Kiddushin as a Progressive Halakhic Concept:

Toward a Theory of Progressive Halakhah

Mark Washofsky

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I. *The Problem*

Few elements of Jewish religious practice testify as clearly to the distinction between traditional *halakhah* and progressive Jewish observance as does the ritual of *kiddushin*, which effects marriage under Jewish law.[1] The outlines of the traditional procedure are largely spelled out in two Tanaitic sources. The first is *Mishnah Kiddushin* 1:1:[2]

> A woman is acquired in marriage in three ways and acquires her independence from marriage in two ways. She is acquired through money, a written document, or through intercourse… And she acquires herself through divorce or through the death of her husband.

And the second is a *baraita* in *B. Kiddushin* 5b:[3]

1. By *kiddushin* I mean the first of the two rituals associated with the inception of the marital union. The second of these is *ḥupah* or *nisu'in*, the "nuptials" traditionally marking the couple's establishment of a marital home, at which the seven marital benedictions (*sheva b'rakhot*) are recited. Although these two rituals are today universally celebrated at the same time and place, this was not always so; historically, *kiddushin* could precede *nisu'in* by as much as a year. This difference in origin is noted today in that each of the two rituals maintains its distinct identity within the wedding liturgy.

2. The *mishnah*'s language is repeated in the major codes - see *Mishneh Torah* (*MT*), *Hil. Ishut* 1:2 and *Shulḥan Arukh* (*SA*) *Even Ha`ezer* 26:4 – with the exception that the codifiers use the language of *kiddushin* in place of that of *kinyan* (acquisition)>

3. Here, too, the codes (*MT Hil. Ishut* 3:1 and *SA Even Ha`ezer* 27:1) accept this formulation as authoritative, but again, they utilize the language of *kiddushin* rather than that of *kinyan*.

How is this acquisition effected by money? When a man gives a woman money or an object of monetary value[4] and says to her: "Behold, you are consecrated (*m'kudeshet*) to me," or "Behold, you are espoused (*m'ureset*) to me," or "Behold, you are my wife," then she is indeed married (*m'kudeshet*). However, when a woman gives the money or the object to the man and says to him: "Behold, I am consecrated to you," or "Behold, I am espoused to you," or "Behold, I am your wife," then she is not married.

It takes no act of deep reading to recognize that traditional *kiddushin* is an exceedingly non-egalitarian affair.[5] The male plays the active role in the ritual, giving the ring[6] to the female and reciting **[p. 28]** the verbal formula that defines the act as constitutive of marriage. Should the bride, rather than the groom, perform these actions, the ritual is legally invalid.[7] This reflects the understanding that the act of marriage is one in which the male *takes* the wife and does the "acquiring."[8] Indeed, the *baraita* can hardly imagine the situation otherwise. Even when it

4. The *mishnah* preserves an old dispute (*maḥloket*) over the measurement of this "value." The school of Shamai holds that the monetary object should be worth at least a *dinar,* that is, an amount of substantial value, since a woman presumably would not agree to enter into marriage in exchange for a lesser sum (such, at least, is the explanation of R. Zeira recorded in *B. Kiddushin* 11a). The school of Hillel rules that the monetary value need amount to only a *p'rutah*, the smallest coin of the realm, presumably because even a *p'rutah* is considered "money" under the terms of the *mishnah* (*Tosafot, Kiddushin* 11a, *s.v. she'khen ishah*).

5. Few could capture this point better than does Rabbi J. David Bleich: "The legalistic essence of [Jewish] marriage is in effect an exclusive conjugal servitude conveyed by the bride to the groom. All other rights, responsibilities, duties and perquisites are secondary and flow therefrom"; "*Kiddushei Ta'ut:* Annulment as a Solution to the Agunah Problem." *Tradition* 90 (1998), p. 33

6. By universal custom, a ring is the practical realization of the "money" (*kesef*) or "object of monetary value" (*shaveh kesef*) mentioned in the texts. And for this reason, the ring is to be plain, with no stones or jewels embedded in it, in order to preclude embarrassing disputes over the estimation of its monetary value; see *SA Even Ha`ezer* 31:2 and 27:1 in Isserles.

7. *MT, Hil. Ishut* 3:2; *SA Even Ha`ezer* 27:7-9. There is some question about the legal validity of the marriage when the groom gives the ring and the bride pronounces the formula.

8. Based on the midrashic reading of Deuteronomy 24:1: "When a man takes a wife, etc." See *B. Kiddushin* 4b: "the Torah writes 'when *he* acquires' – כי יקח – and not 'when *she* acquires' – כי תקח." And see Rashi *ad loc., s.v. lehevu kiddushin*: were it not for this midrash, we might think that the exchange of money is what effects the

considers the possibility that the woman might pronounce the formula – a suggestion that it summarily rejects - the words it places in her mouth ("Behold, I am consecrated to you," etc., rather than "Behold, you are consecrated to me") indicate that it is she who is being "acquired" by the male and not the other way around.[9] All of this is rooted in the conception that the wife falls under the husband's legal authority or domain (*r'shut*)[10] so long as the marriage remains in force.[11] Never do the classical texts indicate that the husband might also fall under the *r'shut* of his wife.

This imbalance obviously contradicts the Progressive Jewish commitment to gender equality, and the Reform movement has long since rectified it. The delegates to the Augsburg Synod of 1871 resolved that weddings should include a double ring ceremony and that the bride should pronounce an appropriate verbal formula.[12] This step had been foreshadowed at the Philadelphia Rabbinical Conference of 1869, whose attendees declared: "The bride shall no longer occupy a passive position in the marriage contract, but a reciprocal avowal should be made by the bridegroom and the bride, by pronouncing the *same* formula, accompanied by an

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marriage, no matter who gives that money to whom. Therefore, the midrash comes to teach us that the Torah purposefully makes the man the grammatical subject of Deut. 24:1, to indicate that the marriage takes effect only when the man gives the money to the woman.

9. Compare as well the passive verb that the Mishnah (*M. Kiddushin* 1:1) uses to describe the woman's role in the procedure (האישה נקנית, "a woman is acquired)" with the active verb it uses to describe the male's role (האיש מקדש, "a man consecrates," *M. Kiddushin* 2:1). And while the Talmud (*B. Kiddushin* 2a-b) explores the ideas behind these differences in wording, it never suggests as a possibility that the Mishnah could have said "that the Mishnah could have said האישה מקדשת, "the woman consecrates (the man)."

10. See for example *M. Ketubot* 4:5: the wife enters the *r'shut* of her husband when she enters the *ḥupah* (see the Kaufmann and Parma manuscripts), i.e., at the time of *nisu'in*, although in principle this transformation occurs at the moment of *kiddushin* (see the commentary of Maimonides *ad loc.*).

11. *M. Kiddushin* 1:1: the wife "acquires herself" – *i.e.*, comes under her own domain or *r'shut* – upon divorce or upon the death of her husband.

12. W. Gunther Plaut, *The Rise of Reform Judaism* (New York: World Union for Progressive Judaism, 1963), pp. 217*ff*; Michael A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (New York: Oxford University Press, 1988), p. 190.

exchange of rings."[13] The point of this enactment – in halakhic language, we would call it a *takanah* - was to affirm "the full equality of woman with man in the conjugal relation and in moral life, so that, just as he consecrates her to be his alone, so she consecrates him to be hers alone, in person and affection."[14] No longer does the legal authority of the marital relationship flow entirely in one direction; with this *takanah*, the husband no less than the wife enters into the *r'shut* of his spouse upon the performance of the act of *kiddushin*.

But if the Reform movement believed that it had successfully addressed the problem of gender imbalance in the **[p. 29]** Jewish marriage ritual, not everyone accepted its solution. The concept of egalitarian *kiddushin* continues draw criticism from either of two directions, which we can term the *halakhic* and the *ethical*. The halakhic criticisms not surprisingly come from Orthodox rabbinical scholars who have uniformly rejected the *takanah* as a distortion of Jewish law. Rabbi Moshe Feinstein,[15] to cite one outstanding example, condemns the double-ring ceremony as nonsensical[16] and as a violation of the Toraitic prohibition against imitating Gentile custom. Against the argument that the ritual does no harm – after all, under traditional *kiddushin* the marriage is valid upon the groom's performance of the act regardless of any subsequent act

13. *Protokolle der Rabbiner-Conferenz, abgehalten zu Philadelphia vom 3.bis zum 6. November 1869* (New York, 1870), p. 39, translation by Moses Mielziner, *The Jewish Law of Marriage and Divorce in Ancient and Modern Times* (Cincinnati: Bloch, 1901), p. 59. By "the same formula" is meant the feminine equivalent of the statement traditionally pronounced by the male: "*harei atah m'kudash li*," etc. Such has been the practice in Reform weddings for generations; See *Rabbi's Manual* (New York: CCAR Press, 1988), p. 238 and the various wedding liturgies contained in the volume.

14. Mielziner (see previous note), *loc. cit.*

15. *Resp. Ig'rot Moshe Even Ha`ezer* 3:18 (1969).

16. Since the marriage is effected by the groom's giving of the ring and his verbal statement, the bride's actions are nothing more than "empty nonsense" (*hevel v'sh'tut*).

or statement by the bride[17] - Feinstein responds that the institution of this ritual leads many Jews to the erroneous conclusion that Jewish marriage *requires* an act of *kiddushin* on the part of the bride as well as the groom, thereby sowing confusion over what the *halakhah* actually is.[18] This rejectionist position is common to all streams of Orthodoxy, although those who identify with the relatively modernist "Open Orthodox" camp, sensitive to the imbalance that lies at the heart of traditional *kiddushin*, have sought other means of granting the bride a more active role in the wedding ceremony.[19] By contrast, the ethical criticism of egalitarian *kiddushin* has been voiced from within a segment of progressive Jewish opinion. I refer here to the feminist scholars[20] who argue that even this liberalized version of *kiddushin* cannot disguise the fact that the ritual is an act of acquisition (*kinyan*), a legal procedure much like the acts of purchase of real estate, chattel, and even slaves. As Rachel Adler reminds us, in the purchase that is traditional *kiddushin* the husband "acquires" power over the wife and thereby subjects her to his authority (*r'shut*). In her view, a double-ring adaptation of *kiddushin* does not solve the problem: it is at best a case of "tit-for tat commodification" and at worst a symbolic reminder of the subjugation of women that lies at the heart of "classical *kiddushin.*" Adler urges Jews who truly care about egalitarian

17. That is, so long as the bride, by accepting the ring - signals her consent to the groom's offer of marriage, since *kiddushin* is valid only upon that consent (*B. Kiddushin* 2b; *MT Hil. Ishut* 4:1; *SA Even Ha`ezer* 42:1). See below, Section III, Part 3.

