*A “Zionist Halakhah.”*

The decades of the early to mid-twentieth century witnessed a remarkable burst of halakhic creativity, a flood of books, essays, articles, and responsa that addressed themselves to issues surrounding the emerging Jewish state. I call this body of writing “Zionist *halakhah*,”<sup>9</sup> because it was largely produced by rabbis associated with the “national religious” or “Mizrachi” Zionist movement. The slogan of the Mizrachi movement--“the land of Israel for the people of Israel according to the Torah of Israel”—expressed the Orthodox Zionist credo that the establishment of a sovereign Jewish state prior to the coming of the Messiah was fully consistent with Torah and *halakhah*. This, in turn, implied that the Jewish state should function in accordance with Jewish law and that the *halakhah* was fully capable of serving as the legal foundation of such a state. Yet to put this belief into practice was a daunting challenge. It was not at all obvious that the *halakhah*, as it was formulated at the dawn of the Jewish national

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Mark N. Staitman, eds., *An American Rabbinate: A Festschrift for Walter Jacob* (Pittsburgh: Rodef Shalom Press, 2000), at 175-177.

9. *Ha gufa kashya*: the term “Zionist *halakhah*” may seem to embody an internal contradiction. *Halakhah*, after all, symbolizes the old, established forms of Jewish life and behavior, while Zionism constituted a veritable revolution in Jewish self-definition. (That Zionism is legitimately described as a “revolution” is a commonplace in Zionist thought and historiography. See Arthur Hertzberg, ed., *The Zionist Idea* [New York: Atheneum, 1975], 16; Shelomo Avineri, *Hara`ayon hatziyoni legevanav* [Tel Aviv: Am Oved, 1985], 13-24; and David Vital, *Hamahapechah hatziyonit*, vols. 1-3 [Tel Aviv: Am Oved, 1978-1991]. Yet it should be recalled that “Orthodox Zionism,” the movement from which these halakhic writings gushed forth, was also a revolutionary departure from much traditional Jewish religious thought and experience. There is, of course, a wealth of literature on the history and ideology of Orthodox Zionism. See, in general, Yosef Tirosh: *Religious Zionism: An Anthology* (Jerusalem: World Zionist Organization, 1975); Yosef Tirosh, *Hatziyonut hadatit vehamedinah: kovetz ma'amarim* (Jerusalem: World Zionist Organization,

movement, was up to the task that the Orthodox Zionists set for it.<sup>10</sup> In neither the realm of private law (torts, contracts, property) nor that [22] of public administrative law and constitutional theory had the *halakhah* attained the necessary sophistication to address the exigencies of a modern society. Although classical halakhic literature does deal with these subjects,<sup>11</sup> the loss of national sovereignty in 70 C.E. and the disappearance of Jewish juridical autonomy with the advent of Emancipation had removed these areas of private and public law from the practical jurisdiction of the rabbinical courts.<sup>12</sup> The result was that, as Orthodox Zionists fully recognized,<sup>13</sup> the *halakhah* of statehood (*hilkhot medinah*) was terribly outdated and simply did not speak to the requirements of contemporary national political life. Accordingly, a group of Orthodox Zionist scholars took upon themselves the mission of re-examining and restating the existing corpus of Jewish law so that it might speak effectively to the requirements of the modern state.

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1978); Dov Schwartz, *Hatziyonut hadatit bein higayon lemeshichiyut* (Tel Aviv: Am Oved, 1999); and S. Almog, Y. Reinhartz, and A. Shapira, eds., *Tziyonut vedat* (Jerusalem: Mercaz Zalman Shazar, 1994).

10. For an argument that the *halakhah* as fashioned by the Rabbis is “anti-political” at its core and was therefore never intended to serve as the legal or constitutional basis for a Jewish state, see Gershon Weiler, *Teokratiah yehudit* (Tel Aviv: Am Oved, 1976), especially at 143-160.
11. To take Maimonides’ *Mishneh Torah* as tool of measurement, four out of the fourteen books that compose that code are devoted to *dinei mamonot*, that is, to property law, penal law, court procedure, and the structures of government.
12. By the “disappearance of Jewish juridical autonomy,” I mean the practice that developed with the rise of the modern nation-state for the citizens of a state, Jews as well as Gentiles, to adjudicate their legal disputes in the state courts. This practice, writes Menachem Elon, brought about serious consequences for Jewish law. “Since Jewish law no longer operated within a functional legal system, its organic development was severely stunted. The harm was compounded by the fact that this historically crucial development in the evolution of Jewish law occurred at the dawn of the nineteenth century, when social, economic, and industrial revolutions were profoundly affecting the law in many fields, especially commercial and public law”; *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), 1586.
13. See, for example, the plea that “our Rabbis instruct us” (*yelamdenu rabbeinu*), along with a detailed agenda of the halakhic problems awaiting resolution, offered by the Mizrahi theoretician S. Z. Shragai before the Tenth National Conference of Hapo`el Hamizrachi, *Din vecheshbon* (Jerusalem, 1950), 45-55.



The work of these rabbis can be seen as the religious counterpart to the *mishpat ivri* movement among secular jurists and legal academicians who sought to establish Jewish law as the legal structure of the new state. Unlike the latter, about which much has been written,<sup>14</sup> we find comparatively little in the way of description or analysis of the literary product of the Zionist rabbis. Fortunately, a large-scale study is presently in progress;<sup>15</sup> in the meantime, we can at least note the scope of their achievement. Among the authors were some of the leading figures of the rabbinical community in Palestine/Israel: Yitzchak Halevy Herzog, the chief Ashkenazic rabbi of Palestine/Israel from 1937-1959, who devoted the most sustained and systematic thought to these matters;<sup>16</sup> Ben Zion Meir Chai Ouziel, chief Sefardic rabbi of

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14. *Mishpat ivri* encompasses two broad, related-but-not-identical trends. The more “purely” academic trend applies the scholarly canons of contemporary jurisprudence and legal history (*Rechtswissenschaft* and the various theories that have succeeded it) to the study of Jewish law. The second trend reflects the desire among many, though not all, *mishpat ivri* scholars that the state of Israel adopt Jewish law to the greatest extent possible as the foundation of its legal system. See, in general, Elon, *Jewish Law* (note 12, above), as well as the essays collected in Ya`akov Bazak, *Hamishpat ha`ivri umedinat yisrael* (Jerusalem: Mosad Harav Kook, 1969). For a critical, “postmodernist” reassessment of the *mishpat ivri* movement, see Assaf Likhovski, “The Invention of ‘Hebrew Law’ in Mandatory Palestine,” *American Journal of Comparative Law* 46 (1998), 339-373.
15. Professor Zvi Zohar has announced plans to produce a monograph entitled *Halakhic Creativity in The State of Israel, 1948-1998*. In the meantime, see Mark Washofsky, “Halakhah and Political Theory: A Study in Jewish Legal Response to Modernity,” *Modern Judaism*, October, 1989, pp. 289-310. Mosheh Una, *Bederakhim nifradot: hamiflagot hadatot beyisrael* (Gush Etzion: Yad Shapira, 1984), 83-105, offers a good journalistic survey of the various and unsuccessful efforts by Orthodox Zionists to prepare Jewish law to serve as the legal foundation of the new state.
16. Most of Herzog’s Zionist halakhic writings are collected in the posthumous three-volume collection *Techukah leyisrael al-pi hatorah* (Jerusalem: Mosad Harav Kook, 1989). See also his *Pesakim ukhetavim*, nine volumes (Jerusalem: Mosad Harav Kook, 1989), particularly volume nine, which deals with issues in *Choshen Mishpat*. Finally, we should mention his *Main Institutions of Jewish Law*, two volumes (London: Soncino, 1936), which attempts a restatement of Jewish civil and monetary law (*dinei mamonot*) and which hints at its author’s desire to see the *halakhah* “updated” as part of the movement toward statehood (see v. 1, xv-xvi). Herzog’s career as a halakhist is explored in B.S. Jackson, ed., *Jewish Law Association Studies V: The Halakhic Thought of R. Isaac Herzog* (Atlanta: Scholars Press, 1991) and by Itamar Warhaftig, “Rabbi Herzog’s Approach to Modernity,” in Moshe Sokol, Ed., *Engaging Modernity: Rabbinic Leaders and the Challenge of the Twentieth Century* (Northvale, NJ: Jason Aronson, 1997), 275-319.

Palestine/Israel from 1939-1953,<sup>17</sup> regarded by many within the Mizrahi community as the Zionist *posek* par excellence;<sup>18</sup> Shaul Yisraeli, “who committed the bulk of his public life to halakhic study and legal rulings on questions of Torah and statehood”;<sup>19</sup> and Eliezer Yehudah Waldenberg, one of the most outstanding contemporary authors of responsa.<sup>20</sup> Their studies and comments appeared in newspapers, collections of [22] responsa, rabbinical court rulings and halakhic journals. The most outstanding of the latter was *Hatorah vehamedinah (HTM)*, appearing annually or bi-annually from 1949 to 1962, edited by R. Shaul Yisraeli under the sponsorship of various Orthodox Zionist institutions.<sup>21</sup> The authors who published in *HTM* were, in the main, younger scholars who saw their task not to issue decisions but to study the legal sources on public and political questions in the hope that their findings might be helpful to the

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17. R. Ouziel’s responsa are collected in his *Mishpetei Ouziel* (Tel Aviv: 1935-1947). A selection of these responsa that speak to “contemporary issues are published as *Piskei Ouziel beshe’elot hazeman* (Jerusalem: Mosad Harav Kook, 1977). On R. Ouziel see: Shabbetai Don-Yechya, *Harav Benzion Meir Chai Ouziel: chayav umishnato* (Jerusalem: Histadrut Hatziyonit, 1955); the entry by Geulah Bat-Yehudah in *Encyclopaedia shel hatziyonut hadatit* (Jerusalem: Mosad Harav Kook, 1971), 4:173-184; Chaim David Halevy, “Pesikat hahalakhah ve’ahavat yisrael bemishnat R. B. Z. Ouziel,” *Niv hamidrashyah* 20-21 (1978-1979), 55-69; Mark Washofsky, “Responsa and Rhetoric,” in John C. Reeves and John Kampen, eds., *Pursuing the Text: Studies in Honor of Ben Zion Wacholder* (Sheffield, UK: Sheffield Academic Press, 1994), 386ff.
18. The Mizrahi ideologue S. Z. Shragai, reflecting upon Rabbi Ouziel’s readiness to respond to all such inquiries directed to him, calls him “*hameshiv hagadol behilkhot hamedinah le’or hatorah*”; Y. Refael and S. Z. Shragai, eds., *Sefer hatziyonut hadatit* (Jerusalem: Mosad Harav Kook, 1977), 1:72.
19. The quotation is from A. Y. Sharir, the editor of *Harabanut vehamedinah* (Jerusalem: Erez Publishing, 2001), a collection of Yisraeli’s articles and essays. Yisraeli’s responsa, rabbinical court rulings and other halakhic writings on matters relating to Jewish statehood appear in his books *Amud hayemini* (Tel Aviv: Moreshet, 1966), *Mishpat sha’ul* (Jerusalem: Makhon Mishpat Vehalakhah Beyisrael, 1997), and *Havat binyamin* (Kefar darom: Makhon Hatorah Veha’aretz, 1992). As we shall see, Yisraeli was also the editor of the Zionist halakhic journal *Hatorah vehamedinah*.
20. Rabbi Waldenberg, perhaps best known for his multi-volume responsa collection *Tzitz Eliezer*, authored a three-volume work entitled *Hilkhot medinah* (Jerusalem, 1952-1955). On this subject, see Mark David Strauss-Cohn, *Hilkhot Medinah: Halalkhah and The Modern State of Israel*, Rabbinical Thesis, HUC-JIR, Cincinnati, 1998.

Chief Rabbinate, an institution that did possess the authority to render actual *pesak*.<sup>22</sup> A glance at the article titles in these volumes reveals the range of their concerns: the halakhic constitutional theory of a sovereign, pre-Messianic Jewish state; rules governing the conduct of a Jewish army; the criminal and penal code of the state; the structure of government institutions and the qualifications of public officeholders; the political status of women; the status of non-Jews under a Jewish government; the halakhic validity of secular legislation (*i.e.*, of the Knesset and other administrative bodies); taxation; marriage law, inheritance, and child custody; urban planning; how the police and other vital services may function on Shabbat; national service for women and for yeshivah students; the Sabbatical year; the observance of Yom Ha`atzma`ut and other “secular” Jewish holidays; and more.

At the beginning of this section, I used the words “halakhic creativity” to describe the work of these Zionist rabbis. I should stress that this “creativity” did not take the form of invention. The authors of the articles that appear in *HTM* do not call for *takanah* (legislation), the creation of new *halakhot* or new legal institutions. Some Orthodox observers, to be sure, advocated such remedies. Convinced that the existing halakhic process was too limited and cumbersome to respond adequately to the challenges posed by political sovereignty, they called for more radical measures, including far-reaching rabbinical legislation<sup>23</sup> and even the revival of

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21. At first, the journal was brought out by the Rabbinical Council of Hapo`el Hamizrachi. Eventually, the sponsorship passed to the National Religious Party and the Department for Torah Education and Culture in the Diaspora of the World Zionist Organization, with financial assistance from Mosad Harav Kook.

22. See the introductory remarks of Rabbi K. P. Techorsh in *HTM* 1 (1949), 8.

23. One who called for *takanot* was the noted Orthodox philosopher Professor Yeshayahu Leibowitz, who portrayed the *halakhah* as a Diaspora product. Jewish public law in its current form reflected the situation of a community enjoying legal autonomy while dwelling under the sovereignty of another people. As such, it was essentially silent on the requirements facing a sovereign government, and this lacuna could be filled only by means of active legislation on the part of rabbinical authorities. As his prime example, Leibowitz

the ancient Sanhedrin.<sup>24</sup> Most of the Zionist rabbis, however, regarded these suggestions as excessive and, at worst, as transgressions against the *halakhah* itself.<sup>25</sup> An [24] outside observer might note that there is nothing essentially anti-halakhic about legislative enactments; legislation, after all, is one of the primary “legal sources of Jewish law.”<sup>26</sup> Still, even modern Orthodox scholars hesitated to push for the introduction of fundamental changes in the structure of the *halakhah*.<sup>27</sup> The Zionist rabbis preferred the time-honored “judicial” method of interpretation and analogical reasoning (*dimu’i milta lemilta*), which, though more piecemeal and gradual than legislation, is for that reason less threatening to the integrity of traditional *halakhah*. Even though

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pointed to difficulties surrounding the observance of Shabbat in the Israeli public realm. See his “Hashabbat bamedinah,” *Beterem* no. 128 (1951), 6-15, reprinted in his *Yahadut, am yehudi umedinat yisrael* (Jerusalem: Schocken, 1975), 108-120.

24. Most prominent among those who advocated this step was the Mizrahi activist Rabbi Yehudah Leib Hakohen Maimon, author of *Chidush hasanhedrin bemedinateinu hamechudeshet* (Jerusalem: Mosad Harav Kook, 1951). On this work see Lawrence Alan Bach, “*The Renewal of the Sanhedrin in Our Renewed State*”, Rabbinical Thesis, HUC-JIR, Cincinnati, 1998.
25. For example, R. Moshe Tzvi Neryah, a leading rabbinical figure in Hapo`el Hamizrachi and a leader of the Benei Akiva youth movement, rejected Leibowitz’s assertion that the founding of a sovereign state posed a “crisis” for Judaism that could be addressed only by means of radical rabbinical legislation. Indeed, Neryah charged, Leibowitz’s proposed changes smacked of reformist tendencies. See “Hilkhos shabbat vehalikhos hamedinah” in *Beterem*, no. 145 (1952), 22 *ff.*
26. Elon devotes eight chapters of his *Jewish Law* (pp. 477-879) to the subject of *takanah* and suggests that the reinvigoration of this rabbinical power in our day would do much to solve some pressing halakhic problems.
27. A major exception was Rabbi Yitzchak Halevy Herzog, who sought to convince the rabbinical community to institute by way of *takanah* some fundamental changes into the traditional Jewish law of inheritance. Herzog realized that the Toraitic standard, under which daughters are excluded as heirs, could not possibly be adopted by the new state of Israel. He also, it seems, had some ethical and practical objections of his own to imposing this particular *din torah* upon a modern society. He believed, too, that legislation might be the only effective halakhic means for responding to some of the complex social and economic problems faced by a modern state. In early 1949 Herzog circulated among the Israeli rabbinate a monograph containing his arguments for a *takanah* granting inheritance rights to daughters. Yet this exception also proves the rule I discuss in the text: the rabbinical community showed little interest in altering the established *halakhah* in such a direct fashion. See volume two of Herzog’s *Techukah le yisrael*, and especially the introduction by Itamar Warhaftig, the volume’s editor (11-37). Warhaftig cites the indifference of government legal authorities as an additional factor that contributed to the failure of

Talmudic reasoning can be quite “creative” (halakhists refer to the ideas developed through the interpretive method as *chidushei halakhot*, “new legal ideas”), it is generally not perceived as the creation of new law (*i.e.*, legislation) but rather as the unfolding of the implied meaning of the existing law, the logical extension of the content of the legal sources.

The essays on constitutional theory that appear in the first two volumes of *HTM* provide a good example of this “judicial” method at work.<sup>28</sup> Perhaps the most basic halakhic problem that the Zionist rabbis had to solve was that of the very legitimacy of a modern sovereign state: does Jewish law permit the establishment of a commonwealth in the land of Israel prior to the age of the Messiah? Many scholars answer this question in the negative, basing themselves upon a Talmudic tradition recounts that when the Temple was destroyed, God adjured Israel never again to rebel against the nations or to attempt to seize Jerusalem by force.<sup>29</sup> Mizrahi theorists had to argue that this prohibition no longer applies or, if it does, that it does not forbid the sort of political activity involved with the formation of the state.<sup>30</sup> Beyond the legitimacy of the idea of statehood, moreover, lay the problem of sovereign power: even if the *halakhah* permits the founding of a state, it is far from certain that it permits the government of the state to exercise the

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Herzog’s effort. See also the article by Ben Tzion Greenberger in Jackson, ed., *Jewish Law Association Studies V: The Halakhic Thought of R. Isaac Herzog* (note 16, above).

28. On the following, see Washofsky, note 15, above.

29. See *B. Ketubot* 110b-111a for the oaths that God administered to Israel. The most detailed halakhic discussion of this tradition, which figures prominently in much Orthodox anti-Zionist polemic, is that of the Satmarer rebbe, R. Yoel Teitelbaum, in *Vayo’el moshe* (Brooklyn, 1959). It is, moreover, a tradition with considerable staying power: R. Ovadyah Yosef uses it to great effect in his ruling permitting the return of the territories occupied by Israel during the Six Day War as part of a lasting peace treaty with the Palestinians. Yosef’s point is that the oaths render inoperative the commandment to seize and to possess the land of Israel; that *mitzvah* will resume its obligatory force only upon the cancellation of the oaths, which will come along with the Messiah. For R. Yosef’s responsum and a rejoinder by R. Shaul Yisraeli, see *Techumin* 10 (1989), 34-61.

kinds of authority normally associated with sovereignty. While the Talmud and the classical codes (particularly Rambam's *Mishneh Torah*) do speak to the issue of governmental [25] authority, these sources presume the existence of a Jewish commonwealth in all its Toraitic accouterments: a king, prophets, priests, Sanhedrin, and ordained judges (*shoftim*). One might well conclude from these sources that the corpus of Jewish law has nothing to say to the political reality of contemporary statehood. The articles in *HTM* therefore seek to locate a sufficient source of sovereign power within existing halakhic theories of governance. Some of the authors based their constitutional theories upon the institution of *takanot hakahal* (community ordinances), the recognized power of local communities act through representative bodies to adopt regulations and to levy taxes. They reasoned that this theory, which lay at the foundation of Jewish self-government throughout the Middle Ages, could be applied as well to a national commonwealth. Others sought the roots of sovereign power in the doctrine of *dina demalkhuta*, "the law of the kingdom," the notion that the government legitimately exercises a range of powers necessary to its existence and proper function. The question here is whether the concept of *dina demalkhuta*, cited in the Talmudic sources to justify halakhic recognition of certain acts of a Gentile government, might apply as well to a Jewish regime in the land of Israel; several authors in *HTM* argued that the answer is "yes." Finally, Rabbi Shaul Yisraeli contended that the foundation of sovereign Jewish power lay in the legal tradition of *malkhei yisrael*, the powers and prerogatives that the Torah grants to a Jewish king in the land of Israel. This theory faced an obvious difficulty: we do not have a Jewish "king" of Davidic lineage, nor do we have the institutions (a prophet and a Sanhedrin) required to invest him in office. Yisraeli responded to

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30. See the response of R. Yitzchak Halevy Herzog, printed posthumously in *Techumin* 4 (1983), 13-23, and in

these objections by adopting a *chidush* (a new halakhic idea) offered by Rabbi Avraham Yitzchak Hakohen Kook,<sup>31</sup> namely that in the absence of a Davidic monarch the powers of kingship (*malkhut*) do not disappear but rather revert to the people; the people, in turn, may bestow these powers upon any person or governmental institution they choose.<sup>32</sup>

Each of these articles displays that mixture of innovation and [26] conservatism that marks the “judicial” approach to the *halakhah* at its creative best. Grounding themselves firmly in precedent and halakhic consensus, the authors endeavor to extend old texts and settled principles of Jewish law to a new and unprecedented political situation. The innovative, ground-breaking nature of their work is readily apparent. The Zionist rabbis have without question created new law, for the classical halakhic doctrines of government never envisioned the rise of a pre-Messianic sovereign state. At the same time, however, no rabbinical activity is more “traditional”—more conservative, more respectful of established ways of legal thinking—than the discovery of implicit, inherent meanings in canonical halakhic sources. Such, after all, is what rabbis do and have always done. In this way, the Zionist rabbis demonstrated their faith in the creative possibilities inherent in the traditional halakhic process, their confidence that the *halakhah* as it presently exists offers the flexibility and the dynamism needed to arrive at the sought-for solutions.

One of the leading Zionist rabbis, Ben Zion Meir Chai Ouziel, formulated what is perhaps the most comprehensive statement of this faith. In the introduction to the first volume of his collected responsa, Ouziel notes that his efforts to derive halakhic answers to contemporary

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his *Techukah leyisrael*, 1:121-133.

31. The *chidush* is found in Kook’s responsum *Mishpat kohen*, no.144, section 14.

problems are criticized by two distinct groups within the Jewish community. The first group of critics, “the lovers of reform in our generation,” claim that he is wasting his time; in their view, the traditional *halakhah* is insufficiently flexible to respond to today’s needs. The other group, while firmly devoted to *halakhah* and Jewish observance, reject the premise of his work on the grounds that today’s *posek* is forbidden to depart from the decisions of his predecessors. In response to the “reformers,” the critics on his left, Ouziel declares his conviction that *halakhah*, properly interpreted, can yield fitting and sufficient solutions to the challenges posed by modern life. And while reassuring the critics on his right that he is free of any and all reformist tendencies—“I am creating no new law (*ein ani mechadesh kelum*), nor are we entitled to do so”— he offers them the following outlook on the [27] nature of halakhic decision:

The judge or the *posek* must not say to himself, or to those who seek his guidance on any question, “bring the book, let us look up the law, let me decide the *halakhah* automatically, in accordance with the written word.” Such is not the path that halakhic authorities should tread. It is their duty rather to study carefully the sources of the law and to subject them to thorough analysis, to test them in the crucible of their training, knowledge, and reason, and to arrive thereby at the correct determination of the law. Whoever decides the *halakhah* simply by citing the written sources without such a process of analysis and without an effort to truly understand the law is one to whom our Sages refer as “a destroyer of the world”<sup>33</sup>...

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32. Yisraeli builds upon these ideas in his *Amud hayemini* (note 19, above), chapters 7-9.

33. Ouziel refers to a *baraita* in *B. Sotah* 22a, which declares: “*tanaim* are destroyers of the world.” The amora Ravina applies this saying to those who specialized in the memorization of Tanaitic literature so that they might “recite” it for the benefit of the scholars in the Babylonian *yeshivot* (hence the title *tanaim*, which means, literally, “those who recite from memory”). Why are these *tanaim* called “destroyers”? Because, says Ravina, “they issue halakhic rulings directly from their *mishnah*,” by rote citation of the sources they have memorized. In so doing, they “err, because they do not know the reason behind that *mishnah*” or that



Those who understand *halakhah* as the rote, mechanical application of black-letter rules are in serious error. For Ouziel, traditional halakhic argument (*masa umatan*) is a flexible and dynamic intellectual activity, capable of meeting new challenges and accommodating changing insights. This process, which in a midrashic metaphor he likens to the dew that refreshes and reinvigorates the grass,<sup>34</sup> demands independence of legal thought. The halakhist must be prepared to slip the stifling bonds of precedent. He may not defer to the authority of codes and compilations. Instead, he must claim for himself the freedom of judgment that belongs to all knowledgeable students of Jewish law, the freedom to arrive at one's own conclusions based upon one's own reading of the sources, no matter how innovative, even if those conclusions disagree with the conclusions of other rabbis.<sup>35</sup> It is vital that the contemporary *posek* proceed in this way, because

circumstances of life, transformations in culture, scientific and technological developments in each and every generation create halakhic problems that demand resolution. We are not entitled to ignore these questions by invoking the slogan *chadash asur min hatorah*, *i.e.*, anything that our predecessors have not already permitted must by that light be forbidden... It is rather our duty to (find answers) through the time-honored path of legal analogy (*lilmod satum min hameforash*).

*Chadash asur min hatorah*—literally, “everything new is forbidden by the Torah”—was, of course, the polemical watchword of Rabbi [28] Moshe Sofer (the Chatam Sofer) in his campaign against the innovations introduced by the Reform movement during the early nineteenth

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the later tradition has interpreted it in a particular way; see Rashi, *Sotah* 22a, *s.v. shemorin halakhah mitokh mishnatan*.

34. *Sifrei Devarim*, ch. 306 to Deut. 32:2.

35. Ouziel cites here the words of R. Asher b. Yechiel (*Hilkhot Harosh, Sanhedrin* 4:6), who affirms the right of the halakhist who knows the law to decide on the basis of that knowledge, “even though some other sage has ruled differently.”

century.<sup>36</sup> Rabbi Ouziel here emphatically renounces Sofer's rejectionism in favor of a different vision of *halakhah*, one that supports an open and positive relationship to the "new," to the challenges posed by the experience of modernity.

Ouziel's attempt to justify his halakhic activity against the attacks of critics to both his left and his right closely resembles my own depiction, at the outset of this article, of the situation faced by today's liberal halakhist. Indeed, I think liberal halakhists share much in common with Ouziel's vision of himself as occupying a middle ground between more extremist positions. Yet for all his talk of a dynamic and flexible *halakhah*, a rhetoric that is quite congenial to our own, let us not forget that Ben Zion Ouziel was *not* a liberal rabbi. He was an Orthodox halakhist, *kasher lemehadrin*, a chief rabbi of the state of Israel. Like all Orthodox halakhists, he denies that he is an innovator, and he opposes the conscious introduction of change—*i.e.*, "reform"—into the corpus of Jewish law. He describes his approach as nothing more or less than the traditional process of *masa umatan* that has been the hallmark of halakhic thought for centuries. Similarly, we should not forget that the entire Zionist halakhic endeavor was an Orthodox product, promoted by Orthodox rabbis faithful to the halakhic system in its accepted Orthodox version. Rejecting calls for reform and innovation, the Zionist rabbis speak of their work as *berur* ("study," "examination," "clarification"), a term that comprehends traditional halakhic *masa umatan*.<sup>37</sup> Their traditionalist stance does much to explain their astonishment at the profoundly

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36. *Chadash asur min hatorah* is a pun on *M. Orlah* 3:9. For a concise review of the literature on Sofer's life and work, see Jacob Katz, *Halakhah vekabalah* (Jerusalem: Magnes, 1984), 353ff. A translation of Katz's article by David Ellenson is available in Frances Malino and David Sorkin, eds., *East and West* (Cambridge, MA: Basil Blackwell, 1990), 233-266. My own essay, "Halakhah in Translation: The Chatam Sofer on Prayer in the Vernacular," will appear in the forthcoming *festschrift* for Rabbi A. Stanley Dreyfus.