18. See also his *Resp. Ig'rot Moshe Even Ha`ezer* 4:13: the double-ring ceremony is objectionable because under such circumstances it is unclear whether it is the groom or the bride who performs the act of *kiddushin* (ולא ניכר מי מקדש למי אם החתן את הכלה או הכלה את החתן).

19. See R. Dov Linzer, "*Ani Li'Dodi vi'Dodi Li*: Towards a More Balanced Wedding Ceremony," *JOFA Journal* (Summer, 2003/Iyar 5763), pp. 4-7. The term "Open Orthodoxy," identified with the institutions and the ideological approach championed by Rabbi Avraham (Avi) Weiss, goes back at least as far as Weiss's 1997 programmatic statement, "Open Orthodoxy! A Modern Orthodox Rabbi's Creed," *Judaism* 46:4 (1997), pp. 409-421.

20. In this context, mention should be made of Judith Romney Wegner, whose groundbreaking study of the place of women in Tanaitic law continues to serve as a foundation for research in the field; see *Chattel or Person: The Status of Women in the Mishnah* (New York: Oxford University Press, 1988).

marriage to replace *kiddushin* altogether with a different halakhic approach, that of *b'rit ahuvim*, a "covenant" rooted in the Jewish law of partnership (*hilkhot shutafut*) rather than of property **[30]** acquisition. While Adler acknowledges some difficulties with this suggestion – a partnership, like *kiddushin*, is also formed through a *kinyan* procedure- she finds this act of acquisition a more congenial legal framework than *kiddushin*, a transaction that "smells of the marketplace."[21] Gail Labovitz of the American Hebrew University similarly regards *kiddushin* as a metaphor for property ownership, "part of a larger cultural context that objectifies women, commodifies them, and denies them agency. *Kiddushin* thus does not stand in contrast to the metaphor of *kinyan*, as some scholars have claimed, but rather affirms it, modifies it, and demonstrates rabbinic culture continuing to live by it."[22] This feminist critique of *kiddushin* extends beyond the liberal Jewish denominations into Open Orthodox circles. Melanie Malka Landau, an ordinee of the Open Orthodox academy Yeshivat Maharat, declares in her study of Jewish marital law that the Rabbinic language of "holiness" or "sanctification" – *kiddushin* – when applied to marriage actually "leave(s) oppressive social relations in fact between men and

21. Rachel Adler, *Engendering Judaism* (Boston: Beacon Press, 1998), pp. 192-196. "Smells of the marketplace" (p. 196) refers specifically to *kinyan sudar*, an act of acquisition performed by the exchange of a cloth rather than a ring. Adler rejects *kinyan sudar* for the same reason that she rejects *kinyan kesef*, namely its association with the merchandising of commodities. Yet *kinyan sudar* is the form of "acquisition" customarily used for the ratification of many types of contract (*ḥiyyuvim*) in Jewish law. The result is that if one seeks a Jewish legal framework in which to constitute marriage as an act of mutual obligation, some act of *kinyan* – smelly or not – will likely be involved.

22. Gail Labovitz, *Marriage and Metaphor: Constructions of Gender in Rabbinic Literature* (Lanham, MD: Lexington Books, 2009). The quotation, at p. 89, summarizes Labovitz's argument that the Rabbinic substitution of the Hebrew root ק-ד-ש (*kiddushin*) for the older term ק-נ-ה (*kinyan*) as the legal descriptor for marriage does not change the fact that the wife in this system is an object to be acquired by the male subject. On this, see below, Section III, Part 1.

women as if that imbalance is in some way related to a sense of holiness."[23] She concludes her book as follows:[24]

> (O)nce *kiddushin* has been exposed as non-reciprocal and having acquisitional elements, thus making it an inappropriate basis for a mutual and reciprocal partnership, we need to determine whether the same term can be used for different means and purposes, with a radically revised content (that may make it contrary to previous rabbinic rulings) or alternatively whether new or recuperative models need to be employed to reflect the shift in values and requirements.

At this point, the reader will understand why I have entitled the introductory section of this article "The Problem," for these criticisms pose a direct challenge to those of us engaged in the work associated with the Freehof Institute, the convener of this conference and the publisher of this volume. The term "progressive *halakhah*," as we use it, signifies the academic discipline in which we are engaged, a way of thinking and of talking about the Jewish legal **[p. 31]** tradition, but it is more than that. It describes a kind of faith in the possibility that Jewish observance can be *both* halakhic *and* progressive, that it can reflect such modern liberal values as gender equality and yet keep a firm foothold within the traditional discourse of Jewish law. The 19th-century *takanah* which maintains *kiddushin* as the operative structure and rhetoric of Jewish marriage while equalizing the wife's legal status to that of the husband, is a classic – perhaps *the*

23. Melanie Malka Landau, *Tradition and Equality in Jewish Marriage: Beyond the Sanctification of Subordination* (New York: Continuum/Bloomsbury, 2012), p. 114.

24. Landau (see preceding note), p. 157. While Landau follows Adler in emphasizing the need to construct a "partnership" model for egalitarian Jewish marriage, she sees her own work as more firmly grounded within traditional halakhic discourse and its conception of rabbinical authority; see especially at pp. 30-32.

classic – expression of this progressive halakhic faith. The double-pronged attack which I have described – one side claiming that egalitarian *kiddushin* is insufficiently "halakhic" and the other side contending that it is insufficiently "progressive" – goes straight to the heart of our entire project, and if we believe in that project we must defend our *takanah* against both sets of objections. With respect to the Orthodox critique, we have to argue that egalitarian *kiddushin* qualifies as an authentic expression of Jewish law; [25] at the same time, we have to answer the feminist assertion that even in its liberalized form the concept of *kiddushin* is morally tainted by its origins in property law and in the language and reality of female subordination.

My goal here is to mount such a defense, a case for egalitarian *kiddushin* that rests upon both halakhic and ethical grounds. I should note at the outset that I shall be speaking here as a practitioner of progressive *halakhah*, an intellectual discipline that, like all others, makes meaning by working within a unique disciplinary discourse that is defined by a particular set of starting points, doctrinal commitments, and rhetorical presumptions. By "unique," I do not mean to say that the discourse of progressive *halakhah* is a secret language that makes sense only to a small circle of initiates. On the contrary, those of us working in the field are committed to the possibility of communicating successfully across disciplinary lines, both to practitioners of other disciplines as well as to the proverbial educated non-specialist. Rather, when I call ours a unique discourse I mean simply that our field, like every other self-identified academic discipline, demands a degree of autonomy: it is up to us, the community of progressive halakhists, to determine the **[p. 32]** standards for what shall count as acceptable evidence and good argument

25. To my knowledge such has never been done. While the Reformers in Augsburg and Philadelphia instituted an egalitarian marriage ritual by way of legislative fiat, neither they nor subsequent commentators spent much time and effort in developing a Jewish legal theory in support on the innovation.

in *our* discipline.[26] To the degree that we do this, thereby constituting ourselves as a self-identified discipline, our arguments will tend to carry the most force within our own community. I do not imagine that what I have to say will somehow compel Orthodox halakhists or feminist theorists, who work within discourses that possess their own disciplinary integrity, to retract their criticisms of egalitarian *kiddushin*. At the same time, I would like to think that I am not speaking *exclusively* to an audience of progressive halakhists. If our discipline is not identical to that of Orthodox *halakhah* or of Jewish feminist theory, it shares some considerable areas of overlap with both of them, and that space of common interest and concern ought to facilitate the possibility of real communication. To put this another way, we should never underestimate the power of a good argument. If we do not expect to bring our interlocutors over to our viewpoint on the issue, we can yet hope to demonstrate to them, as well as to the members of our own camp, that our position is a reasonable one, based upon a thoughtful interpretation of Jewish legal sources and of the moral values of justice and equity. And to demonstrate reasonableness, especially in this era or polarization in politics, culture, and religion, would be no little thing.

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26. The idea that any academic discipline can be completely autonomous is a difficult one to support in this interdisciplinary age. In particular, the claim of jurists that the study of the law enjoys a sort of formal disciplinary autonomy has come under serious challenge in recent years. See, for example, Richard A. Posner, "The Decline of Law as an Autonomous Discipline, 1962-1987," *Harvard Law Review* 100 (1987), pp. 761-780, and Stanley Fish, "The Law Wishes to Have a Formal Existence," in *There's No Such Thing as Free Speech… and It's A Good Thing, Too* (New York: Oxford University Press, 1994), pp. 141-179 (although Fish does not seem particularly bothered by the law's demand for an autonomy that it doesn't really have). The "degree of autonomy" to which I refer is a softer version of the pure autonomy that draws the critics' fire. For a more fully developed argument concerning the disciplinary autonomy of *halakhah* and of progressive *halakhah*, see my "What's So Special about Halakhic Reasoning? Cigarette Smoking, Jewish Law, and Rabbinical Decision Making," in Walter Jacob, ed., *Addiction and Its Consequences in Jewish Law* (Pittsburgh: Rodef Shalom Press, 2015), pp. 37-88, https://www.academia.edu/16543896/Whats_So_Special_About_Halakhic_Reasoning_Cigarette_Smoking_Jewish_Law_and_Rabbinical_Decision_Making

II. *Toward a Theory of Progressive Halakhah.*

I have spoken of progressive *halakhah* as a "self-identified academic discipline" that makes meaning through its own "unique disciplinary discourse." This prompts obvious questions of definition and boundary-drawing: What *is* that discourse? What *are* those afore-mentioned "starting points, doctrinal commitments, and rhetorical presumptions" that distinguish our practice from other approaches to Jewish legal thought, in this instance Orthodox *halakhah* and Jewish feminist theory? The following is my effort to sketch, in broadest outline, my answer to these questions. I use the word "sketch" advisedly; a complete theory of progressive *halakhah* would require a book-length treatment, which I cannot attempt to provide here.[27] In the meantime, I want at least to point to the **[p. 33]** intellectual commitments that define our work, the elements that, in my view, are essential to any attempt to define the discipline of progressive *halakhah* and to account for its modes of thinking and speaking.