37. Thus, "halakhic analysis and clarification" (*habechinah veha'iyun hahilkhati vehaberur ha'inyani*; Techorsh in *HTM* 1 [1949], 8); "fundamental clarification" (*berur yesodi*; Techorsh *loc. cit.* at 9); "the

negative response by other Orthodox halakhists to the Zionist halakhic program. Despite all the effort invested by the Zionist rabbis to derive a Jewish legal basis for the new state of Israel, their opponents, a group that included the preponderant majority of the *gedolei hador* (the recognized halakhic authorities), greeted their writings with indifference, silence, and outright hostility.<sup>38</sup>

We hear the echoes of [29] this reaction in the introductory words penned by Rabbi Shaul Yisraeli to the first two volumes of *HTM*. In volume one,<sup>39</sup> Yisraeli emphasizes the urgency of the intellectual task that the Zionist rabbis have set for themselves. Had we but foreseen the sudden rise of a sovereign Jewish state, he writes, we would long ago have set up a council of scholars who would have devoted the requisite effort to develop a halakhic constitution and legal code for the new Jewish polity. Yet even now--the spring of 1949--it is not too late: the laws of the state, which still rest largely upon the legal foundation laid during the period of the British mandate, will be replaced, and it is our urgent mission to see to it that they are replaced by a truly *Jewish* legal system. Yisraeli realizes that the non-observant segment of the population, particularly those enamored of all things Gentile and who regard Jewish tradition as inferior and outdated, will have no use for this effort. Yet he is more concerned about opposition from “Torah scholars who fear a public study of contemporary halakhic issues, who hesitate to issue rulings

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analysis of the laws pertaining to statehood” (*berur hilkhoh medinah*; Yisraeli in *HTM* 1 [1949] 11); and “the work of clarification” (*avodat haberur*; Yisraeli, *loc. cit.* at 12).

38. See Techorsh, *HTM* 1 (1949), 9: “It is worthwhile to note that we invited the leading halakhic authorities (*gedolei harabanaim*), those of great rabbinical prestige and knowledge of Torah, to submit articles to this volume. Our hope was that this forum might be enhanced by the opinions of these outstanding sages and by their in-depth halakhic analyses (*berureihem hama`amikim*). For some reason, however, their articles have not yet arrived.”

39. *HTM* 1 (1949), 11-13.

on these matters lest the wider community make improper use of their words.<sup>40</sup> They urge caution, abstention, and inactivity.” Yisraeli rejects these fears. Those who wish to make “improper use” of the words of Torah will do so in any event, no matter what we rabbis do. Our task is to study and publish our findings for the benefit of those who sincerely wish to know what the Torah has to teach us. He adds the following:

This would appear to be one of the chief reasons for the failure of observant Judaism, that out of fear and hesitation we tend to ignore contemporary problems. But it is in the nature of things that problems do not disappear simply because they are ignored. And if the leading Torah sages do not search for solutions, other hands are ready to find other, and unhappy, solutions.

By the following year,<sup>41</sup> Yisraeli’s criticism of his Orthodox opposition had grown angrier and more despondent. He noted that “there are those who cast a suspicious eye upon our work, as they do upon all the activities of the Rabbinical Council of Hapo`el Hamizrachi. Halakhic rulings, they contend, should be the exclusive province of veteran rabbinical scholars.” Yisraeli concedes that such [30] ought to be the case. Were the great sages of our day to take on the duty of readying the *halakhah* for the immense challenges posed to it by statehood, his Rabbinical Council might assume the more humble of studying and disseminating the writings of those scholars. Unfortunately, the great sages have refused the challenge.

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40. While Yisraeli does not specify the nature of this “improper use,” it is reasonable that he refers to the reality that the findings and conclusions of the Zionist rabbis would ultimately have to be adopted—and therefore debated, amended, and modified—or rejected by the Knesset. Would the rabbis be comfortable at the prospect of a secular legislature having the final word upon these issues of Jewish law, thereby replacing rabbinical authority with that of the Israeli voter? See the article by Yitzchak England in Bazak (note 13), 110-134.

To our sorrow, things have worked out differently. Some of our greatest authorities regard the state as a plague visited upon us (*gezeirah min hashamayim*), to which they respond in the spirit of the Talmudic dictum: a plague will end some day.<sup>42</sup> They wall themselves off in splendid isolation, declaring everything that happens outside their little world to be of no import. We will not debate with them, both out of our respect for their honor and out of the knowledge that nothing we say can change their opinion in the least. For our part, we regard it as a divine punishment (*onesh min hashamayim*) upon our generation that we have not merited to see our great teachers march before us to show us the way. It is a punishment just as surely as the failure of our rabbis to bring our people to the land of Israel (in advance of the Holocaust) was a divine punishment.

### *The Insufficiency of Method*

This emotional reference to the passivity of the *gedolei hador*, the great rabbinical sages of Europe, in the face of the impending Nazi destruction neatly expresses R. Shaul Yisraeli's bitter disappointment in the *gedolei hador* of his own time. He speaks of another tragically missed opportunity, of a loss of rabbinical nerve at another moment that required bold rabbinical leadership. His tone of frustration suggests that he knew than what we know now: namely, that the Zionist halakhic project was doomed. By this, I do not mean that the Mizrahi rabbis had accomplished nothing of value. Far from it: they succeeded in producing an impressive cache of writings that can be said to enrich the halakhic discussion to this day.<sup>43</sup> Rather, the Zionist

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41. *HTM* 2 (1950), 5-7.

42. See *B. Ketubot* 3b. The word *gezerah* also carries the sense of "persecution," particularly that imposed by a Gentile government upon the Jews.

43. In some ways, the project of *Hatorah vehamedinah* is carried on today by the journal *Techumin*, an annual collection of articles and responsa on matters of "Torah, society, and state" published by Zomet, an institute based in Elon Shevut. The introduction very first volume of the journal (1980) makes the connection to *HTM* explicit (pp. 9-11). Yet the editors of *Techumin* mention no hope on their part that their studies might influence the *pesikah* of the *gedolei hador*. That this element, so prominent in *HTM*, is missing from

halakhic project was a failure in its most fundamentally practical aim: it did not persuade the bulk of the recognized *poskim* to join in or even to pay much attention to the work of deriving a *halakhah* of Jewish statehood. By 1962, its energy spent, the Rabbinical Council [31] of Hapo`el Hamizrachi ceased the publication of *Hatorah vehamedinah*, having given up hope that the leading rabbinical sages would participate in its enterprise.<sup>44</sup>

Observers suggest various reasons for this failure.<sup>45</sup> Some attribute the silence of the *poskim* to *yir'at hora'ah*, which we might translate as “judicial humility”, the traditional reluctance of rabbinical authorities to issue rulings on substantive, controversial legal questions. Some Orthodox authorities also feared that the non-observant public—acting, for example, through the secular legislature—might misinterpret and misapply far-reaching and creative halakhic decisions, thereby distorting the “true” *halakhah*.<sup>46</sup> First and foremost, though, this failure was the inevitable outcome of a long-standing clash of ideologies within the Orthodox community. Many, particularly among the *charedim* (“ultra-Orthodox”), opposed Zionism, even of the religious variety, on theological and halakhic grounds. They denied that the Jewish people was entitled to establish a sovereign state prior to the coming of the Messiah and the rebuilding of the Temple. That state would be governed by a Davidic monarch and *not* by some political institution exercising the powers of *malkhut* in the absence of a legitimate king. In their view, the creation of the secular state of Israel was a violation of the divine order of Jewish history, a

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*Techumin* suggests that by 1980 the Zionist halakhists had long since realized that they were speaking exclusively to observant Jews who shared their ideological perspective.

44. See Una, note 15, above, 95.

45. See Una, note 15, above, 102.

46. See Yitzchak Englard (above, note 40).

trespass upon the limits that God had set at the time of the destruction of the Second Temple.<sup>47</sup> Those who held this opinion, who (to use Yisraeli's language) saw the creation of the state as a *gezeirah min hashamayim*, would hardly interpret contemporary Jewish history in the same light as those who regarded Zionism as a sign of God's deliverance.

The argument over Zionist *halakhah*, in other words, could not be settled by the application of halakhic "method." The technical rules and procedures that comprise traditional halakhic analysis did not--nor could they--produce demonstrably correct answers to questions of Jewish law as they related to issues of government and society in the sovereign Jewish state. This failure was not for lack of [32] trying, for the Zionist rabbis were nothing if not "methodological." They described their work, remember, as *berur* or *masa umatan*, terms that denote the thoroughly traditional approach to halakhic reasoning and *pesak*. They insisted that they were doing nothing "new." Safely and surely "Orthodox," they denied any revolutionary tendencies in their legal thinking and conclusions.<sup>48</sup> The whole point of their enterprise was to demonstrate that Jewish law in its accepted, existing (*i.e.*, "Orthodox") manifestation could

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47. For a collection of such opinions by the leading Orthodox rabbis of recent times see A. Rosenberg, *Mishkenot haro'im* (New York, 1983).

48. This was not a purely formal necessity. Some Orthodox Zionists, such as Yeshayahu Leibovits (see note 23, above), who perceived more clearly a revolutionary element in the Jewish national movement, called for a "new" *halakhah* or approach to legal thinking that would accommodate itself to the radically new condition of Jewish life portended by the approach of statehood. This was especially true of Rabbi Haim Hirschensohn, a Zionist activist whose book *Malki bakodesh* (St. Louis: Moinester, 1919-1928, 6 vols.) developed pioneering new approaches to halakhic reasoning precisely because the new world of approaching Jewish statehood demanded such revolutionary innovations. On Hirschensohn, see Eliezer Schweid, *Democracy and Halakhah* (Lanham, MD: University Press of America, 1994). Schweid contrasts Hirschensohn to Rabbi Avraham Yitzchak Hakohen Kook, who though audacious in his theology manifested a much more conservative approach than did Hirschensohn to halakhic interpretation. Schweid, for his part, is exceedingly critical of Kook's halakhic conservatism on matter affecting the settlement of the land of Israel; see his *Hayahadut vehatarbut hachilonit* (Tel Aviv: Hakibutz Hame'uchad, 1981), 136. The halakhic thought of Rav Kook is a distinct subject of research. For contrasting views as well as bibliography, see M. Z. Nehorai, "He`arot ledarko shel harav kook befesikah," *Tarbiz* 59 (1990), 481-505,

accommodate the establishment of a sovereign state and support the institutions necessary to its survival and function. Yet for all their faithfulness to traditional halakhic “method,” the Zionist rabbis did not succeed in persuading other Jewish legal authorities, who were surely no less “Orthodox” than they, that their conclusions were correct readings of the *halakhah*. Each of the Orthodox camps, one Zionist and the other anti-Zionist, observing the requirements of the halakhic process in all its appropriate stringency, arrived at a set of decisions and understandings that differed radically from those of the other.

The same holds, I contend, across the board, for *all* questions of Jewish law, regardless of subject. Halakhic method does not produce *the* correct *pesak* because, to repeat, there is no such thing as the one objectively correct answer to a question of *halakhah*. An “objectively correct” answer is correct in a formal and systemic way, an answer the correctness of which cannot be doubted by any serious practitioner of the *halakhah*. Objective correctness is not established through argument and persuasion; it is a matter of definition rather than debate. Much like a mathematical equation, the objectively correct answer to a halakhic question would be dictated by the inherent logic of the system and its decision-making rules. To doubt the correctness of such a conclusion is to violate the system’s integrity, to damage and diminish the system as a whole. Such formal correctness does not obtain in halakhic reasoning, and no “method,” however diligently followed, can achieve it.

**[33]** *Between Halakhah and Meta-Halakhah.*

One might at this point object that the evidence I have presented does not support the broad, “across the board” statement I make in the preceding paragraph. One might say that the

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and Avinoam Rosenak, “Hahalakhah hanevu’it vehametz’ut befesikato shel harav kook,” *Tarbiz* 69



dispute between the Zionist halakhists and their opponents is so totally attributable to clashing ideologies as to render the *machloket* an exceptional case that teaches us little or nothing about halakhic thought and practice in general. Professor Marc B. Shapiro makes precisely this observation:

Zionist rabbis author responsa showing how one must live in Israel, serve in the army, say Hallel on Yom Ha-Atsma'ut. Non- and anti-Zionist rabbis write halakhic treatises proving the exact opposite. Often, both sides claim to be approaching the sources with objectivity, but it is clear to the outside observer that this is not the case... These *poskim* are building a halakhic decision in large part upon ideology and not *vice versa*... (With regard to more extreme examples of this sort of writing) many would assert what we are dealing with...is simply propaganda masquerading as halakhic discourse.<sup>49</sup>

To Shapiro, “what we are dealing with” is a dispute so fundamentally ideological that it cannot truly be regarded as a matter of *halakhah* at all. Although each side expresses its ideology in traditional halakhic language, hoping thereby to win the hearts and minds of the observant community, they are divided not so much over the meaning of legal texts as over irreconcilable issues of *weltanschauung*. If the Zionist rabbis fail to prove the halakhic correctness of their positions, that is because their positions are not in fact based upon *halakhah* but upon theological and ideological assumptions that their opponents simply do not share. It is for this reason that there is no one obviously correct answer to the question “can Jewish law accommodate the creation of a sovereign state in our time?” Such indeterminacy presumably would not obtain when the question under discussion is a properly halakhic one, when the conflicting points of view can be tested and judged by the accepted procedures of Jewish law. A halakhic controversy

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(2000), 591-618).

that *is* halakhic, a question that fits comfortably within the standard framework of Jewish legal discourse without touching upon divisive ideological commitments, can be solved, convincingly and [34] correctly, through the diligent application of halakhic method.

This is, on the surface, an eminently reasonable distinction. Surely, Professor Shapiro suggests, when we read halakhic responsa we can tell the difference between arguments that are halakhic and arguments that are more properly ideological or “meta-halakhic” in nature.<sup>50</sup> By “halakhic” factors he means the hard, textual, and formal-legal elements cited in a ruling, while “meta-halakhic” describes all those considerations, arguments, and reasons given by the *posek* that “are not subject to proof or disproof on the basis of textual sources, but depend upon an overall view of which...ruling will best serve the community—a view which other authorities need not share.”<sup>51</sup> From this it follows that a rabbinical decision that rests significantly upon meta-halakhic factors is more a matter of ideology than of law, even if that decision is conveyed in a halakhic responsum and is expressed in traditional Jewish legal language. It also follows that a ruling *not* based upon meta-halakhic factors could well be determined by the operation of the objective, ideologically-neutral legal method that, in the Orthodox account of things, serves to distinguish the “right” from the “wrong” halakhic answers. Yet though it be reasonable I do not

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49. Marc B. Shapiro, “Sociology and Halakhah,” *Tradition* 27 (Fall, 1992), 83, n. 7.

50. See, in addition to the article cited in the previous note, Marc B. Shapiro, *Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg, 1884-1966* (London: The Littman Library of Jewish Civilization, 1999). Shapiro makes much of this distinction in his consideration of Weinberg’s responsum on the “humane slaughter” issue (117-129) and of his rulings concerning the observance of *bat mitzvah* (206-221). In each case, Shapiro stresses that the dispute between Weinberg and his opponents was in essence “meta-halakhic” rather than “halakhic,” so that both positions could claim to be correct as a matter of Jewish law.

51. *Ibid.*, 119.

accept this distinction, and I want at this point to suggest why I think that Professor Shapiro is wrong.

Professor Shapiro is wrong because his distinction between *halakhah* and *meta-halakhah* is based upon the common but erroneous identification of legal (and halakhic) discourse as a matter of rules, “definite, detailed provisions for definite, detailed states of fact,”<sup>52</sup> abstract or general statements of what the law permits or requires of classes of persons or things in classes of circumstances.<sup>53</sup> Rules tend to be statements of “black-letter” law that we look up in codes and apply in a formal, mechanical, and quasi-mathematical fashion<sup>54</sup> to a specific set of facts: if the facts the rule stipulates are given, and if the rule itself is valid, then there is no recourse but to accept the answer it supplies.<sup>55</sup> Examples of rules in the *halakhah* include: that the flesh of a pig is forbidden for consumption; that two [35] witnesses are required to establish proof in a Jewish court;<sup>56</sup> and that one who inadvertently breaks a pitcher that was left lying in the public thoroughfare is exempt from liability.<sup>57</sup> It is quite easy to tell the difference between a legal rule and some other, less definitive statement in a legal text. Were law to consist entirely of rules, as

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52. Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale U. Press, 1954), 56.

53. This formulation is taken from Burton (note 4, above), at 13. Burton speaks only of “classes of persons” and not “things,” but the latter fits well with the classical conception of law as dealing with things (property, obligations, etc.) as well as with persons.

54. See the definition of “black-letter law” in Bryan A. Garner, *A Dictionary of Modern Legal Usage* (New York: Oxford University Press, 1987), 88-89: “legal principles that are fundamental and well-settled or statements of such principles in quasi-mathematical form.”

55. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 24.

56. There are, of course, exceptions to this rule, such as the reliance upon the testimony of a single witness in order to establish a presumption of a state of ritual prohibition (*ed echad ne’eman be’isurin*; *B. Gitin* 2b-3a; *Yad, Edu* 11:7). Yet a rule can be formulated so as to account for its exceptions.

57. *M. Bava Kama* 3:1.

some scholars indeed suggest,<sup>58</sup> then it would be relatively easy to distinguish between “legal” and “non-legal” elements of judicial decision making: any statement by a judge that does not conform to or apply a legal rule would by definition be a statement of non-law, “meta-law,” or at least something other than “law.”<sup>59</sup>

Yet law cannot be reduced to rules and their logical application. Rules must be applied to cases or questions, specific instances of reality for which a legal response is sought. It is the job of the judge or decision maker to determine the legal rule that best fits the circumstances of the case or question. This, however, is no simple task. Even when it is clear to legal observers that a particular rule disposes of a case, it may be far from obvious just how the rule is to be applied. To take a famous example:<sup>60</sup> suppose there is a law that forbids a person from taking a vehicle into a public park. This prohibition would seem clearly to forbid the entrance of automobiles into the park. Does it apply as well to bicycles, roller skates, or toy automobiles? What about a military truck placed on a pedestal as a memorial to the soldiers who fought in the last war? The rule does not simply and obviously answer any of these questions. The judge called upon to

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58. Chief among these are the legal positivists, the most famous of whom is H. L. A. Hart, *The Concept of Law* (Oxford: Oxford U. Press, 1961). Hart defines law as entirely a system of primary rules (that is, rules establishing norms of behavior) and secondary rules (rules that stipulate how primary rules are established, enacted, or repealed). If a particular case cannot be decided by appeal to a rule—that is, if it falls outside the clear circumference of the established rules—then it is not properly speaking a matter of “law” at all. It is rather a subject for judicial discretion, in which the judge in effect reaches beyond the law in order to legislate a new answer to the question.

59. Something of this idea can be seen in the distinction in the common law tradition between the “holding” or “rule” of the judicial opinion, which is binding upon future judges, and everything else that the judge writes, which is called “dicta” and is not binding. See Rupert Cross, *Precedent in English Law* (Oxford: The Clarendon Press, 1977), 38ff.

60. The example is a hypothetical debated by H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958), 593-629, and Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” *Harvard Law Review* 71 (1958), 630-672.

decide this case will have to interpret the rule to make it yield an answer.<sup>61</sup> Consider a well-known rule of Jewish law: the Torah disqualifies the “wicked” person (*rasha*) from serving as a witness, and those who habitually violate the Torah’s commandments are customarily defined as “wicked.”<sup>62</sup> Question: in the opinion of Orthodox jurists, does the exclusion enunciated in this rule apply to Jews in our day who for a variety of reasons do not adhere to an Orthodox standard of religious observance? Many Orthodox authorities disqualify non-Orthodox Jews from serving as witnesses at [36] weddings on precisely these grounds. On the other hand, a 1946 ruling by the Supreme Rabbinical Court of Eretz Yisrael accepts the testimony of non-observant Jews and therefore recognizes the halakhic validity of weddings at which they served as witnesses.<sup>63</sup> The judges reason that the prohibition is rooted in the concern that one who violates any of the Torah’s commandments is likely to bear false witness before the court; this concern, they say, does not apply in an age of widespread non-observance of Jewish ritual law. In this non-religious age we can easily conceive of the possibility that a Jew might violate the laws of Shabbat or *kashrut* and yet be an honest person who would tell the truth as a matter of ethical behavior. A non-observant Jew is therefore not necessarily “wicked” in the Torah’s definition; thus, courts may decide on a case-by-case basis whether he is sufficiently trustworthy to accept his

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61. While both Hart and Fuller (see previous note) accept the need for interpretation in this case, they differ sharply over its nature. For Hart, the issue is one of the meaning of language. For all linguistic terms, such as “vehicle,” there is both a settled core of meaning (a set of instances that clearly fit within the parameters of the term) and a “penumbra” of unsettled meaning. The judge must decide whether the penumbral case does or does not fit within the language of the rule. This decision is an act of legislation, a creative attempt by the judge to make new law in accordance with some conception of public need or social policy. In Fuller’s view, the issue here is not linguistic—“what is a ‘vehicle’?”—but rather a matter of applying the purpose of the law—what the rule “is aiming at in general”—to the case at hand. There is a significant difference between these two approaches to legal textual interpretation. For our purposes, though, it is sufficient to say that both regard the written rule as insufficient to decide the case.

62.. Ex. 23:1; B. *Sanhedrin* 27a; *Yad, Edu* 9:1ff.

testimony. Our purpose here is not to consider the extent to which this decision, which departs from the conventional approach to the question among most Orthodox *poskim*, might influence the actual course of development of Jewish law.<sup>64</sup> It suffices to point out that although a clear rule of Jewish law prohibits a “wicked” person from serving as a witness, the two trends of *pesak*—to accept or reject the testimony of a ritually non-observant Jew—divide sharply over the very meaning of the word *rasha*, over the application of that legal category to the circumstances of contemporary Jewish life. That application requires a judgment about the nature and purpose of the rule, a judgment that, although necessary to decide the law, is not itself dictated by the law. To put this differently, no rule or text can control its own interpretation; “the language of a rule does not itself determine whether many particular cases come within the class of cases designated by the rule.”<sup>65</sup> The judge has no recourse but to choose an interpretation from among the available alternatives, and that choice, because it is absolutely essential to the process of legal decision, is as much a part of the law as is the rule the judge must interpret.

[37] A second reason why law is not exclusively a function of rules is that even when the definition and circumference of a particular rule are tolerably clear, it may not be certain whether *that* rule or an alternative rule is the one that fits the facts of the case. In such an instance, because the competing rules do not by themselves determine their application,<sup>66</sup> the judge must

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63. Chief Rabbinate of Israel, *Osef Piskey Din* (1950), 337-338. The court refused a petition to annul a marriage on the grounds that the wedding was not conducted according to proper halakhic form.

64. For an analysis of the ruling see Menachem Elon, *Miba`ayot hahalakhah vehamishpat bemedinat yisrael* (Jerusalem: Hebrew University, Institute for Contemporary Judaism, 1973), 22ff. What we can say is that the judges of the court were anything but obscure and insignificant figures in the world of *halakhah*. They included the two chief rabbis of Eretz Yisrael, Yitzchak Halevy Herzog and Benzion Meir Hai Ouziel, along with R. Meshulam Ratta, the well-known author of the responsa collection *Kol Mevaser*.)

65. Burton (note 4, above), 21.

choose between them. An example of this phenomenon in Orthodox jurisprudence is the question of the halakhic validity of marriages between Jews solemnized in the civil courts or in a Reform synagogue. One approach denies any validity whatsoever to these wedding ceremonies, on the grounds that they do not conform to the rules that define the contracting of Jewish marriage (*kiddushin*).<sup>67</sup> A conflicting approach recognizes these ceremonies as halakhically valid, not because the *halakhah* approves of civil marriage or Reform Judaism *per se*, but because the rule of common-knowledge testimony (*anan sahadei*, “we are witnesses”) establishes the evident desire of the Jewish couple to live together legally as husband and wife, and that desire is sufficient evidence to the intent to form a valid Jewish marriage.<sup>68</sup> The Orthodox halakhist may utilize either of these two sets of rules to define the marital status of the couple. Each set is thoroughly steeped in halakhic doctrine; neither is more obviously “right” than the other. The *posek* must choose between them. It is a fateful choice indeed, for it will determine whether either spouse requires a *get* prior to remarriage. But it *is* a choice, a decision that the rules themselves do not dictate in advance.

A third reason why law cannot be understood simply as a system of rules is that judicial decision rests upon other sources of law much less precise and objective than rules. Among these other sources are legal *principles*, “general premises for judicial and juristic reasoning.”<sup>69</sup> A principle is “a standard to be observed, not because it will advance or secure and economic, political, or social situation deemed desirable, but because it is a requirement of justice or

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66. *Ibid.*, 41-57; Lief H. Carter, *Reason in Law* (4<sup>th</sup> edition; New York: HarperCollins, 1994), 17ff.

67. On Reform weddings, see R. Moshe Feinstein, *Resp. Igerot Moshe, Even Ha'ezer* 1:76-77.

68. R. Yosef Eliyahu Henkin, *Resp. Teshuvot Ibra*, no. 76.

fairness or some other dimension of morality.”<sup>70</sup> A principle differs from a rule [38] in that it offers a reason for a decision but does not necessitate that decision. Principles do not *require* that judges decide cases in a particular way, because there may be other principles in the law that would support a different outcome. The judge in each case must first determine whether a principle applies and then weigh the relative importance of that principle against other principles that would argue for a different outcome. Take, for example, the well-known American case *Riggs v. Palmer*,<sup>71</sup> in which the court ruled that a man named as the heir in his grandfather’s will could not inherit under that will because he had murdered his grandfather in order to do so. The court defended its ruling on the basis of the principle that “no one shall be permitted...to take advantage of his own wrong.” While this was certainly a good reason on which to found the decision, it did not obligate the court to reach that finding. Other principles, such as the need to establish a clear title, or to enforce the stated will of the testator, or to refrain from inflicting punishments beyond those stipulated by the legislature, argued in favor of the opposite decision. An example of conflicting principles in Jewish law can be discerned in halakhic practice with respect to the *agunah*, the woman unable to remarry due to her husband’s disappearance or his inability or refusal to grant her a divorce. On the one hand, the sources enunciate the principle that it is a *mitzvah* to search for every possible leniency in the law in order to release the

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69. Pound (note 52, above).