A. *We Start from Where We Are*

What's in a name? In this instance, at least, pretty much everything. The discipline called "progressive *halakhah*" proceeds from the simultaneous commitment to *both* the halakhic tradition *and* the progressive values that shape our modern Jewish outlook. Our goal is to create

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27. In the meantime, see the following publications in which I attempt to move toward such a theory: "Internet, Privacy, and Progressive *Halakhah*," in Walter Jacob, ed., *The Internet Revolution in Jewish Law* (Pittsburgh: Rodef Shalom Press, 2014), pp. 81-142, http://huc.edu/sites/default/files/unsorted/people/Internet%20Privacy%20and%20Progressive%20Halakhah.pdf ; "Against Method: Liberal *Halakhah* Between Theory and Practice," in Walter Jacob, ed., *Beyond the Letter of the Law: Essays on Diversity in the Halakhah* (Pittsburgh: Rodef Shalom Press, 2004), pp. 17-77, http://huc.edu/sites/default/files/people/washofsky/Against%20Method.pdf; and "On the Absence of Method in Jewish Bioethics: Rabbi Yeḥezkel Landau on Autopsy," in Alyssa Gray and Bernard S. Jackson, eds., *Jewish Law Association Studies XVII* (2007), pp. 254-278, http://huc.edu/sites/default/files/people/washofsky/On%20the%20Absence%20of%20Method%20in%20Jewish%20Bioethics.pdf . (All websites accessed December 20, 2016.)

a Jewish religious praxis that is conversant with both discourses, that of Jewish law as well as that of contemporary liberal or progressive thought, and those of us who work in this discipline do not and cannot understand our Jewish religious practice in the absence of either of these intellectual and cultural traditions. "Progressive *halakhah*" is the disciplinary approach through which we bring Jewish law into productive and creative encounter with our contemporary religious outlook and, in doing so, strive to do full justice to both.

Right off the bat, the critic – let's identify this person as the Critic, with a capital "C" - will raise a fundamental – perhaps *the* fundamental - objection to our enterprise. We can formulate that objection as follows:

> "Progressive *halakhah*" is an oxymoron. *Halakhah* and progressive thought are two widely divergent discourses, each of which makes meaning on the basis of a set of theoretical assumptions that the other does not share. *Halakhah* is a system of religious law based in a traditional theology and, more to the point here, a particular conception of textual authority: our commitment to the halakhic system obliges us to do what the accepted authoritative texts, as interpreted through history by a recognized body of religious jurists, tell us to do. Progressive (or, alternately, liberal) thought is a product of modernity. It emphasizes individual **[p. 34]** freedom and autonomy over obedience to traditional authority. In progressive Judaism, therefore, *we* are the ones who define our Judaism; we do not abandon that task to some corpus of dusty writings composed and interpreted by a scholarly elite who did not and do not share our liberal worldview. And that worldview privileges gender egalitarianism, ethical universalism,[28] openness to

28. That is, the notion that our ethical responsibilities to our fellow human beings (as opposed to matters of ritual law) are the same regardless of whether the Other is a Jew or a Gentile.

surrounding non-Jewish cultures, and other values not easily squared with traditional *halakhah* and which, in cases of unavoidable conflict, should take precedence over it. In short, says our critic, these two traditions are deeply conflicting and ultimately irreconcilable. Each demands its own primacy, and the religious Jew must choose between them.[29] Our people, in reality, have already made their choice and have voted *against* the *halakhah*. Our entire theology, indeed, flows from the rejection of the authoritarian claims of the halakhic process, wherein the Jew is required to obey the decision of the *rav*, even should that decision run counter to reason or conscience, because he is the official spokesperson of God and Torah. Given that this authoritarian element is absolutely essential to the Jewish legal system, our effort to identify a *halakhah* that is democratic and pluralistic or sufficiently flexible to encompass progressive values is doomed from the start. To declare a simultaneous commitment to both *halakhah* and progressive values, therefore, is to be entrapped in a fatal contradiction. You progressive halakhists want to have it both ways, but you *can't* have it both ways.

Much of what I write in the following pages will consist of an effort to answer the Critic's objection in some detail. For now, though, let me suggest that the objection suffers from a fatal weakness of its own. It rests upon the assumption that the term "progressive *halakhah*" encompasses an irreconcilable binary opposition: authority versus autonomy, traditional values

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29. The eminent Reform theologian Eugene Borowitz summarizes this conundrum as a clash between the halakhic system and the demands of conscience. For non-Orthodox Jews, "a *halakhah* that can require the significant surrender of 'conscience' will be unacceptable"; *Renewing the Covenant: A Theology for the Postmodern Jew* (Philadelphia: Jewish Publication Society, 1991), p. 282.

versus modern ones. That assumption, however, is unprovable because it **[p. 35]** involves specific and controversial definitions of the key words "progressive" and "halakhic."[30] Other definitions do exist; as we shall see, we progressive halakhists begin our thinking from a different starting point, a set of definitions that does not accept the binary opposition as posed above. Therefore, the assumption that there is an inevitable and irreconcilable contradiction between *halakhah* and progressive values cannot claim to be objectively correct. By the same token, of course, neither does our rejection of that assumption enjoy the status of objective correctness. If the Critic were to ask why we begin with *our* starting point rather than the one that assumes the binary opposition, we would respond simply that "we can only start from where we are." That phrase is not as banal as it sounds. Some neo-pragmatist philosophers utilize it to express the insight that intellectual inquiry need not proceed from "a theory of everything," from absolutely certain and objective "foundations" of reasoning. It is enough rather to begin our thinking from the situation in which we actually find ourselves.[31] In this case, "to start from where we are" means to acknowledge that we progressive halakhists begin our thinking with this simultaneous commitment because it is our reality. The goal is not to test our commitment

30. In particular, this description offers an unnecessarily limiting stipulative definition of "*halakhah*." A *stipulative definition* "proposes ('stipulates') that language shall be used in a given way" and is distinguishable from a *lexical definition*, "such as one that occurs in a dictionary ('lexicon')… a kind of report on how language is used"; Michael T. Ghiselin, *Metaphysics and the Origin of Species* (Albany: SUNY Press, 1997), p. 63. As we shall see, "*halakhah*" is used in different senses in the world of practice.

31. The phrase "we can only start from where we are" is taken verbatim from Hilary Putnam, *Words and Life*, James Conant, ed. (Cambridge, MA: Harvard University Press, 1995), p. 201. See, in general, David L. Hildebrand, *Beyond Realism and Antirealism: John Dewey and the Neopragmatists* (Nashville: Vanderbilt University Press, 2003), pp. 149ff. Putnam's point that inquiry is *situated*, that it begins not from some objectively certain and thus value-neutral foundations but from the place that an individual or a community actually occupies in life, is common to pragmatist philosophy, paleo- as well as neo-.; see, for example, Larry A. Hickman, *Pragmatism as Post-postmodernism: Lessons from John Dewey* (New York: Fordham University Press, 2007). This is not the place for an extended consideration of pragmatism and its critics, and I am not claiming that the success of my argument for progressive *halakhah* requires adherence to pragmatism as one's guiding philosophical doctrine. The references here simply support my contention that the practice of progressive *halakhah* is intellectually respectable, i.e., that it does not contradict some supposedly objective state of fact.

against that supposed foundational binary opposition between authority and autonomy – a foundation no firmer than our own starting point - but rather, because we cannot help but accept that commitment as descriptive of our religious and intellectual situation, to inquire into the bases for our commitment and to make the best sense of it that we can.[32] That, and nothing more ambitious than that, is my purpose here.

B. *Reform Judaism's Engagement with Halakhah*

Progressive *halakhah* begins with the denial that ours is now a "non-halakhic" or a "post-halakhic"[33] Judaism in which Jewish law no longer serves to define the parameters of Jewish religious duty and commitment. On the contrary: we affirm that Jewish legal discourse is both central and necessary to any expression of religious Judaism, including Reform or Progressive Judaism. Put differently, **[p. 36]** to the extent that Progressive Jewish religious life is substantively *Jewish*, it is by that token also *halakhic*.

Consider the words of Rabbi Solomon B. Freehof, the dean of Reform halakhists,[34] in his theoretical defense of the practice of Reform responsa writing. But first, some background to establish the context of those words. Freehof (d. 1990) was by no means the first Reform rabbi to engage in halakhic discourse and to write halakhic responsa. The practice of progressive *halakhah* originates with the dawn of the Reform movement in early nineteenth-century Europe,

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32. To draw again upon pragmatist thought, a theory that meets these criteria also meets John Dewey's definition of "truth" as "warranted assertibility"; see his "Propositions, Warranted Assertibility, and Truth," *Journal of Philosophy* 38 (1941), pp. 169-186. That's the best anybody can do in an inquiry such as theology or *halakhah* where the foundational criteria for objective knowledge are lacking.

33. "Post-halakhic" is how Neil Gillman describes the position of Borowitz (note 29, above); see his *Doing Jewish Theology: God, Torah, and Israel in Modern Judaism* (Woodstock, VT: Jewish Lights, 2010), p. 182.