70. Dworkin (note 55, above), 22. Dworkin makes a sharp distinction between “principles” and “policies,” which he defines as desired social, political, or economic goals and which pertain more appropriately to the sphere of the legislature than to that of the judge. A number of scholars question whether a significant distinction can in fact be made between “principles” and “policies”; see Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 259-264, and Aharon Barak, *Judicial Discretion* (New Haven: Yale U. Press, 1989), 31. Though the difference between these positions is substantive, we need not resolve this *machloket* here. For our purposes, it is enough to say that the concepts “principle” and “policy” can both refer to considerations other than rules that are yet essential to the judge’s decision and which therefore determine the law in specific cases.



unfortunate *agunah* from her plight. On the other hand, the serious consequences that would result if a legally-married woman were permitted to remarry—she would be committing adultery, and her children by her subsequent husband would be *mamzerim*—induce many authorities to invoke a competing principle, namely that a *posek* must assume a posture of conservatism and caution in matters of marital status and not support a leniency unless he is absolutely sure it is warranted by settled *halakhah*.<sup>72</sup> Here, too, valid principles can be invoked by the legal authority to support two very different rulings on the case in question. The judge will have to choose between them, and this choice may depend as much if not [39] more upon “background” factors—the judge’s ethical and social values, perhaps—as upon more technically legal ones.

The final reason why law cannot be reduced to the application of rules is that judicial decisions inevitably depend upon—and cannot be made in isolation from—the very sorts of “meta-legal” factors that Professor Shapiro wishes to distinguish from the more purely legal aspects of *pesak*. My point is that, in practice, “meta-*halakhah*” simply cannot be distinguished from “*halakhah*.” This is not to say that some of the source materials that judges and rabbis cite in their rulings are less formally “law-like” than others. It is to say simply that *all* of these sources are essential to the making of what is ultimately a *legal* ruling, a *halakhic* decision. During the past century and more, legal scholarship has fairly well demolished the ideal of *elegantia juris*, the notion that law is best characterized as a system displaying formal logical integrity,<sup>73</sup> in favor

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71. 115 N.Y. 506, 22 N.E. 188 (1889).

72. The two positions are charted by Y. Z. Kahana in his marvelously detailed introduction to *Sefer Ha'agunot* (Jerusalem: Mosad Harav Kook, 1954), 7-76.

73. As Holmes wrote in his critique of the jurisprudence of Christopher Columbus Langdell: “ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates

of a conception that includes political, social, and moral commitments within the disciplinary confines of law. The “legal realism” movement that flourished in American jurisprudence during the first half of the twentieth century taught that the true motivations of law’s development lay not in its formal, inner logic but in its social, economic, and political context. A judicial decision, in other words, owes as much if not more to the judge’s *Weltanschauung* as it does to the more purely technical, “objective” (*wertfrei*) legal factors mentioned in the opinion.<sup>74</sup> Prominent jurists began to recognize that social values play a vital and inevitable role in the judicial function. Benjamin Cardozo gave this idea its classic literary formulation in his description of how a judge actually decides cases:<sup>75</sup>

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence...Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God

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than to show that the conclusions from them hang together. ... so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of law.” By contrast, says Holmes, “The life of the law has not been logic; it has been experience. The seed of every new growth within its sphere has been a felt necessity.” See Oliver Wendell Holmes, “Review of CC Langdell, *Summary of the Law of Contracts* and WR Anson, *Principles of the Law of Contract*,” *American Law Review* 14 (1880), 233ff, at 234. Cardozo describes *elegantia juris* as “an intellectual passion...for symmetry in form and substance”; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale U. Press, 1921), 34.

74. It is a tricky business to summarize “legal realism” in as cursory a fashion as I do in the text, though reasons of space leave me little choice. It should at least be noted that legal realism was not an academic “movement” in any organized sense but rather a *mood*, a particular disposition that took root among American (and some European) legal academics during the first several decades of the twentieth century. Fundamental to this mood was an aversion to the formalist or conceptualist jurisprudence of Langdell (see previous note) that had become predominant in American law schools. Realists emphasized the “real” (*i.e.*, non-doctrinal) causes of legal development and judicial decision, incorporating elements of pragmatist philosophy and social science into their understanding of law. Much has been written about the history of the “movement”; a good recent work that deals incisively with the historiographical controversies is Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: The Clarendon Press, 1995), 65-160.

75. Cardozo (note 73, above), 66-67.

prayed, and his prayer was “Be it my will that my justice be ruled by my mercy.”<sup>76</sup> That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges [40] are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.

The conception of the welfare of society—what Shapiro calls “an overall view of which...ruling will best serve the community”—is therefore not an extra-legal factor at all. It serves along with such “legal” elements as logic, history, and custom as one of “the directive forces of our law.”<sup>77</sup> Indeed, it is the most decisive of these forces, for “when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.”<sup>78</sup> As Justice Haim Cohn summarizes Cardozo’s view:

culture, ethics, sociology, and economics are not to be defined as ‘poor cousins standing at the threshold’ of ‘law.’ Rules and statutes are nothing other than the mirror in which law finds its reflection; its substance and essence are hidden from view. All these disciplines enter law’s domain and are absorbed by it, to a greater or lesser extent. They are not distant relatives; they are the flesh of our flesh.<sup>79</sup>

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76. That “old legend” is found in *B. Berakhot* 7a.

77. Cardozo (note 73, above), 64.

78. *Ibid.*, 65.

79. Haim H. Cohn, *Hamishpat*. (Jerusalem: Mosad Bialik, 1991), 79.

We find much the same contention, though applied to a much broader canvas of human experience, in Robert Cover's famous declaration that law can never be understood in isolation from its normative context and setting:<sup>80</sup>

We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for every decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be [41] located in discourse—to be supplied with history and destiny, explanation and purpose...

(P)rescription, even when embodied in a legal text, (cannot) escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.

Our normative commitments determine how we interpret and apply law's "rules and formal institutions"; the narratives that supply law's purpose tell us what the law is. In this sense, it is futile to draw firm methodical boundaries between law and meta-law. These insights speak just as directly to the Jewish legal process. All the elements cited in a rabbinical responsum, the "non-legal" as well as the "legal," are "halakhic" in that they function to support and justify the halakhic conclusion. Both are integral and essential to the process of *pesak*, because *pesak* does

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80. Robert M. Cover, "Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (1983), at 4-5.

not and cannot take place without them. A judgment of “which view will better serve the community” may in fact be a subject of controversy, but take away that meta-halakhic judgment and you knock the legs out from under the legal decision itself.

This point is as crucial as it is banal: halakhic decision does not take place in an ideological vacuum. The point is crucial in that, as I have argued, one cannot account for the halakhic decision of a *posek* without taking into account the fundamental value commitments that constitute his religious, intellectual, and cultural world-view. The point is banal in that it has been made by many others, many times.<sup>81</sup> With respect to our own subject, at any rate, Mizrahi activists<sup>82</sup> clearly and openly recognized that the halakhic differences between them and their opponents resulted from the ideological divide that separated the two camps. The “correct” halakhic decision on matters of *hilkhot medinah* depends in large part upon the rabbi’s normative commitments and their supporting “narrative,” his sympathy for Zionism or his rejection of it. The Zionist halakhists and their opponents read the same Talmudic and halakhic sources that speak to issues of politics, government, and national economy, but they approach these legal

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81. See, for example, the essay by Chaim I. Waxman, “Toward a Sociology of *Pesak*,” in Moshe Sokol, ed., *Rabbinic Authority and Personal Autonomy* (Northvale, NJ: Jason Aronson, 1992), 217-237. That the volume is published by “The Orthodox Forum Series, A Project of the Rabbi Isaac Elchanan Theological Seminary,” testifies just how mainstream and unobjectionable this idea has become. There are, of course, many works devoted to the relationship between social and ideological factors and the development of Jewish law. Among these, the many studies of the late Professor Jacob Katz deserve special mention. One of his essays that I find particularly helpful in setting *pesak* within its social context is his “Ha’im chidush hasanhedrin hu begeder pitaron?” in Jacob Katz, *Le’umi’ut yehudit: masot umechkarim* (Jerusalem: World Zionist Organization, 1979), 181-190. On Katz’s contributions to Jewish studies see Jay M. Harris, ed., *The Pride of Jacob* (Cambridge, MA: Harvard University Press, 2002).

82. See the memorandum on the Chief Rabbinate by S. Z. Shragai, reprinted in his *Sha`ah venetzach* (Jerusalem: Mosad Harav Kook, 1960), 326-336. Shragai describes the Chief Rabbinate as “the fruit of Orthodox Zionist (*dati-le’umi*) thought, an institution whose authority is based upon its recognition that the establishment of the state reflects the divine will. Its halakhic rulings must therefore reflect this Orthodox Zionist perspective, in much the same way that the pronouncements of the Council of Torah Sages of Agudat Yisrael reflect the anti-Zionist ideology of that movement. “Halakhic decision takes place within

texts on the basis of very different narrative structures that each group applies to the facts of contemporary Jewish [42] history. One group sees in the progress of the Zionist movement the beginning of the fulfillment of God's promise of redemption to the Jewish people.<sup>83</sup> The other group tells a very different story about the work of the Zionist activists and settlers, a story that stigmatizes their efforts as an arrogant forcing of God's hand, an unwarranted hastening of the divine timetable of salvation.<sup>84</sup> These narratives do differ in form from the formal halakhic citations—the rules, principles, and precedents—that fill the writings of these rabbis. “Narrative” is the translation we often give to the term *agadah*, which we tend to distinguish from *halakhah*. Yet the halakhic conclusions that these writings advance would be incoherent (if they could be formulated at all) in the absence of the normative commitments that the agadic narratives express. Call those normative commitments by any other name, ideology, theology, politics; they are necessarily and inescapably *halakhic* all the same.<sup>85</sup>

Responsa are for that reason *halakhic*, not “ideological” documents, even when the motivating factor behind the rabbinical decision seems to be something other than law in the pure and narrow sense. As against Shapiro, I would view rabbinical legal discourse as an integrated experience of language and argument, a way of thinking and of talking that comprises any and all intellectual elements that rabbis utilize in their journey toward *pesak*. Since the ruling

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this ideological framework,” for an individual must accept the governing ideology of the rabbi before turning to that rabbi as his personal halakhic authority.

83. Perhaps the most comprehensive treatment of this theme is R. Ben-Zion Meir Chai Ouziel, *Hegyonei Ouziel* (Jerusalem: Hava'ad Lehotza'at Kitvei Harav, 1991).
84. See above, at note 29.
85. I have in mind here Bialik's classic essay “Halakhah ve'agadah,” *Kitvei Ch. N. Bialik* (Tel Aviv: Dvir, 1935), vol. 2, 260-275, which portrays a symbiotic relationship between these two modes of religious expression, albeit in literary rather than in jurisprudential terminology.

ultimately rests upon all these elements, the meta-halakhic as well as the halakhic, no essential distinction can be drawn between them. True, Shapiro's "outside observer" might perceive such a distinction. To such a reader, rabbinical disputes over governmental and political issues might better be classified as examples of *da`at torah*, expressions of the rabbis' social and political ideology, rather than as instances of *pesak halakhah*.<sup>86</sup> Yet responsa are written not by outside observers but by scholars who stand *within* the conceptual world of *halakhah*. And in our case, those insiders, those practitioners of rabbinical legal discourse, present their work as *berur halakhah*, Jewish legal analysis; they do *not* refer to what they are doing as [43] ideology, *weltanschauung*, or *da`at torah*. These rabbis could, of course, be wrong, but I do not know why we should regard the outsider's definition of their activity as more convincing than their own.

#### *Halakhah as a Social Practice.*

To summarize thus far: I have argued against the contention that liberal *halakhah* is an incorrect and invalid understanding of the tradition of Jewish law. This is so because in order to sustain that judgment, those who make it must demonstrate the existence of a set of formulaic criteria—some sort of method—by which to measure the objective correctness or incorrectness of any particular interpretation of the *halakhah*. The controversy over the Zionist halakhic tradition shows that such a method does not exist: neither side in that dispute could convince the other of the correctness of its legal viewpoint through the application of the formal procedures of halakhic analysis. The irreconcilability of that disagreement is no unique or exceptional case

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86. On the institution of *da`at torah* as a means of expressing Orthodox rabbinical ideology on subjects that do not fit comfortably under the heading of *halakhah*, see Lawrence Kaplan, "Daas Torah: A Modern

because law and legal decision in general cannot be reduced to the application of a system of hard and fast rules. Before they can reach their answers, judges must define the terms of the rules; they must decide which of several alternative rules covers the case; and they will frequently resort to other legal sources such as principles that are much less specific than rules. All of these moves involve acts of judicial choice that cannot be determined by the formal rules of law. Rather, they are determined by the so-called meta-legal factors that function as the inevitable and necessary context for all legal decision making. For these reasons, “method” cannot define or establish the correctness of any statement of law or *halakhah*. And for *that* reason, Orthodox halakhists cannot summarily reject our work as an incorrect or invalid understanding of Jewish law.

At this point, the reader might well sniff an aroma of relativism wafting from my argument. If halakhic decision making is inevitably grounded in an act of rabbinical choice among alternative outcomes, [44] and if that choice is not determined by a value-neutral halakhic method, then *halakhah* is nothing more than the will of the *posek* (his “will” in the sense that the choice depends upon his own moral and cultural proclivities, his subjective sense of “which view will better serve the community”). Yet we tend to think of *halakhah*, as of law in general, as something other than the judge’s will, as something other than politics or ethics or economics; in short, the law “is claimed to be its own thing and not entirely reducible to anything else.”<sup>87</sup> Law, precisely because it “wishes to have a formal existence,” demands its own rules and procedures by which it can speak in its own unique language and arrive at its conclusions in its own

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Conception of Rabbinic Authority,” in Moshe Z. Sokol, ed., *Rabbinic Authority and Personal Autonomy* (Northvale, NJ: Jason Aronson, 1992), 1-60.



autonomous fashion.<sup>88</sup> This is the sense in which legal method understands itself as “value-neutral”: “the law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.”<sup>89</sup> This is not to imply that legal decision is a purely mechanical affair in which the judge, in oracular fashion,<sup>90</sup> pronounces the ruling that is dictated by the controlling forces of law’s immanent logic. Law is not mathematics or a “hard” science.. As with any activity that demands interpretation, the determination of legal meaning cannot aspire to the clear-cut correctness that is the outcome of a syllogism or an equation. The formality of law *does* mean, however, that the act of interpretation is constrained by means of the “disciplining rules” of legal analysis that, by directing the judge’s inquiry along the proper path, insure that his decision is objectively correct.<sup>91</sup> Such a formal approach safeguards the rule of law, which holds that decision-makers should wield power in a community not in accordance with personal whim or even with deeply-held personal conviction but with previously agreed-

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87. Allan C. Hutchinson, *It's All In The Game: A Nonfoundationalist Account of Law and Adjudication* (Durham, NC: Duke University Press, 2000), 25.