34. For a study of Freehof's contributions to Reform halakhic writing see Joan S. Friedman, *Guidance, Not Governance: Rabbi Solomon B. Freehof and Reform Responsa* (Cincinnati: Hebrew Union College Press, 2013).

when rabbis sympathetic with the goals of the movement wrote extensive halakhic justifications for the innovations that the Reformers were introducing into synagogue liturgy and practice.[35] In North America, the Central Conference of American Rabbis established its Committee on Responsa in 1906, at the height of the "classical" period in Reform Jewish history and long before Freehof became the chair of that committee in 1956.[36] Still, it is Freehof who to this day is recognized as *the* rabbi, the great teacher of the progressive halakhic enterprise. This is due not only to the sheer volume of his halakhic publications[37] but also to his contributions as a progressive halakhic theoretician. While Freehof is not remembered as a professional theologian, and while he never produced a "big book" of halakhic theory, the introductions to his halakhic works set forth the raw materials for a justification of the practice of *halakhah* in the North American Reform movement. Of particular interest here is his critique of the Bible-centered emphasis of those Classical Reformers who insisted that Scripture was the sufficient textual basis for Reform Judaism and that the Talmud and the Rabbinic literature had accordingly been demoted to marginal status:

> The weakness of the proposition was primarily that the self-description of Reform as being solely Biblical was simply not true. All of Reform Jewish life in all its observances was actually post-Biblical in origin. None of the arrangements of worship, the hours of

35. For extensive discussion and translation of relevant documents, see Alexander Guttmann, *The Struggle over Reform in Rabbinic Literature* (New York: World Union for Progressive Judaism, 1977), and Jakob J. Petuchowski, *Prayerbook Reform in Europe:The Liturgy of European Liberal and Reform Judaism* (New York: World Union for Progressive Judaism, 1986), pp. 84-104.

36. For a brief survey of the Reform movement's engagement with *halakhah* see Walter Jacob's introduction to *American Reform Responsa* (New York: CCAR, 1983).

37. These include eight volumes of responsa as well as his more systematic treatise *Reform Jewish Practice and Its Rabbinic Background*, two volumes (New York: UAHC Press, 1963). I should also mention two volumes of halakhic scholarship aimed at a lay audience: *The Responsa Literature* (Philadelphia: Jewish Publication Society, 1955) and *A Treasury of Responsa* (Philadelphia: Jewish Publication Society, 1963).

> service, the text of the prayers, no matter how rewritten, was primarily Biblical. The whole of **[p. 37]** Jewish liturgy is an achievement of post-Biblical times. The religious calendar, based indeed on Scripture, was elaborated in post-Biblical times. Marriage ceremonies and burial rites were all post-Biblical. The Bible, of course, was the source of ethical ideas, but the actual religious life was rabbinic. Early Reform may have rejected contemporary rabbinic authority, but it could not avoid the constructs that lived in the pageantry of the Jewish mode of life.[38]

This is a brilliant passage, especially for the way in which, here as elsewhere,[39] Freehof finesses the theological conundrum of authority versus autonomy raised by our Critic. I say "finesses," because Freehof certainly does not solve that problem; for that matter, to my knowledge he never addresses it explicitly in any of his published works. In fact, so long as we are playing a game of theoretical absolutes, the problem may be irresolvable. So long as we are speaking the language of either/or – "we *either* uphold the principle of untrammeled personal religious autonomy *or* we bind ourselves to the system of textual authority and legal discipline that is the Orthodox conception of *halakhah*" – then our Critic is probably right: we can't have it both ways. Freehof, though, has little use for the either/or way of thinking; he prefers to leave the theoretical question to the theoreticians and to focus instead on reality. *Halakhah* may not fit neatly within the conceptual world created by progressive Jewish theologians, but it is and always has been a fact of Reform Jewish life. Reform Judaism may have called itself a Bible-centered or "prophetic"

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38. Solomon B. Freehof, *Reform Responsa* (Cincinnati: Hebrew Union College Press, 1960), pp. 15-16.

39. See the introduction to his *Reform Jewish Practice*, volume one (see note 37, above). Another important document, which also deserves republication, is Freehof's 1967 lecture "Reform Judaism and the Law," delivered at HUC-JIR in Cincinnati, Ohio. There he expands on the themes set forth in his introduction to *Reform Responsa* (see preceding note).

Jewish movement,[40] but its religious *life*, its practice, cannot be imagined in isolation from its roots in Rabbinic – which is to say *halakhic* – soil. Let's expand a bit on Freehof's description of that religious life. The structure of our synagogue liturgy - *birkhot hashachar, p'sukei d'zimra,* the recitation of the *Sh'ma* and of the *t'filah*, the reading of Torah and *haftarah*, the very names of the services (*shaḥarit*, *minḥah*, *aravit*) – all of this is founded in and defined by the Rabbinic-halakhic books. The familiar observances of Shabbat and festivals – the lighting of candles, *Kiddush, Havdalah,* the *sukkah,* the *lulav* **[p. 38]** and *etrog,* the Passover Seder, the sounding of the *shofar*, the Yom Kippur fast, the kindling of the Hanukkah lamp, the reading of *m'gilat Esther* – either originate or take on their currently recognizable form in the literature of the Talmud and the *halakhah*. The familiar rituals with which we mark the important occasions of the lifecycle – birth, coming-of-age, marriage, and death – owe their structure and substance to the *halakhah* and its literary sources. Many, perhaps most of our well-known ritual observances are indeed rooted in the Bible, but they have become *Jewish* – that is, they have assumed the distinctly Jewish shape with which they have been associated for many centuries – thanks to the literature of Jewish law. The same is true when we turn our gaze beyond the ritual realm and consider our ethical observance. While the Bible, especially in its prophetic books, offers us stirring words of moral exhortation, the details of moral *practice* are Rabbinic. When we endeavor to identify specific Jewish approaches to issues affecting the marketplace, medical practice,[41] our government and society, we of necessity engage in a discourse anchored in the Rabbinic literature and suffused with references to halakhic texts.

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40. The theme of "prophetic Judaism" suffuses the Reform Jewish writing of the nineteenth and twentieth centuries. For an accessible summary, see Eugene B. Borowitz and Naomi Patz, *Explaining Reform Judaism* (New York: Behrman House, 1985), pp. 112-118.

41. For an extended argument that Reform Jewish bioethics is inescapably *halakhah*-based, see Mark Washofsky, "Halachah, Aggadah, and Reform Jewish Bioethics: A Response," *CCAR Journal* 53:3 (Summer, 2006), pp. 81-106.

The mention of the word "discourse" reminds us that Reform Judaism's attachment to the world of Rabbinic Judaism and *halakhah* extends beyond the substance of its ritual practice to the very medium of religious thought and communication. Specifically, Reform has never abandoned its connection with the *language* of the *halakhah* and with the ways in which halakhic Judaism makes meaning. Proof of this lies in the existence of a large and variegated Reform halakhic literature, which consists of several major genres. First, there are the guidebooks to Jewish religious practice published by the CCAR and the Union for Reform Judaism;[42] the endnotes to these volumes indicate their deep dependence upon Rabbinic-halakhic source material. The CCAR also publishes rabbinical manuals that contain liturgies for lifecycle ceremonies; these are accompanied by sections of "Historical and Halakhic Notes" that situate Reform practice in its Rabbinic and Jewish law background.[43] Then there are the Reform responsa, more than 1300 **[p. 39]** of which have been published under auspices of the CCAR Committee on Responsa.[44] This number includes the *t'shuvot* (responsa) published by Rabbi

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42. A partial list: Solomon B. Freehof, *Reform Jewish Practice and Its Rabbinic Background*, 2 vols. (New York: UAHC Press, 1963); Peter S. Knobel, ed., *Mishkan Moeid: A Guide to the Jewish Seasons* (New York: CCAR Press, 2013); Shimeon J. Maslin, ed., *Gates of Mitzvah: A Guide to the Jewish Life Cycle* (New York: CCAR Press, 1979); Mark Dov Shapiro, Neil Waldman, Scott-Martin Kosofky, *Gates of Shabbat: A Guide for Observing Shabbat, Revised Edition* (New York: CCAR Press, 2016); Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice, Revised Edition* (New York: URJ Press/Behrman House, 2010).

43. The latest example is included in *L'chol Z'man V'eit: For Sacred Moments* (New York: CCAR Press, 2015). See also the Historical and Halachic Notes at the conclusion of David Polish, ed., *Rabbi's Manual* (New York: CCAR Press, 1988).

44. The latest collection of the CCAR responsa is Mark Washofsky, ed., *Reform Responsa for the Twenty-First Century*, 2 vols. (New York: CCAR Press, 2010). The Responsa Committee has also published the following volumes through the CCAR Press: W. Gunther Plaut and Mark Washofsky, eds., *Teshuvot for the Nineties* (1997); Walter Jacob, ed., *Questions and Reform Jewish Answers: New American Reform Responsa* (1992); Walter Jacob, ed., *Contemporary American Reform* (1987); and Walter Jacob, ed., *American Reform Responsa* (1983). The responsa in these volumes, along with those published since the appearance of the last printed collection, are available to CCAR members at http://ccarnet.org/rabbis-speak/reform-responsa/ (accessed November 21, 2016).

Solomon B. Freehof throughout his long and illustrious career.[45] Reform responsa are *halakhic* documents, compositions that apply the traditional halakhic language of source citation and argument (*shakla v'tarya*) to questions of religious practice. And considered as a whole, these responsa constitute by far the largest genre of literature devoted to issues of Reform religious observance. Reform Jewish interest in *halakhah* also explains the existence of the institute, named after Solomon B. Freehof, that publishes this volume and that supports the efforts of rabbis and scholars to study and apply *halakhah* from a progressive Jewish perspective.[46]

The above, it bears emphasis, are facts of progressive Jewish life, and facts, as John Adams once observed, are stubborn things. These facts in particular stand in stubborn opposition to glib efforts to portray our Judaism as "non-halakhic" or "post-halakhic." *Halakhah*, it turns out, is all around us in Reform Judaism; it is and always has been a central aspect of Reform religious life. And it functions as such precisely because we want that life to be distinctly and unmistakably Jewish in nature. To turn our backs on *halakhah*, therefore, is to renounce what Freehof called "the Jewish mode of life," all that is distinctly *Jewish* in the way we practice our Judaism. To put this another way, the literature of the *halakhah* is the foundation of all Jewish observance, including our own. It is the genre of writing in which the Jewish tradition has historically worked out its understandings of what the Torah and the Covenant require of the Jew in the realm of sacred action. There is no explicitly and specifically *Jewish* way of structuring

45. These include the following volumes, all published by Hebrew Union College Press, Cincinnati: *Reform Responsa* (1960); *Recent Reform Responsa* (1963); *Current Reform Responsa* (1969); *Modern Reform Responsa* (1971); *Contemporary Reform Responsa* (1974); *Reform Responsa for Our Time* (1977); *New Reform Responsa* (1980); and *Today's Reform Responsa* (1990).