88. “The law wishes to have a formal existence. This means, first of all, that the law does not wish to be absorbed by, or declared subordinate to, some other–nonlegal–structure of concern... and second, the law...desires that the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse.” Stanley Fish, “The Law Wishes to Have a Formal Existence,” in Austin Sarat and Thomas R. Kearns, eds., *The Fate of Law* (Ann Arbor: University of Michigan Press, 1991), 159-208. The quotation is at 159.

89. Hans Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967), 192.

90. I take this description from G. Edward White, who describes the once-predominant conception of judges as “oracles” who merely find the law and do not make it, “mechanically applying existing rules to new situations” and “who could discover the law’s technical mysteries but who could not influence the content of the law itself.” See *The American Judicial Tradition* (New York: Oxford University Press, 1976), 7-8. I presume that White derives his description from Sir William Blackstone, *Commentaries on the Laws of England* 1:3 (facsimile first edition, 1765. Chicago: University of Chicago Press, 1979), 69.

91. See Owen Fiss, “Objectivity and Interpretation,” *Stanford Law Review* 34 (1982), 739-763.

upon rules and standards.<sup>92</sup> Law is law, and nothing other than law. To say otherwise, to deny law its status as a self-authenticating process, is to herald “the death of the law” by assimilating it into some other discipline or disciplines.<sup>93</sup> And if this is so, then we have entered the universe of [45] legal relativism, a situation in which, as a matter of law, anything goes; the activity of judging, or of *pesak*, is not constrained by law *per se* and is nothing more than the ad hoc, unprincipled enforcement of the judge’s subjective value commitments, be they based upon ethics, emotion, or “gut reasoning.”<sup>94</sup> For all these reasons, the reader might conclude, it would be inaccurate (not to say disastrous) to reject the concept of method as definitive of the legal process.

I agree with almost everything stated in the preceding paragraph. To me, no less than to the reader to whom I impute these sentiments, “law” makes no sense if we cannot understand it as an autonomous discipline that, no matter how much it draws upon or shares in common with other bodies of thought, operates by its own procedures. Judicial decision accordingly must be constrained by the boundaries that law—and no other discipline—sets. A judge is a “judge” by virtue of the fact that her ruling is not simply her own opinion as to what ought to be but rather a *judgment*, an interpretation of legal doctrine made by a legal professional and its application to

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92. For moral arguments of behalf of the “rule of law” see Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) and Neil MacCormick, “The Ethics of Legalism,” *Ratio Juris* 2 (1989), 184-193.

93. See Owen M. Fiss, “The Death of the Law?” *Cornell Law Review* 72 (1986), 1-16, who attacks two legal academic “movements,” Law and Economics and Critical Legal Studies, for distorting the purposes of law by denying the integrity of its own discourse.

94. “Gut reasoning,” translated literally into Hebrew, *sevarat hakeres*, a concept found in numerous responsa (see, for example *Resp. Terumat Hadeshen* 2:92, near the end). In my experience, *sevarat hakeres* almost always conveys a less-than-positive connotation. It is invoked in support of the view that a *posek* ought to have a better and more formally halakhic reason to justify his conclusion than an argument he feels, as it were, from his *kishkes*.

the case at hand. Judges, as far as I am aware, do not regard themselves as free to render whatever decisions they wish but as bound by their duty to rule in accordance with the law. *Poskim* similarly express a clear sense of the limits under which they work: the Torah and the *halakhah* constrain them to rule correctly, even when they would wish for a different outcome.<sup>95</sup> All this is an essentially persuasive account of legal and halakhic process. Yet from the fact that law constrains (or ought to constrain) the freedom of the decision maker, it does not necessarily follow that there exists a method that imposes this constraint in an objective way, serving as a barometer of legal correctness, as the formula by which the judge or *posek* can arrive at the “one right answer” to a question of law or *halakhah*. Legal decision, as I have indicated above, does not take place in a value-free zone or outside of an ideological context. The key fact here is judicial *choice*: judges and *poskim* are constantly confronted with plausible alternative interpretations and applications of legal rules and [46] principles. They must choose the better or best of the available alternatives, and there is no “method” that can determine for them the right choice in a non-controversial way.

This argument, which I have framed in language specific to legal theory and *halakhah*, stands firmly within a much more general “critique of methodology,” a term that comprehends the contemporary intellectual “attack on the claims of objectivity that have been advanced by a broad range of academic disciplines.”<sup>96</sup> I cannot, within the confines of this essay, begin to do justice to this broad and deep trend in academic and professional thought and to the many

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95. See the regrets of the rabbis forced to rule stringently on the *agunah* question in Kahana (note 72, above).

96. The precise term “critique of methodology” is taken from Edward L. Rubin (note 3, above) at 1838ff. The quotation is at 1839.

thinkers who have contributed to it.<sup>97</sup> I would only say that the critique is a reaction against the “Enlightenment project,” the effort undertaken by thinkers during the past three centuries to locate rational bases for human inquiry.<sup>98</sup> According to that conception, objective knowledge—that is, knowledge based upon reason alone, untainted by appeals to authority, prejudice or tradition—is attainable by the human mind. The goal of philosophy, and by extension all intellectual disciplines, is to discover the proper method by which to attain it, by which to distinguish real and objective knowledge from mere opinion. This method presupposes the existence of *foundations*, of matrices, contexts, or categorical schemes that function as the basis of all knowledge. These foundations are the permanent, ahistorical, culturally-neutral and value-free grounding for all claims of knowledge and truth. All thought, evidence, or argument proceeds from these foundations, appeals to them, and is judged by them. A method is therefore a set of techniques that discovers information and tests it against the foundations that, within a particular form of inquiry, serve as the indices of truth and objective knowledge.<sup>99</sup> Such foundations underlie a variety of approaches in modern legal theory, from the conceptualist

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97. Rubin (note 3, above) provides a helpful bibliography at pp. 1835-1836. See also Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 345.

98. On all that follows see Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983). As Bernstein notes at p. 8, the tension between “objectivist” and “subjectivist” accounts of truth has been around ever since Plato battled the Sophists. The “modern” turn in this conflict comes with the “Enlightenment project,” the attempt to locate non-religious and rational foundations for human inquiry. On the “Enlightenment project,” see Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981), 36ff. See also H.G. Gadamer, *Truth and Method*, Second, Revised Edition (translation by Joel Weinsheimer and Donald G. Marshall; New York: Continuum, 1993), 277, on “the fundamental presupposition of the Enlightenment, namely that methodologically disciplined use of reason can safeguard us from all error.”

99. In the words of Stanley Fish (note 98, above), p. 343: “the successful foundational project will have provided us with a ‘method,’ a recipe which...will *produce*, all by itself, the correct result.... In literary studies the result would be the assigning of valid interpretation to poems and novels...” (Emphasis in the original).

“orthodoxy” of Christopher Columbus Langdell,<sup>100</sup> through the writings of the natural law thinkers,<sup>101</sup> to the analyses of the legal positivists.<sup>102</sup> As divided as these approaches may be on fundamental issues, they are as one in their contention that true [47] and objectively correct legal knowledge can be attained through the application of the proper method of study.

The “critique of methodology” (or “antifoundationalism”<sup>103</sup>) is a pervasive skepticism about the existence of self-evident foundations of knowledge that are not contingent upon human experience.<sup>104</sup> According to this critique, questions of fact, truth, validity, and correctness cannot be answered by any ahistorical, non-contextual, or non-controversial set of facts or rules. All human knowledge is situated within the social and historical circumstances of particular communities. Our very perception of reality is conditioned by thought processes that we have developed through our participation in human culture and community. It follows that our modes of inquiry, the ways in which we seek out and determine the truth, are themselves products of the same circumstances: “the problems people perceive, the categories they establish, the hypotheses they generate, the methodologies they employ, the arguments they use, and the criteria of validity they accept are all specific choices, made in the midst of history, as part of ongoing

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100. See Thomas C. Grey, “Langdell’s Orthodoxy,” note 5, above, at p. 5: “Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover.”

101. Although natural law has been around for quite a long time, its post-Enlightenment (*i.e.*, non-openly-religious) manifestation deserves special mention. For a well-known representative, see John Finnis, *Natural Law and Natural Rights* (Oxford: The Clarendon Press, 1980).

102. Chief among these is H. L. A. Hart, *The Concept of Law* (note 58, above). See, in general, Mario Jori, ed., *Legal Positivism* (New York: New York University Press, 1992).

103. See Fish (note 98, above), 342-355.

intellectual traditions.”<sup>105</sup> The implication for all forms of human inquiry is that there exists no “method” based in a value-free rationality that can serve as the index to objective knowledge. Many of the trends and “movements” within legal theory during the past century have proceeded from this sort of critique. For all the differences that separate them, the scholars associated with these schools of thought recognized that legal decision is rendered by judges who are inevitably rooted within the culturally-contingent *loci* of particular legal communities. Exemplary of this trend are the Legal Pragmatists, those theorists who

reject the notion that there is a universal, rational foundation for legal judgment. Judges do not, in their view, inhabit a lofty perspective that yields an objective vision of the case and its correct disposition. Instead, these scholars understand the role of judging more pragmatically; they recognize that all judges bring their own situated perspectives to the case and do the [48] best they can under all the circumstances to reach a fair and just disposition.<sup>106</sup>

A glance at the literature reveals that virtually all contemporary legal theorists have abandoned the excesses of the formalist past in favor of a more realistic, pragmatic conception of the process of judicial decision making.<sup>107</sup> The account I have rendered here of the ideologically-

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104. A sharp, brief expression of this critique is that of Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982), xix: Plato’s effort to discover the ultimate basis of truth “is the impossible attempt to step outside our skins...and compare ourselves with something absolute.”

105. Rubin (note 3, above), 1840.

106. Catherine Wells, “Situated Decisionmaking,” in Michael Brint and William Weaver, eds., *Pragmatism in Law and Society* (Boulder, CO: Westview Press, 1991), 275.

107. The glance was taken by Richard Rorty, “The Banality of Pragmatism and the Poetry of Justice,” in Brint and Weaver (note 107, above), 89-97. He notes that pragmatism is the governing approach even of those theorists who denounce “pragmatism.” On the “anti-foundational” thrust of much of twentieth-century legal theory, see Minda (note 4, above), especially for the bibliography he provides.

centered nature of *pesak* and the inevitability of rabbinical-judicial choice between available alternatives fits firmly within this trend.

But if “foundationalism” is dead, what is to protect us from relativism and even nihilism in disciplines such as law? Where are the constraints upon judicial discretion? Is the law in fact whatever the judge or judges say it is? In the absence of objective, non-ideological, and non-contextual reference points against which to measure our knowledge, are we not forced to conclude that “anything goes,” that our decisions and judgments are based upon nothing more solid than beliefs and opinions that cannot be adjudicated in any rational way? This dichotomy between objectivism and subjectivism, between “knowledge” and “opinion,” has of course been raging ever since Socrates battled the Sophists, and the Platonic literary record of that debate leaves us in no doubt that the former prevailed over the latter. Yet it is just possible that the Sophists have gotten a bum rap, that they were not suggesting that statements of truth in the spheres of politics, ethics, and law were based on nothing more than taste and mere opinion. Not a few contemporary observers have concluded that the Sophists in fact offered a middle ground, one that, though located through rhetoric and persuasive discourse rather than through “philosophy” and scientific proof, rescues us from the clutches of that false dichotomy.<sup>108</sup> A similar observation can be made concerning the obsession with method that characterizes much of modern philosophy: perhaps we are dealing here with the “Cartesian anxiety,” the fear that “unless we can ground philosophy, knowledge, or language in a rigorous manner we cannot

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108. For a reconsideration of what the Sophists were really saying, see Anthony T. Kronman, “Rhetoric,” *University of Cincinnati Law Review* 67 (1999), 677-709. See as well the description of the Sophistic controversy in Brian Vickers, *In Defense of Rhetoric* (Oxford: The Clarendon Press, 1989). For a response to Socrates’ devastating attack upon rhetoric, see James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1985), 215-237.

avoid radical skepticism.”<sup>109</sup> Again, many theorists locate a middle ground between these two poles in the form [49] of *praxis*, or what we might call situated knowledge. The starting-points of our reasoning are contingent, rooted in our cultural traditions, the product of “our heritage from, and our conversation with our fellow-humans.”<sup>110</sup> An intellectual discipline, an organized way in which we seek to gain knowledge, is therefore a *communal* (as opposed to an objectively rational) enterprise. It “is not a body of objective information, or a set of techniques for discovering such information, but a practice; a system of socially constituted modes of argument shared by a community of scholars.”<sup>111</sup> Inquiry, in this view, is more rhetorical than logical, proceeding and succeeding by way of a conversation carried on among practitioners, a persuasive argument addressed to a particular, historically and culturally situated audience. The “critique of methodology,” in other words, is much more than the critique of rationality; it is a broad-based effort to identify a different *kind* of rationality, one that is rooted within communities of interpretation and practice, a rationality that tests its propositions through rhetoric and argument rather than through “a Method claiming neutrality and universality.”<sup>112</sup> The goal of inquiry is to prove its propositions through “normal discourse,”<sup>113</sup> the attainment of

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109. Richard J. Bernstein (note 99, above), 8. Bernstein’s monograph is a comprehensive description of the struggle between the search for foundations and methods (hence the attribution to Descartes) and the attempt to identify new approaches that ground knowledge in something less than objective certainty but something more than pure subjectivism.