46. The Freehof Institute for Progressive *Halakhah* sponsors symposia featuring scholarly discussion of issues of religious, social, cultural, and political importance from the perspective of progressive halakhic thought and practice. These symposia are published; see the Institute's website at https://freehofinstitute.wordpress.com/books/ (accessed November 23, 2016). The Freehof Institute also sponsors a blog devoted to halakhic discussion at http://blog.huc.edu/freehof/ (accessed November 23, 2016).

and defining our progressive Jewish religious practice that is not fundamentally based in the Jewish legal tradition, and that makes *halakhah* and its discourse the authentic home of progressive Jewish ritual and ethical practice. I recognize that the word "authentic" may be off-putting to those who detect in it an attempt to identify one particular vision of progressive or Reform Judaism as the only right one. Such, though, **[p. 40]** is not my intent. By "authentic," I mean simply that all unmistakably Jewish religious practice takes shape in the literature of the *halakhah* and in its discourse. Our desire for Jewish authenticity, therefore, leads us inevitably to our continued engagement with the substance and the language of the *halakhah*, an engagement that as we have noted is a fact of Reform Jewish life.

C. *The Necessity of Tradition*

The Critic could respond, of course, that the mere existence of a Reform Jewish halakhic literature does not by itself prove anything about the nature of the movement. It could be the case that these books and responsa are the product of a few rabbis whose idiosyncratic fascination with Jewish law places them outside the mainstream of Reform thought. However, a quick look at the list of the Reform rabbis who have engaged in this endeavor renders that suggestion absurd on its face.[47] A more telling counterargument would look past the identities of the halakhic writers and question the appropriateness of halakhic discourse in a Jewish movement that has so

47. Consider that the CCAR Responsa Committee was established in 1906 and that by 1995 its chairpersons included Kaufmann Kohler, Jacob Lauterbach, Jacob Mann, Israel Bettan, Solomon B. Freehof, Walter Jacob, and W. Gunther Plaut. Consider, too, the colleagues who have served on the committee over the course of a century. For example, during the late 1970s and early 1980s, a period that saw the publication of the volume *American Reform Responsa*, we find *t'shuvot* signed and edited by Leonard Kravitz, Eugene Lipman, Simeon Maslin, Stephen Passamaneck, W. Gunther Plaut, Harry Roth, Herman Schaalman, Rav Soloff, Sheldon Zimmerman, and Bernard Zlotowitz, in addition to Walter Jacob, the committee chair. All of these individuals were *Reform* rabbis. Now one can always claim that these individuals, and in particular their involvement with Reform *halakhah* was atypical of the Reform rabbinate. But what is beyond argument is that they were Reform rabbis of the first rank.

enthusiastically affirmed the culture of modernity. In brief, the Critic would insist that if all authority is ultimately rooted in the autonomous self, then no *tradition*, legal or otherwise, can be permitted to exert authority over the individual. Since *halakhah* speaks with the authority of tradition and asserts the right to limit the individual's freedom to choose, its demands are anathema to a Judaism founded upon personal autonomy. We return therefore to the Critic's binary opposition between autonomy and the authority of tradition: one cannot have both, and the progressive Jew must necessarily choose the former over the latter.

This line of thought is certainly appealing to our liberal temperament. None of us would subjugate our hard-won critical freedom to the iron control of the past, to a tradition embodied in dusty old books written by men (and they *were* all men) whose ancient and medieval worldviews differ so radically from our own. At the same time, though, this thinking presumes a particular definition of "tradition," namely as a static object, an Other that we **[p. 41]** confront as knowing subject, evaluating its claims according to our objective critical judgment, accepting some and rejecting others. It is to be sure a commonly-held understanding of the concept,[48] but it is not the only one, nor is it the best one. I would propose in its place the definition offered by Alasdair MacIntyre in his groundbreaking study of Western ethical thought:

48. See, for example, the language of the 1976 CCAR platform *Reform Judaism: A Centenary Perspective* (http://ccarnet.org/rabbis-speak/platforms/reform-judaism-centenary-perspective/, accessed December 20, 2016), paragraph 4, "Our Religious Obligations": "Within each area of Jewish observance Reform Jews are called upon to confront the claims of Jewish tradition, however differently perceived, and to exercise their individual autonomy, choosing and creating on the basis of commitment and knowledge." Note the *confrontation* of autonomy and tradition. It is instructive that the word "autonomy" does not appear in the most recent CCAR platform, *A Statement of Principles for Reform Judaism* (1999; http://ccarnet.org/rabbis-speak/platforms/statement-principles-reform-judaism/, accessed November 28, 2016), leading to the observation that "if 'autonomy' was the key word of the Centenary Perspective, 'dialogue' is the key word of the Pittsburgh Principles (*i.e.,* the 1999 platform; http://ccarnet.org/rabbis-speak/platforms/commentary-principles-reform-judaism/, accessed November 28, 2016).

> For all reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition; this is as true of modern physics as of medieval logic…. Traditions, when vital, embody continuities of conflict… A living tradition is then an historically extended, socially embodied argument… precisely about the goods that constitute that tradition… Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part.[49]

Let us give MacIntyre's formulation the careful attention it deserves. To say that "all reasoning takes place within the context of some traditional mode of thought" is to deny (or at the very least to cast doubt upon) the Enlightenment's conception of "Reason" as the objectively critical, culturally neutral "view from nowhere" that enables us to arrive at certainty in the sphere of humanistic knowledge.[50] Rather, reasoning is always situated within a particular context called "a traditional mode of thought." A tradition is an *argument* carried out among the members of a particular community of interpretation, a group characterized by its "historically extended," socially embodied" existence. The argument revolves around "the goods that constitute that

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49. Alasdair MacIntyre, *After Virtue*, Third Edition (Notre Dame, IN: Notre Dame University Press, 2007), p. 222.

50. The language of this sentence alludes to Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), which examines the tension between our attempts at objective knowledge and our grounding in a particular situation that inevitably shapes our perceptions. The reference to "humanistic knowledge" is a recognition that objective rationality plays a more determinative role in other disciplines, such as mathematics and the physical sciences. On the other hand, those working in scientific fields are famously aware of the influence of context – "paradigms" – upon their findings. The classic citation on this point is Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962). MacIntyre himself seems to indicate this insight when, in describing his view of reasoning, he remarks that "this is as true of modern physics as of medieval logic."

tradition," its core values and truth claims, which tend to be embodied in the community's sacred or foundational texts. Argument is necessary because the tradition's goods or texts do not proclaim their own meaning, let alone their specific application to new questions and issues. These meanings and applications must be *argued* into existence by way of discussion and debate geared to the achievement of persuasion and consensus. **[p. 42]** A "living tradition" embodies what MacIntyre calls "continuities of conflict," which suggests two things: first, the argument over the meaning of the community's sacred texts may never be conclusively resolved, and second, it is irrelevant that the argument is never resolved, because the ongoing conflict or argument is what enables the community to arrive at new, innovative, and always tentative understandings of those texts. This is what MacIntyre means by the power of reasoning to transcend "through criticism and invention the limitations of what had hitherto been reasoned in that tradition." Tradition is not a static, unchanging embodiment of a past that seeks to impose its will upon us. It is not an Other against which we stand in order to dissect, examine, accept, or reject. It is, rather, an experience *within* which we stand, a framework of common discourse by which its participants make meaning and by that token transform the previously-held understandings of its texts.

MacIntyre was not speaking specifically of Jewish tradition, of course. His definition applies as well to just about any philosophical, literary, or legal tradition whose participants make meaning together by arguing over that community's foundational ("sacred") texts. But his approach is an accurate description of the particular tradition called *halakhah,* which is filled to the brim with argument and dispute (*maḥloket*), one of the purposes of which is to apply old texts to new situations and thereby derive new meaning from them. The existence of a Reform halakhic literature, therefore, is not an indication of some premodern or anti-modern tendency

within the progressive camp but rather evidence that Reform Jews wish to take their place in the "historically extended, socially embodied argument" that is the *halakhah,* to contribute their part to the interpretation of its texts, to push the understanding of those texts beyond "the limitations of what had hitherto been reasoned in that tradition." Such, at any rate, is what our Reform halakhic literature does on every page. In this sense, participation in the *tradition* of halakhic argument and of halakhic literature is entirely in keeping with a progressive approach to Judaism.

[p. 43] D. *Halakhah Can Be Progressive*

I hope to have demonstrated thus far that *halakhah* and halakhic discourse are pervasive in Reform Judaism and that the concepts of "tradition" in general and the "halakhic tradition" in particular are not alien to a progressive Jewish mindset. The Jewish legal tradition is at home in our movement, and we can find a home in its discourse. Still, one can argue, on both procedural and substantive grounds, that *halakhah* is foreign to the religious world we inhabit. Procedurally, says our Critic, *halakhah* asserts the authority of its recognized interpreters – exemplified by the *rav* – over our freedom to follow the dictates of reason or conscience. Substantively, the content and teachings of Jewish law run counter to our progressive worldview, which "privileges gender egalitarianism, ethical universalism, openness to surrounding non-Jewish cultures, and other values not easily squared with traditional *halakhah*." Again, the binary opposition upon which the Critic takes her or his stand: one cannot simultaneously be halakhic progressive.