110. Rorty, (note 105, above), 166,.

111. Rubin, (note 3, above), 1841.

112. John S. Nelson, Allan Megill, and Donald N. McCloskey, *The Rhetoric of the Human Sciences* (Madison: University of Wisconsin Press, 1987), 6.

113. See Richard Rorty, *Philosophy and The Mirror of Nature* (Princeton: Princeton University Press, 1979), 320: “Normal discourse is that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good



consensus by way of a conversation among practitioners. “Truth” is conceived in “intersubjective” rather than in “objective” terms, and it is measured in the extent to which communities of interpretation and practice gather around and give assent to propositions. Is consensus a sufficient guarantee against radical skepticism? It certainly would not suffice for a Descartes or a Kant or the logical positivists. Yet more and more thinkers are coming to the conclusion that its very rootedness within community is the guarantee that inquiry will not degenerate into pure subjectivism or irrationality. When even the so-called “hard” sciences, hardly bastions of irrationality, have now been described as communities of practice in which argument and conversation assume a major role in determining truth,<sup>114</sup> it would seem that we need not fear that we are standing over the abyss of nihilism.

[50] How does this approach to rationality apply to law? It begins by envisioning law as a community of interpretation and practice. As I have noted, legal theorists of widely-divergent political views have rejected foundationalism, the notion that legal reasoning is a value-free, neutral method that stands apart from the practice of law in order to render an objective critique of the work and writings of legal actors. Legal reasoning is rather embedded *within* the practices and the culture of specific legal communities; it is the name we give to the cluster of techniques, conventions, and traditions that describe what lawyers do and thus comprise the craft of law.<sup>115</sup>

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argument for that answer or a good criticism of it. Abnormal discourse is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside.”

114. The proper citation here is Thomas Kuhn, *The Structure of Scientific Revolutions*, Second Edition Enlarged (Chicago: University of Chicago Press, 1970). Fundamental to Kuhn’s system is his notion of scientific paradigms: “universally recognized scientific achievements that for a time provide model problems and solutions to a *community of practitioners* (viii; emphasis added). See also Richard Rorty, “Science as Solidarity,” in Nelson, Megill, and McCloskey (note 112, above), 38-52.

115. Thomas C. Grey, “Holmes and Legal Pragmatism,” *Stanford Law Review* 41 (1989), at 798. Among these theorists on the “left” are Stanley Fish (note 98, an argument he repeats throughout the book) and Joseph

This turn in jurisprudential thought draws heavily upon numerous and diverse sources: the writings of the pragmatic philosophers,<sup>116</sup> Ludwig Wittgenstein,<sup>117</sup> and the scholars identified with philosophical hermeneutics<sup>118</sup> and in the contemporary “recovery of rhetoric.”<sup>119</sup> It is committed to the proposition that law is a social practice or, to put it differently, a language, a set of texts and of ways of arguing about their meaning that is the vernacular of a particular legal

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William Singer, “The Player and the Cards: Nihilism and Legal Theory,” *Yale Law Journal* 94 (1984), 1-70. The “right wing” (as these things are measured in American politics, at any rate) is represented by Richard Posner in many of his writings on legal pragmatism. See, e.g., *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), at 116-117: legal reasoning is “the ‘art’ of social governance by rules,” “a craft,” or “a skill such as riding a bicycle or speaking a foreign language.”

116. I have no intention of offering a bibliography to this vast subject. I should mention, though, one famous survey of the intellectual history of this movement in the United States, with special reference to its relevance for legal studies: Morton White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949). For the observations of leading pragmatists on law, see John Dewey, “Logical Method and Law,” *Cornell Law Quarterly* 10 (1924), 17-27, and Richard Rorty, note 108, above.
117. A Lexis-Nexis search of American law reviews from the years 1992-2002 produces 823 citations of “Wittgenstein.” Compare this to citations of thinkers more commonly associated with jurisprudence: “Savigny” (327), and “Salmond” (131). See Dennis Patterson, ed., *Wittgenstein and Legal Theory* (Boulder: Westview Press, 1992), and Thomas Morawetz, “The Epistemology of Judging: Wittgenstein and Deliberative Practices,” *Canadian Journal of Law and Jurisprudence* 3 (1990), 35-59.
118. Chief among them Hans-Georg Gadamer (see chiefly *Truth and Method*, note 99, above) and Jürgen Habermas, *The Theory of Communicative Action* (translated by Thomas McCarthy. Boston: Beacon Press, 1984). On the implications the thought of Gadamer and Habermas (and the controversy between them) for law, see David C. Hoy, “Interpreting the Law: Hermeneutical and Poststructuralist Perspectives,” *Southern California Law Review* 58 (1985), 135-176.
119. I take the title from R. H. Roberts and J. M. M. Good, eds., *The Recovery of Rhetoric: Persuasive Discourse and Disciplinarity in the Human Sciences* (Charlottesville: University of Virginia Press, 1993). See also Herbert W. Simons, ed., *The Rhetorical Turn: Invention and Persuasion in the Conduct of Inquiry* (Chicago: University of Chicago Press, 1990), as well the volume by Nelson, Megill, and McCloskey (note 113, above). These studies seek to “recover” rhetoric from the anathema pronounced upon it by Plato and, to a lesser extent, by Aristotle, who contrasted it with dialectic as an approach to inquiry. The goal of this “movement” is to remind us that the forms of human inquiry are inescapably rhetorical (as opposed to methodological). Perhaps the most important contemporary work in the theory of rhetoric as a mode and structure of human knowledge is Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (J. Wilkinson and P. Weaver, translators. Notre Dame: Notre Dame University Press, 1969). See also Stephen Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958), 248: we should demand of arguments “not that they shall measure up against analytic standards but, more realistically, that they shall achieve whatever sort of cogency or well-foundedness can relevantly be asked for in that field.”

community.<sup>120</sup> To understand law in this way allows one to concede that legal truth is, when tested against the standard of objective, philosophical certainty, radically indeterminate. Good arguments can usually be made for either side of a contested point of law, so that a firm and sure perception of “truth” is well-nigh unattainable.<sup>121</sup> Thus, while jurists might well approach their work on the faith that there does exist “one right answer” to any particular legal question, that answer cannot be identified with anything approaching absolute certainty.<sup>122</sup> Yet the very nature of law as a language or social practice preserves it from the acids of indeterminacy and radical skepticism. Legal decision may well involve choices among alternatives, but lawyers and judges are not free to rule arbitrarily, to impose any choice they wish. The choice may not be determined by the law’s rules and principles; it is directed, nonetheless, by the fact that lawyers and judges make that choice *as* lawyers and judges. This means, first and foremost, that they approach the work of interpretation in a communal way, as [51] members of a profession who

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120. I would cite here almost all the works by James Boyd White. See, in particular, note 109, above, at 77-106. See also his *The Legal Imagination, Abridged Edition* (Chicago: University of Chicago Press, 1985), xiii: “I think that the law is not merely a system of rules (or rules and principles), or reducible to policy choices and class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture... The law makes a world.”

121. This is a theme stressed again and again in the literature of the Critical Legal Studies “movement”(CLS): legal doctrine is largely indeterminate because the law, as a discrete, procedural discipline, allows for arguments in more than one direction. The only way to solve these disputes is through a substantive choice in favor of the arguments supporting one particular social vision over those that support another. This sort of choice, though, is political rather than legal. Hence, the title of David Kairys’ *The Politics of Law* (New York: Basic Books, 1998), an important collection of essays by a variety of scholars associated with CLS.

122. Many halakhic authorities do believe in the existence of a single, uniquely correct answer to any question of Jewish law; see Shimshon Etinger, “Machloket ve’emet: lemashma`ut she’elat ha’emet hahilkhatit,” *Shenaton Hamishpat Ha`ivri* 21 (1998-2000), 37-69. For other views, see Avi Sagi, *Eilu ve’eilu: mashma`uto shel hasiach hahilkhati* (Tel Aviv: Hakibbutz Hame’uchad, 1996). My remarks in this essay, however, go to a more practical level of concern: even if there *is* one right answer to a question of law or *halakhah*, there is no reliable method by which the scholars of the field can identify that answer in any formal way. And this, at the very least, means that the authorities cannot summarily reject any and all divergent points of view from the legal conversation.

must account for their views before an audience of fellow practitioners. They are the participants in a tradition of craft and techniques such as practical reasoning<sup>123</sup> that, learned and internalized by lawyers, teach them how to approach the rules and principles in a manner recognizable to their fellow practitioners and guide their understanding of doctrine and of the “leeways” it permits. In this way, “law” does constrain the freedom of decision makers: not through any restrictive power of its rules and principles but through its embodiment as a social practice that guarantees the predictability of legal decision.<sup>124</sup>

Like law in general, *halakhah* is a species of practice, an endeavor that is always *situated* within a particular community of legal interpretation. *Pesak* is therefore not a science but a craft, the conversation of a self-identified community of practitioners, the accumulated set of

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123. “Practical reasoning,” as distinct from formal logic, is often linked to the Aristotelian term *phronesis*. It is, in the words of Richard Bernstein (note 99, above, at 54) “a form of reasoning that is concerned with choice and involves deliberation... a judgment (in which) there are no determinate technical rules by which a particular can simply be subsumed under than which is general and universal. What is required is an interpretation and specification of universals that are appropriate to this particular situation.” In a legal sense, practical reasoning is the idea that judges should decide cases “not by deductive logic, but by a less structured problem-solving process involving common sense, respect for precedent, and an appreciation for society’s needs”; Daniel A. Farber, “The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law,” *Vanderbilt Law Review* 45 (1992), at 536-537. For discussion and bibliography see Thomas F. Cotter, “Legal Pragmatism and the Law and Economics Movement,” *Georgetown Law Review* 84 (1996), at 2082-2091.

124. The most important exponent of this point of view is Karl Llewellyn, whose *magnum opus* is *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960). See especially the chapter entitled “Major Steadying Factors in Our Appellate Courts,” 19-61. The term “leeways” that I use in the text is taken from Llewellyn’s treatment of “the leeways of precedent” in this work, pp. 62ff. A more accessible version of his approach is *The Case Law System in America* (translated by Michael Ansaldi. Chicago: University of Chicago Press, 1989); see especially at 76-78, along with editor Paul Gewirtz’s excellent introductory essay, ix-xxiii. Gewirtz notes the subtle but important difference between Llewellyn’s approach and Stanley Fish’s notion of practice and “communities of interpretation” (*Doing What Comes Naturally*, note 97, above, and *Is There A Text In This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980). Where Fish exalts the influence of practice over interpretation and suggests that rules do nothing to constrain it, Llewellyn posits a kind of dialogue between rules and practice, carried on by the professionally-trained practitioner. For an appreciation of Llewellyn’s understanding of law, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Belknap/Harvard, 1993), 210-225.

interpretive techniques and assumptions that allow each practitioner to gain a “situation sense”<sup>125</sup> of what sorts of rulings and claims of meaning will be acceptable or unacceptable in the eyes of his colleagues. It is useless to speak of a halakhic “method” if by that we mean a set of rules or criteria to evaluate in an objective way the correctness of a particular halakhic decision or line of decisions. To perform that function, any such rule would have to exist separate and apart from the practice of *halakhah* itself in a non-interpreted fashion: that is, all practitioners of *halakhah* would have to agree upon its precise, meaning, and circumference. Yet as we have seen, rules do not work this way in law and in *halakhah*. Rules are always and constantly being interpreted by lawyers and judges in the course of their work. Rules do not “mean” anything until they are applied to the facts and circumstances of the particular question, and every act of application reshapes, modifies, and transforms the meaning of the rule; thus, the language of a rule does not define its own application.<sup>126</sup> In short, there is no objective methodological basis on which to judge the work of a practice; any and all standards of judgment are exercised by the practitioners themselves in the course of their work.

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125. A term favored by Karl Llewellyn; see the preceding note.

126. This is a general descriptive statement, of course, and it is only as good as the evidence that can be brought to support it from specific decisions and responsa. Such evidence exists in abundance, scattered throughout numerous studies of halakhic development on particular topics. A common thread uniting all these cases is that the *poskim* arrive at rulings that are unexpected, given the “rules” that presumably ought to have dictated different outcomes. The techniques utilized to support these innovative (deviant?) decisions are varied; the rabbi in question either ignores the limiting rule, or reinterprets it, or finds another rule that “trumps” it. Taken together, though, these individual examples tend to buttress the theoretical approach I offer in this essay: namely, that the “rules” function *within* halakhic discourse but do not judge it. Rabbis use rules as arguments, as tools to construct the rhetoric of justification; the rules do not serve to evaluate in some methodical way the correctness of rabbinical argument. I have addressed this point in a number of venues; see the article cited in note 8, above, as well as Mark Washofsky, “Taking Precedent Seriously: On *Halakhah* As A Rhetorical Practice,” in Walter Jacob and Moshe Zemer, eds., *Re-Examining Progressive Halakhah* (New York: Berghan Books, 2002), 1-70.

[52] If there is no such “method” external to halakhic practice by which to determine the correctness of a halakhic decision, does this mean that there is no such thing as a “wrong” decision? Are there no constraints upon what a *posek* might say in the name of Torah and *halakhah*? Not at all. There *are* constraints, and powerful ones, too, that severely hem in the range of rabbinical discretion. Like the judge (and, for that matter, like the participant in any other intellectual practice), the *posek* is constrained because he speaks and writes from within a particular community of practitioners. He is not free to say whatever he wishes, not because he is constrained by “foundations” or formal criteria of halakhic validity, but because he must address himself and his words to that community in a language that they will understand as the discourse of their practice. His ruling is an argument rehearsed before a particular audience composed of scholars who share his “situation sense” as to what constitutes acceptable halakhic argumentation. His interpretation is “correct” to the extent that it secures the adherence of that audience, that it persuades them to form a community around his words, that it brings them to interpret Torah and *halakhah* in the way that he reads them. It is this situated-ness, the fact that the *posek* must speak in a professional discourse that defines a particular community of practice, that places real limits upon his discretion. The proper term to apply to this process is “rhetoric,” not “method.” If we insist upon using the term “halakhic method,” it can only mean the discourse and the rhetoric of the halakhic community. It will and must operate as part of the language and experience of textual analysis and argument. It will always be interpreted and modified as it is applied; thus, it cannot control its own application. Such a “method” is not a formula that declares in some objective, *a priori* way what halakhists ought to do. It is no more and no less than a description of what halakhists do in fact.