This is a potent objection, but as I have suggested its cogency relies upon the assumption that no other definitions are admissible for the key terms "progressive" and "*halakhah*." For example, the Critic's definition of "progressive" thought seems to assume a fundamental and

ultimately irreconcilable tension between personal autonomy and the authority of law. Yet that opposition is obviously overstated; no modern community of which I am aware, including the most "progressive" ones, exists in the absence of law and a legal tradition within which it argues and determines the ways in which it shall govern itself. Modernity, or postmodernity for that matter, has not altered the fact that the human being is, in Aristotle's phrase, a "political animal," a being that lives naturally in community, and if modern political communities have moved away from traditional authority they have replaced it with legal authority, authority based upon a recognized system of law.[51] My primary focus here, however, is on the term "*halakhah*," which our Critic defines as a system of authority that requires "a significant surrender" of **[p. 44]** individual conscience, since it will lead inevitably to rulings that offend our progressive values with respect to gender equality, ethical universalism and so forth. The Critic insists upon this definition of *halakhah* because these objectionable elements are absolutely essential to it; "[a]ny concept of *halakhah* that foregoes this notion of requirement should not call itself "*halakhah*." Thus, any effort to understand *halakhah* so that it comports with progressive values is but a "figurative" understanding of it, wherein authority lies not in the Law but in the self.[52] Against this, I argue that alternative definitions of *halakhah* do exist and that they *do* deserve to be called by that name.

This argument requires a careful consideration of that apparent oxymoron "progressive *halakhah*." Let's return to Alasdair MacIntyre's formulation of "tradition," in particular his claim that "the individual's search for his or her good is generally and characteristically conducted

51. Any discussion of this topic must include Max Weber's classic essay "Politics as a Vocation," in H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946), pp. 77-128.

52. The quotations in this paragraph are from Borowitz (note 29, above), p. 282.

within a context defined by those traditions of which the individual's life is a part." Note his usage "traditions," in the plural, which indicates the fact that in modernity we tend to be members of more than one community, more than one "historically extended, socially embodied argument" over the nature of the good life. When it comes to determining our religious practice, we progressive Jews participate in at least two such traditions: the Jewish legal tradition and the tradition of Western liberal modernity. When we compare the two, we rightly focus upon the characteristics that distinguish the latter from the former. Among the most distinguishing elements of the tradition of liberal or progressive thought, we might mention:

> *secularity*, an organization of the world which consigns religion to the sphere of private and voluntary activity;
>
> *pluralism*, the recognition of the legitimacy of multiple models for religious commitment;
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> *egalitarianism*, the rejection of traditional religion's assignment of public and ritual roles on the basis of gender **[p. 45]** or race or other distinctions now regarded as ethically irrelevant;
>
> *innovation*, the acceptance of new models for religious behavior and the refusal to regard established ways and custom as binding precedents for our own decisions.

We participate in this liberal tradition just as surely as we participate in the ongoing argument that is *halakhah*. These liberal values, among others, are *our* values, and we bring them to bear on our understanding of halakhic texts just as we do in any other realm of thought. What we call progressive *halakhah* is the outcome of the meeting of these two discourses, a "fusion of horizons" that, according to hermeneutical theory,[53] is a requirement for the interpretation of any

53. Especially the thought of Hans-Georg Gadamer, who seems to have coined the term *Horizontverscmelzung*; see *Truth and Method* (Translated by J. Weinsheimer and D. C. Marshall). New York: Crossroad, revised edition, 1989.

sort of text. This is another way of saying that all halakhic thinking (or legal thinking, or ethical thinking, etc.) takes place within some cultural context,[54] so that if the context changes, the *halakhah* that emerges from the encounter will of necessity change with it. For this reason, we ought to understand the concept *halakhah* as containing within itself a plurality of meanings depending upon how the word is actually used in its varying cultural contexts.

The idea that differing and even conflicting approaches to Jewish law and the Jewish legal tradition might nonetheless all qualify for the title "*halakhah*" will seem counterintuitive to some observers. Take our Critic, for example, who thinks that one and only one definition of *halakhah* is acceptable. This is an example of what we can call an essentialist definition, which rests on the presumption that certain properties or characteristics are part of the "essence" of an object or a concept, so that the object or concept cannot exist without them. An essentialist definition, which after all dates back to Plato, is perfectly respectable on intellectual grounds. But while it is one thing to insist on an essentialist definition of a physical object like a cat or a table, it is quite another thing to demand that a concept, an idea, or an intellectual tradition conform to that requirement. Thus, I would turn to Wittgenstein's notion of **[p. 46]** "family resemblance," his suggestion that rather than attempt to define a term according to its objective essence (a reality that is either impossible or frustratingly difficult to pin down), we should look to how the word is used in common speech, its situation within a "complicated network of similarities overlapping and criss-crossing." Wittgenstein uses the "family resemblance" (*Familienähnlichkeit*) as part of his effort to define what he means by "language game" (*Sprachspiele*), the collection of informal means and usages by which languages make

54. A point recently and forcefully made by Roberta R. Kwall, *The Myth of the Cultural Jew* (New York: Oxford University Press, 2015).

meaning.[55] On this approach, we see that the different and conflicting understandings of the term *halakhah* do indeed coexist, so that there is no prima facie requirement that we determine which of those understandings conforms to the term's putative "essence."

One of these alternative understandings, as I have argued, is "progressive *halakhah*," but it is not the only one. Recent Jewish history offers ample evidence that even within the Orthodox world "*halakhah*" is an umbrella term that signifies a plurality of meanings as opposed to a unitary essence. Let us begin with the fact that, as conceived and practiced today, *halakhah* differs significantly from the form it assumed in the "traditional society" of pre-Enlightenment and pre-Emancipation times.[56] This change is rooted, first of all, in the loss of Jewish juridical autonomy. The new secular states offered the prospect of full citizenship to their Jewish residents, but this entailed that the state asserted a monopoly over all legal power. As the Jewish courts were no longer able to enforce their legal authority upon Jewish individuals, the preponderant majority of Jews began to litigate their monetary law issues (*dinei mamonot*) in the civil courts rather than in the *beit din*, the court of Jewish law. The result is that the entire department of the *halakhah* that speaks to such issues, corresponding roughly to section *Ḥoshen Mishpat* of the *Shulḥan Arukh*, became frozen in place; without cases, that segment of the law was not called upon to respond in any practical way to the entire range of challenges brought on by the development of the modern economic state.[57] In its modern form, therefore, *halakhah* was

55. Ludwig Wittgenstein, *Philosophical Investigations*, translated by G. E. M. Anscombe (Oxford: Basil Blackwell, 1958), aphorisms 65-69. The quoted passage is at 66.

56. I use the concept "traditional society" as it is defined by Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages*, translated by Bernard Dov Cooperman (Syracuse, NY: Syracuse University Press, 2000), p. 3, namely "a society that saw itself as based upon a body of knowledge and a set of values handed down to it from the past."

57. On the loss of Jewish juridical autonomy as the major factor accounting for the lack of development in *dinei mamonot* during the past several centuries see Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), pp. 1575-1584 And see Solomon B. Freehof, *Reform Responsa*

confined to the realm of ritual[58] and ceased **[p. 47]** to function as the working law of a living society. It was no longer the law of the Jewish community as a whole but the ritual code of a sectarian segment of that community; "*halakhah*" became a distinctly Orthodox *halakhah*, its reach restricted to the Orthodox community and to an audience of Orthodox readers. This narrowing horizon has had its effects upon the nature of *p'sak* (halakhic decision making), for the *posek* is no longer in touch with the concerns of the wider Jewish public, and "it is understandable that many a halakhist, when giving his decisions today, has in mind these very few who are prepared to adhere to any strict rules duly authorized by competent halakhists."[59] *Halakhah,* that is to say, operates today within a fairly closed circle of consumers who will accept whatever the *ḥaredi* ("ultra-Orthodox) authorities hand down, and these *poskim* therefore have no incentive to moderate the content of their decisions or to adjust their interpretation of the *halakhah* in accordance with the inclinations and expectations of a wider community of Jews. If this sounds like a vicious circle, that's because it is.

Another factor contributing to the transformation of Orthodox *halakhah* is the rise of what has to be called a *yeshivah* culture. In Israel, this has taken form in the development of what the sociologist Menachem Friedman has termed "a society of learners" (*ḥevrat lomdim*), in which a large percentage of the male population spends many years learning in *yeshivah* rather than engaging in gainful employment. This trend is a radical departure from the traditional

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(note 38, above), pp. 7-8: Jewish civil law is now neglected by virtually all Jews, since "people who surely consider themselves Orthodox have simply ceased to resort to rabbinical courts in business matters."

58. That is, to *Oraḥ Ḥayyim, Yoreh De`ah*, and the non-monetary subject matters of *Even Ha`ezer*. The segments of *Even Ha`ezer* dealing with the financial arrangements brought on by marriage and its dissolution were now subject to the exclusive jurisdiction of the civil authorities.

59. Jacob Katz, "Is the Re-establishment of the Sanhedrin a Solution?" *Conservative Judaism* 12:4 (1958), at pp. 19-20.

culture of the Ashkenazic communities of Eastern Europe (to say nothing of Jewish communities from Arabic- speaking lands), and among its most notable features has been the rise of the *g'dolim*, the heads of the *yeshivot,* as the dominant halakhic and political authorities within the Orthodox community, as well as the transformation of the culture of halakhic observance into "a world of *ḥumrot* (stringency)."[60] While this "society of learners" exists primarily in Israel, similar developments are noticeable in North America and elsewhere. Haym Soloveitchik observes that contemporary Orthodoxy has changed from a culture of mimesis to **[p. 48]** one of book learning.[61] Where Jewish observance had traditionally been learned through imitation, that is, through following the customs of one's family and household, the phenomenon of widespread higher Jewish education among the Orthodox community (a product of that community's increasing affluence) has increased the authority of the *yeshivah* heads over that of the family and of the local rabbinate. *Halakhah* for today's Orthodox Jews has become less a matter of family tradition and increasingly learned from books, from a wave of halakhic publication that did not emerge from the ranks of the left or centrist Orthodoxy but from the *ḥaredi* world. The availability of a mass of literature of praxis aimed at a lay audience, a literature that represents the viewpoint of the most right-wing elements of contemporary halakhic thought, has accelerated the tendency toward *ḥumrot* within the Orthodox community.[62]

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60. Menachem Friedman, *Haḥevrah haḥaredit: m'korot, m'gamot, v'tahalikhim* (Jerusalem: Jerusalem Institute for Israel Studies, 1991), especially at pp. 80-87.

61. Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodox Society," *Tradition* 28:4 (1994), pp. 64-130.

62. The assumption is that when one is aware of the existence of more opinions, one is more apt to choose the most stringent option in order to be *yotzei kol hade`ot,* confident that one has met the requirements set down by even the most stringent authority. Soloveitchik, at notes 10-1, cites the example of the debate over the precise quantity of *k'zayit*, the "olive's-bulk" required for the fulfillment of such *mitzvot* as *kiddush* and *matzah*. Where families have for centuries operated according to their own traditional understandings of what *k'zayit* means, all of this was brought into question by R. Avraham Y. Karelitz, the *Ḥazon Ish,* during the early 1940s. The olive has grown substantially in size as Orthodox Jews have sought to make sure that they followed the more stringent standard set

These features of contemporary Orthodox sociology go hand-in-hand with some of the more prominent intellectual and ideological tendencies within that community. Professor Avi Sagi, one of the leading figures in the burgeoning academic field known as "philosophy of *halakhah*," notes that "halakhic authorities and large segments of the observant community" use the word "*halakhah*" to describe not simply the concept of normative Jewish behavior but also the one right answer (in their view) to every halakhic question. "*Halakhah*" is now identical to the current Orthodox notion of *codified* Jewish law, the sum total of the rulings (*p'sak*) of today's *g'dolim*, the recognized *ḥaredi* authorities. The "wrong" answers – that is, all those textual interpretations that, however plausible, are rejected by the consensus of the *g'dolim* - are therefore *not-halakhah*. This way of thinking shares much in common with the doctrine of legal formalism, which imagines law as a conceptual and immanently rational phenomenon in which the uniquely correct answer to every legal question can either be deduced logically or derived by the application of proper legal method. In the world of *halakhah*, Rabbi Joseph D. Soloveitchik and Yehshayahu Leibowitz portray the workings of Jewish law in this **[p. 49]** fashion. The result is that *halakhah*, as it is perceived today by many (but not all[63]) within the Orthodox community, is an alternative understanding and not the *only* understanding of the concept. It is a much

down by the Ḥazon Ish, and this larger measurement (*shiur*) has become the *de rigeur* standard throughout the Orthodox community, which had previously been satisfied to follow family custom.

63. While this is not the place to develop the point in depth, it is critical to keep in mind that a number of Orthodox rabbis in recent times have dissented from this narrow and formalistic conception of *halakhah*. The names Ben Zion Meir Hai Ouziel, Hayyim David Halevi. Eliezer Berkovits, and Emanuel Rackman belong in that list, as do the rabbis associated with the movement known as "Open Orthodoxy." And while some Orthodox writers will question whether some of these authorities are truly "Orthodox," that act of defensive line-drawing strikes other observers as motivated more by considerations of institutional politics than of Jewish legal theory.

narrower and far more abstract version of the *halakhah* than the history of Jewish law shows it to be.[64]

I point to these alternative understandings, again, to show that there does not exist a one-size-fits-all definition of *halakhah.* The normative system that today is generally called by that name is largely a narrow, excessively formal, and sectarian version of a much broader and more dynamic legal tradition that at one time spoke to the entire Jewish community. To put this plainly, "Orthodox *halakhah*" is not the same thing as *halakhah*; the understanding of *halakhah* put forth by today's Orthodox rabbinate does not exhaust the meanings conveyed by the term. This suggests that what we call "progressive *halakhah*" cannot be dismissed simply on the grounds that it, too, is a sectarian phenomenon. Rather, it fits quite well by way of family resemblance within the circumference of the concept *halakhah*. More than that: given that progressive *halakhah* seeks to recover the fullness of halakhic discourse, including those interpretive possibilities that contemporary Orthodox *g'dolim* reject out of hand, I would argue that progressive *halakhah* is a more faithful reflection of the tradition of argument and *maḥloket* that has been the historical hallmark of Jewish law.

To summarize: I have attempted to sketch the beginnings of a theory of progressive *halakhah*. My argument consists of several components: first, that in spite of the criticisms that can be and have been leveled against the very concept of "progressive *halakhah*," that term both describes the religious and intellectual position from which we proceed and denotes an discipline that makes a valid claim to its intellectual autonomy; second, that the efforts to portray Reform Judaism as "anti-halakhic," "post-halakhic," or "non-halakhic" are a failure, given that the

64. Avi Sagi, *Ne'emanut hilkhatit: bein p'tiḥut l's'girut* (Ramat-Gan: Bar-Ilan, 2012), especially at p. 32, pp. 116-148, and pp. 255-269.

discourse of Jewish legal tradition has always played and continues to play a vital role in the determination of our movement's religious practice; third, that **[p. 50]** despite the emphasis placed by a number of our movement's leading thinkers upon the principle of individual religious autonomy, the concept of "tradition" is not antithetical to Reform Judaism but, indeed, is a necessary factor in any form of coherent historical thought, including that of the progressive variety; and fourth, that progressive *halakhah*, which reflects the meeting of the two intellectual-cultural-religious traditions in which we partake, is one of several different approaches to Jewish legal thought and practice that qualify by way of family resemblance for the label "*halakhah*." I call my argument the "beginnings" of a theory of progressive *halakhah* in lieu of a yet-to-be-written full exposition. I hope, though, that this sketch is an adequate first step towards a full theory, which is essential if we, the participants in this discipline, wish to argue for both its intellectual and halakhic legitimacy.

III. *Kiddushin and Progressive Halakhah*

As its own discipline, therefore, progressive *halakhah* insists upon its intellectual integrity. Like all other disciplines, it makes meaning by way of its unique discourse. That discourse, as we have seen, is the product of a meeting between the two intellectual and cultural traditions in which we participate: the tradition of Jewish thought and practice, which is predominantly the tradition of *halakhah*; and the tradition of modern liberalism, with its emphasis upon individual freedom, critical inquiry, and egalitarianism. The result of this meeting is a discipline or a discourse that, as both halakhic *and* progressive, stands on its own. Thus, though progressive *halakhah* shares much in common with the discourses of Orthodox *halakhah* and feminist theory, it is distinct from both.

It is on the basis of that distinction that we can mount a defense of the concept of egalitarian *kiddushin* against the criticisms levelled against it by those other discourses. That defense, as I noted earlier, must be both halakhic and ethical in nature. Against the Orthodox criticism, it must argue that egalitarian *kiddushin* is halakhicly justifiable, that it is coherent with Jewish law, even though in its origins *kiddushin* is anything but egalitarian. And against feminist **[p. 51]** criticisms, it must argue that egalitarian *kiddushin* is in keeping with progressive values even though *kiddushin* in its origins is a legal ritual of acquisition (*kinyan*) that expresses the commodification of marriage and the subjugation of women to male authority. These are obviously two separate defenses, but both are based upon the phrase "in its origins" which appears in the two preceding sentences. That is to say, the halakhic concept of *kiddushin*, to say nothing of the halakhic conception of marriage as an institution, is an *evolving* reality:[65] it is no longer the same as it once was, and the changes it has undergone enable us to draw some significant ethical and halakhic conclusions.

This last point deserves emphasis. Progressive halakhists conceive of Jewish law as a dynamic and developing historical phenomenon. This is what we mean when we speak of *halakhah* as a discourse of argument: the meanings of terms and rules are subject to change as the argument over that meaning proceeds. For this reason, the meaning or significance of a halakhic institution cannot be restricted to its original understanding; different interpretations, born in subsequent periods of history, are just as significant for us as the original understanding.[66] Moreover, if we can identify some consistencies and directions in the historical

65. See Judith Hauptman, *Re-reading the Rabbis: A Woman's Voice* (Boulder, CO: Westview Press, 1998), p. 62: The changes that took place in the payments associated with marriage are probably the best indication of an evolving rabbinic perception of the nature of marriage."

66. One need not accept a concept of "evolution" to arrive at this awareness. See the comment of R. Yom Tov Ishbili (Ritva) in his *ḥiddushim* to *B. Eruvin* 13b, the famolus passage "*eilu v'eilu divrei Elohim ḥayyim*": the Torah

development of a halakhic concept, we may come to understand them as *principles* that should guide present-day and future interpretation.[67] In the case before us, we see in the history of *kiddushin* and Jewish marital law a consistent tendency toward the equalization of the legal status of women and men. To us, this tendency is a decisive legal as well as historical development: the Rabbis and their medieval successors clearly pointed their understanding of marriage *halakhah* in the direction of gender equality and justice. If they did not quite arrive at that goal, their intention serves as a signpost to us to continue their work, and our *takanah* of egalitarian *kiddushin* fits right in step.

How have the ritual of *kiddushin* and the institution of Jewish marriage "evolved" from their origins as expressions of property acquisition and male domination? Let's consider the following elements of the *halakhah*.

[p. 52] 1. *From Acquisition to Sanctification*. While the ritual of Jewish marriage definitely originated as an act of *kinyan*, or acquisition, it is significant that at a fairly early date the Rabbis altered the name of that ritual: *kinyan* (Hebrew root ק-נ-ה) in *Mishnah Kiddushin* 1:1 becomes *kiddushin* (Hebrew root ק-ד-ש), an act of "sanctification" or "consecration," in the second chapter of the tractate. The term, as the Talmud (*B. Kiddushin* 2b) already points out, is

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as given on Sinai contains all the possible interpretations of its language, thus leaving it to the sages of every generation to determine which are correct. On this understanding, plurality is not the product of development but of the "original intent" of the Author of the Torah.