If halakhic practice always takes place within a *particular* community of interpretation, we should not be surprised that very different sorts of interpretation and consensus will emerge from [53] different halakhic communities. We have seen that the Zionist halakhists and their Orthodox opponents operate on the basis of fundamentally different sets of assumptions as to how the Jewish legal tradition speaks to the question of sovereignty and statehood. When Rabbi Shaul Yisraeli writes in such evident frustration that “we will not debate with” the anti-Zionists, he is merely affirming that on these issues the two groups comprise separate and distinct interpretive communities, so that further discussion is pointless. Lacking the common definitions and professional discourse that are the *sine qua non* for productive argument, neither side can hope to persuade the other of the rightness of its own view. The two communities cannot resolve their disagreements by appeal to a “meta-principle,” a value-neutral halakhic method that adjudicates impartially between their competing interpretations. Again, no such method exists, for any decision-making rule can function only *within* the practice of a particular halakhic community, as part of the shared assumptions and techniques that direct the conversation of its practitioners. As it is, the failure of the two groups to arrive at a common discourse is evidence of the absence of any sort of method for determining objectively correct answers.

For similar reasons, we should not be surprised at the continuing Orthodox rejection (to which I alluded at the beginning of this paper) of the ideas and insights put forward by liberal halakhists. Keep in mind that liberal halakhic writers present their interpretations, which cover such matters as liturgical practice, the role of women in synagogue ritual, Shabbat and festival observance, *kashrut*, marriage and divorce law and more, in standard halakhic terminology. Well-supported by text citation and analysis, these liberal responsa are framed in what looks and

sounds like traditional halakhic discourse; in other words, they discuss the same questions and read the same texts as those found in “orthodox” responsa on the subjects at hand. Yet none of this seems to matter to Orthodox rabbis, who simply ignore liberal responsa, something they would never do to the [54] responsa of other Orthodox rabbis with whom they disagree. Liberal halakhic opinions are never cited in Orthodox legal discourse, except when the goal of the particular Orthodox writer is to demonstrate the heresy of the liberals and to prevent misguided members of his own community from drawing the conclusion that such ideas *might* be valid *halakhah*.<sup>127</sup> Some liberal halakhists, unwilling to take “no” for an answer, do try to argue their way into Orthodox halakhic conversation. They will contend that their responsa are examples of “kosher” *halakhah* because they meet the formal test of halakhic validity: that is, they are supported by Talmudic reasoning and are authored by scholars who are loyal to the halakhic system. Yet Orthodox rabbis still brand these responsa as halakhically illegitimate. The reason for this is that a “formal test for halakhic validity” is a methodological principle, intended to serve as a neutral and objective index of correctness. And as I have argued, such “method” does not exist outside of and apart from the accepted practice of a particular community of interpretation. Although Orthodox halakhists do cite formal rules and methodological principles in their writings, they do so as *Orthodox* rabbis. The rules and principles will always yield an “orthodox” conclusion, because they will and must be applied and determined by practitioners who see

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127. A classic example may be found in the first volume of J. David Bleich’s *Contemporary Halakhic Problems* (New York: Ktav/Yeshiva, 1977), 78: “The deliberations and publications of the Rabbinical Assembly [specifically, the Committee on Jewish Law and Standards–MW] do not, in the ordinary course of events, properly come within the purview of a work devoted to Halakhah. Much is to be said in favor of simply ignoring pronouncements with regard to Jewish law issued by those who have placed themselves outside the pale of normative Judaism. Yet from time to time a particular action is erroneously presented as being predicated upon authoritative precedents, and hence being within the parameters of Halakhah. Since the



themselves as forming a distinctly *Orthodox* community of halakhic interpretation. Orthodox rabbis do not accept liberal *pesak* as a correct interpretation of Jewish law, not because some formal method constrains them to reject it, but because it is rendered by *apikorsim*, outsiders, Jews who by definition dwell outside the boundaries of *halakhah*. They cannot admit us and our ideas into their halakhic conversation and remain a self-consciously Orthodox community. No matter what we say, no matter how well we argue our positions, our words strike Orthodox ears as a foreign language, a conversation other than *halakhah*. Attempts by liberal scholars to convince Orthodox observers of the correctness of our own understandings of Jewish law are therefore doomed to fail.<sup>128</sup>

**[55]** *The Practice of Liberal Halakhah.*

All of the above applies to us as well. Liberal *halakhah*, like the Orthodox variety, is the intellectual practice of a particular self-defined community of interpretation. It is *our* practice, and we, its practitioners, need not seek legitimacy or validation in the eyes of another community of interpretation. Our decisions are “correct” when they satisfy *us*. Our responsibility, therefore, is to ourselves and our own practice, the same responsibility shouldered by the participants in any other intellectual discourse: we should seek to conduct our practice according to *our* own best understanding of it. I use the word “best” to imply a sense of aspiration, which is part and

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unwary and unknowledgeable may very easily be confused and misled by such misrepresentations it becomes necessary to take note of the issues involved.”

128. See, for example, Rabbi Joel Roth’s efforts to disprove Rabbi Moshe Feinstein’s declaration that Conservative Jews are *apikorsim*, or heretics, ineligible to serve on a *beit din*. Roth contests the ruling as a matter of law, but he tragically misses the point. Feinstein is addressing a community of *Orthodox* Jews who define and identify themselves largely on the basis of lines such as the one he draws in that ruling. For sources and discussion, see note 8, above.

parcel of the activity of any intellectual practice.<sup>129</sup> Professionals are not as a rule content to accept any and all examples of their practice as equally valuable. On the contrary: lawyers, philosophers, literary theorists, and others tend to operate on the assumption that there are better and worse ways to practice their craft. Their discussions center upon the critical examination of the work of their colleagues, in order to determine by means of accepted intra-disciplinary argument just what counts as a “good” (or “better,” or “best,” or “not-so-good”) example of their community discourse. If liberal *halakhah* is such a discourse, a similar aspiration ought to be at work in our discussions and teaching. I begin with the assumption that we *do* have standards, that those who participate in the liberal halakhic endeavor do not do so with the idea that anything goes or that every interpretation presented in the name of “liberal *halakhah*” is as good (or as bad) as every other one. Each of us who works in the field does so according to a vision of what liberal *halakhah* is and ought to be. Though we need not seek Orthodox approval of our work, we do seek our own; we measure it according to the criteria of value that motivate us. We should at the very least strive to see that meets our own standards of what constitutes liberal *halakhah* at its very best.

[56] What precisely are those standards? Well, there’s the rub. If I am “against method” as an objective index of halakhic correctness, I cannot offer a set of rules or criteria by which to

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129. To this point, I have offered what I think is a descriptive account of halakhic practice, and I do not now want to muddy the waters by switching to normative language, an advocacy of what *ought* to be rather than a discussion of what *is*. (Advocacy has its proper place, but that place is not here.) When I speak of “aspirations,” I am saying that a conception of higher standards of practice—the best that the practice can be—is an integral part of the work of any discipline. The members of that community do in fact evaluate each other’s work critically against such standards. For example, Ronald Dworkin argues that this sort of aspiration lies at the basis of the activity of literary interpretation; see *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 149ff (on the “aesthetic hypothesis,” the notion that the activity of literary interpretation aims at showing “which way of reading...the text reveals it as the best work of art). My idea of “aspiration” here is quite similar: halakhists aspire to produce a *halakhah* that is “the best it can be,” that meets the highest standards of evaluation that exist within the practice.

evaluate the objective correctness of any particular piece of liberal halakhic writing. I do have my own ideas as to what constitutes liberal *halakhah* at its best,<sup>130</sup> but I cannot impose these as a formulaic definition of our practice or as a kind of calculus by which to evaluate “right” and “wrong” decisions. The best we can do is to say that our standards must emerge from our practice itself, the day-to-day functioning of liberal halakhic conversation by which we analyze, challenge, and ultimately strengthen each other’s work. Standards of excellence or “correctness” in liberal *halakhah*, like the standards of any other rhetorical practice, are therefore fixed not by method or formula but through argument. Again, there is no method that allows us to distinguish in objective fashion between good and bad arguments.<sup>131</sup> The standards we apply are therefore the ones that we have, the ones that we as a community of practice determine to insist upon as the yardsticks by which to evaluate our efforts. Accordingly, a “good” example of liberal halakhic practice is a piece of writing to which we resonate and around which we coalesce as a

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130. See Mark Washofsky, *Jewish Practice* (New York: UAH Press, 2001), xxii-xxv. I do believe that the concepts and values I set forth there (such as our commitments to gender equality, the moral dignity of all human beings, and our openness to innovation and creativity in the forms of religious life) are integral to any decent understanding of the practice of liberal *halakhah*. Yet they are at the same time necessarily vague and general. They are *descriptive* of our practice, in the sense that any ruling or essay in liberal *halakhah* will most likely have to explain itself in accordance with them. But they cannot *prescribe* just what decision a liberal halakhist ought to reach on any particular question. The meaning of any rule or criterion of liberal *halakhah*—like the meaning of rules and criteria in any other discipline—can take shape only in practice, through argument carried on among a community of interpreters.

131. See, for example, Perelman and Toulmin in the works cited in note 120, above. Both of these authors criticize the tendency among prior theorists to evaluate the validity of argumentation on the basis of formal, analytical logic. And if argumentation is, as they suggest, a matter of practical reasoning (contextualized to the audience it addresses or to the field within which it functions), then it is much less likely that we can agree upon any formal standard by which to judge its correctness. See also Dale Hample, “What Is a Good Argument?” in W. L. Benoit, D. Hample, and P. J. Benoit, eds., *Readings in Argumentation* (Berlin: Foris Publications, 1992), 313-336. Hample examines three foundations upon which rhetorical theorists might establish criteria for evaluating argument: public (that is, the audience to whom the rhetor directs his or her address); logic (that is, the rationality of the argument itself); and “field” (that is, the specific discipline within which the argument takes place. He concludes that no general theory based upon any of these foundations can predict which arguments will be “good” ones in particular cases. This is another way of saying that there is no “method” by which to judge the correctness of an argument.

community. An example of liberal halakhic practice can be a good one even if we do not adopt the proposal it advocates or the solution it offers. After all, *machloket*, principled disagreement, has always been a central feature of halakhic discourse.<sup>132</sup> The point is that a good liberal responsum makes a case that our community must take seriously, presents an argument that we as liberals *could* find convincing. A successful essay in liberal *halakhah* is one that frames and supports its conclusion—whether we happen to agree with it or not—in the language of *our* community, that raises the intellectual and moral level of our discourse, and that speaks to us in a voice that we can recognize—or wish to recognize—as our own.<sup>133</sup> In other words, the standards by which we evaluate the quality of liberal halakhic thought and writing are the same sort of standards by which we evaluate the work of any other intellectual [57] practice: they are *community* standards, the demands that those who write and read liberal halakhic literature—the “producers” and “consumers” of liberal *halakhah*—place upon the work we do. If we wish to raise the level of those standards, we may do so, but we can do so only through the very same process of intra-disciplinary rhetoric by which we have created the standards that currently exist.

Like many other observers of the contemporary scene, I am “against method” as a way of establishing meaning in such discourses as law and *halakhah*. “Method” is a refuge, a simple and ultimately artificial formula for determining correctness that allows practitioners to marginalize

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132. See Hanina Ben-Menahem, Natan Hecht, and Shai Wasner eds., *Hamachloket bahalakhah*, 2 vols. (Jerusalem: Hamakhon Letikhnun Mediniut Be-Yachasei Yisrael Vehatefutzot, 1991).

133. I am relying here upon the insights emerging from the field of “ethical criticism,” best exemplified by such writers as Wayne C. Booth, *The Company We Keep: An Ethics of Fiction* (Berkeley: University of California Press, 1988), and Martha Nussbaum, *Love’s Knowledge: Essays On Philosophy and Literature* (Oxford: Oxford University Press, 1990) and *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995). Most especially, I owe a deep debt to the thought of James Boyd White, whose portrayal of law and judging as forms of rhetoric and ways of speaking open a path toward an approach to legal criticism that is rigorous and exacting while not “methodical.” See the works cited in

their opponents while sparing themselves the hard work of argument and debate. In fact, there *is* no method, no refuge from that hard work. From this, we can derive two important lessons. The first is that the critics of liberal *halakhah*, whether to our right or to our left, have no “objective” basis upon which to declare that our halakhic teachings are incorrect. In the absence of formal halakhic method, they can declare us to be “wrong” only on the basis of argumentation that we, a distinct community of Jewish legal interpretation and practice, find persuasive and convincing. The second lesson is that we need to pay close and careful attention to the way in which we arrive at our decisions. That there is no formal halakhic method for determining objective correctness does not mean that anything goes, that any liberal halakhic idea is as good as any other. Our ideas are “right” to the extent that they pass the test of argument as imposed, understood, and practiced by our own community. Argument, when you get right down to it, is all that liberal halakhists—and for that matter, *any* halakhists-- have. Yet that, if we do it right, is quite enough. Our task, like that of halakhists who form communities other than our own, is to facilitate the conduct of our argument, to make sure that it can be carried on honestly, vigorously, and respectfully, and that in pursuing it, we practitioners keep before our eyes the goal of making our practice the best that it can be. These conditions do not insure that any one of us will win the [58] arguments in which we participate. But they will do much to see to it that what emerges from our debate will be a result that can command our attention, our respect, and our assent.

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notes 109 and 121, above, as well as *Justice As Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), 89-112.