67. The precise legal status of broadly-worded principles, as opposed to hard-and-fast rules, has been a source of ongoing controversy in Jewish legal scholarship. Menachem Elon, in particular, argues that the study of "the complete historical range" of any Jewish legal institution enables the researcher to find "its common denominator, its axis, during the various historical stages, in order to establish the central principle which lies at the basis of all periods"; *Ḥerut hap'rat b'darkhei g'vi`at ḥov bamishpat ha`ivri* (Jerusalem: Magnes Press, 1964), p. xiii. The theory has come in for criticism by others, particularly Itzhak Englard, who restrict the content of "Jewish law" to the actual words of the texts and authorities. On all this, see Mark Washofsky, "Internet, Privacy, and Progressive *Halakhah*," in Walter Jacob, ed., *The Internet Revolution and Jewish Law* (Pittsburgh: Rodef Shalom Press, 2014; http://huc.edu/sites/default/files/unsorted/people/Internet%20Privacy%20and%20Progressive%20Halakhah.pdf, accessed December 20, 2016), at pp. 111*ff.* There, I offer a more extended argument in favor of the use of principles in the interpretation of *halakhah*.

lishna d'rabanan, an invention of the Rabbis, while *kinyan* is described as Toraitic (or Biblical; *lishna d'oraita*) in origin. "Invention" is the significant point here. The Rabbis need nopt have coined a new name for the marriage ritual; they could have described it using a form of the Biblical root א-ר-ש, "to espouse."[68] But while the Tanaim do employ that root (in the construction *erusin*) to denote "betrothal," the period of marriage prior to the time that the bride and groom dwell together,[69] it never functions as a descriptor of the act which effects the marital bond. That act is always described as *ma`aseh kiddushin*, a legal act of *kiddushin*. The Rabbis were therefore certainly trying to say something by coming up with this new usage. The question for us is "what's in a name?," and the answer, some say, is "not much." As we have already seen, they dismiss "*kiddushin*" as simply another metaphor for property acquisition and note that the new terminology did not signify an alteration of the basic structure of Jewish marriage, in which a man "takes" (acquires) a wife and brings her into his legal domain (*r'shut*).[70] Still, changes in terminology can be of significance, which we shouldn't overlook in our haste to condemn the misogyny of the Rabbis. If it is true that *kiddushin* is an act of acquisition, it is also true that the term is reserved for marriage and is never used to describe any other act of *kinyan*. The existence of a unique term suggests that there is something in the legal constitution of marriage that distinguishes it from all other *kinyanim*. The Talmud passage explains that the Rabbis use the language of sanctification to express the halakhic fact that, by the act of marriage, the husband

68. See, e.g., Exodus 22:15, Deuteronomy 22:23, and Hosea 2:21-22.

69. See, e.g., *M. Y'vamot* 6:3 and *M. K'tubot* 11:2: a woman can be a widow or a divorcee either from the time of *erusin* (i.e., she was *betrothed* but not yet married to her husband when he died or divorced her) or from the time of *nisu'in* (marriage).

70. See Gail Labovitz at note 22, above.

creates a ritual as well as a legal prohibition; following *kiddushin,* the wife is forbidden to all other men as though she were consecrated property (*hekdesh,* also from **[p. 53]** the root ק-ד-ש). As Tosafot tells us,[71] the term *kiddushin* adds the element of conjugal exclusivity to the element of legal domain. By virtue of becoming *m'kudeshet* ("sanctified") to her husband, the wife becomes ritually prohibited to all other men. The ritual nature of this prohibition distinguishes the act of marriage from all other "acquisitions." One does not acquire a garment, for example, by declaring "this garment is consecrated to me," because one's garment does not exist in a state of ritual prohibition (*isur*) to all other persons. Again, the language of *kiddushin* continues to signify an act of acquisition, but it is a unique sort of acquisition; the wife is "acquired" as property is acquired, but she is different from all the other kinds of real and chattel property described in the first chapter of tractate *Kiddushin*. We see here in its early stages the evolving nature of the Rabbinic understanding of marriage, from an act of property acquisition to the formation of a bond that partakes of ritual as well as monetary law.

The unique nature of the marriage transaction, which necessitated the invention of the term *kiddushin* to describe it, leads us to an additional point. As we have seen,[72] the act of *kinyan* is the means specified by Jewish law not only for the acquisition of property but also for the formation of many sorts of contract or obligation (*ḥiyyuvim*). That is to say, one acquires obligations through the same legal form that one acquires ownership over property. In the case of marriage, each party to the transaction "acquires" such obligations with respect to the other, and this mutuality transforms its legal definition. This point is stressed by R. Moshe Sofer, the

71. *B. Kiddushin* 2b, *s.v. d'asar lah akulei alma k'hekdesh*.

72. At note 21, above.

"Ḥatam Sofer" (d. 1839): "In *kiddushin*, it is inappropriate to speak of a 'buyer' and a 'seller.' The transaction is rather an exchange (*ḥalipin*): the man 'sells' and binds himself to certain obligations, such as sustenance, clothing, and conjugal relations, in exchange for which the woman 'sells' and binds herself to the Toraitic obligation of sexual exclusivity and the Rabbinically-imposed obligations concerning financial matters."[73] Sofer, hardly a friend of the early Reform movement, was well aware of the mutual nature of the marriage "acquisition," just as we are. The classic **[p. 54]** Jewish-legal form for the creation of such a mutual contractual bond is *ma`aseh kinyan*, a ritual act of "acquisition." We may wish to replace the ring with something that smacks less of the marketplace, but however we carry it out, the ceremony will be one of *kinyan*.

2. *The Institution of the Ketubah*. The *ketubah*, a word sometimes if imprecisely translated as "the Jewish marriage contract,"[74] is in fact a promissory note issued by the husband to the wife that specifies the sums that he or his estate owe to her should he precede her in death or divorce her.[75] Although worded in the form of a freely-undertaken personal obligation, the *ketubah* along with its accompanying obligations is a requirement of Jewish law – a "stipulation of the court," or *t'nai beit din* - and the *beit din* will enforce it should the husband or his heirs fail

73. *Ḥidushei Ḥatam Sofer, Bava Batra* 47b: דבקידושי' אשה לא שייך לא קונה ולא מקנה אלא חליפין שהוא מוכר עצמו ומשעבד גופי' לשיעבודי' ידועי' בשאר כסות ועונה וחלף זה היא מכירה ומשעובדת לו לתשמיש מה"ת ולמעשה ידי' מדרבנן. The financial obligations have to do with the husband's right to any income the wife earns during the marriage, a right granted him under Rabbinic law in exchange for his payments of maintenance (*m'zonot*). Should the wife wish to keep control of her income, she may contract with him to exempt him from paying for her maintenance. See *B. Ketubot* 47b and 58b; *MT, Hil. Ishut* 12:4; *SA Even Ha`ezer* 69:4. Needless to say, this sort of negotiation would have no place if the wife were in fact viewed as the husband's chattel.

74. As in Louis M. Epstein, *The Jewish Marriage Contract: A Study in the Status of Women in Jewish Law* (New York: Jewish Theological Seminary, 1927).

75. Provided that the wife was not divorced for sufficient cause; see *M. Ketubot* 7:6.

to pay.[76] According to traditional history, the Sages based this requirement upon the Biblical institution of the bride-price,[77] which was originally payable at the time of marriage. In so doing, they sought to achieve two policy goals. First, since it may be unreasonable to expect young men to acquire significant property prior to marriage, turning the payment into a loan payable at their death (and for which their entire estate, acquired during their lifetimes, serves as security) enables them to marry and raise their families.[78] And second, the Rabbis were concerned "that it not be an easy thing for him to divorce her";[79] the prospect that the husband will have to pay a significant sum at the dissolution of the marriage will serve as a disincentive to ill-considered divorce. In this way, the Rabbis reduced the power gap between wives and husbands that exists under Biblical law. The wife is now promised a degree of financial security at the end of the marriage, and she enjoys some negotiating power in the event that her husband decide to end the marriage.

3. *The Bride's Consent is Required.* While the groom, as stated at the outset of this article, is the active party in the ritual of *kiddushin*, the bride must consent of her own free will to the marriage.[80] This is one more way in which *kiddushin* differs from all other forms of

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76. *M. Ketubot* 4:7-12; *MT, Hil. Ishut* 12:2 and 5; *SA Even Ha`ezer* 69:1-2. Among the accompanying obligations enforced by the *beit din* are the following: that the husband will pay the wife's medical expenses; that his wife's sons (and not the husband's sons from other wives) will inherit her *ketubah* and the property she brought into the marriage; that their daughters will receive financial support from the husband until they are married; and that the wife, should she be widowed, may remain in the marital home until she remarries (*M. Ketubot* 4:8-12).

77. *B. Ketubot* 10a; see Exodus 22:15-16 and Rashi *ad loc.*

78. This policy is explained in a *baraita* in *B. Ketubot* 82b.

79. *Shelo t'hei kalah b'einav l'hotzi'ah*; *B. Ketubot* 11a and elsewhere; *MT, Hil. Ishut* 10:7.

80. *B. Kiddushin* 2b; *MT, Hil. Ishut* 4:1; *SA Even Ha`ezer* 42:1.

"acquisition," since no other form of "property" must grant consent to its acquisition. This requirement of consent **[p. 55]** creates something of a logical problem in the *halakhah*. In general, when one who is forced to sell property – i.e., without his or her consent – the sale is considered valid, although the seller can subsequently protest the transaction in court.[81] In *kiddushin*, where the wife is "acquired" by the husband, she occupies the position of "seller"; why then is an act of coerced *kiddushin* considered invalid? The Talmud (*B. Bava Batra* 48b) answers that in cases of coercion the *beit din* annuls the marriage. We'll have more to say about marriage annulment below; for the moment, it is enough to note that the Rabbis do not regard the wife as a species of "property" and act so as to safeguard a woman's right to consent or not to consent to the marriage.

4. *Marriage as a Public Liturgical Ceremony*. The evolutionary nature of the Jewish law of marriage is perhaps most visible in the transformation of marriage from a private[82] to a public setting. As we have seen, *kiddushin* originates as a transaction between the bride and the groom or their authorized representatives.[83] The community as such has no role to play in the formation of the marriage, and this lack of supervision can lead to any number of legal uncertainties. Was the ritual performed in accordance with law? Are the couple disqualified from entering into this marriage? Was the *kiddushin* performed as a serious, intentional action on the part of both parties? In the event that an ill-considered yet valid marriage results from the actions of the

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81. *B. Bava Batra* 48a-b. The rule is that in order for the sale to be valid the seller must receive fair market value for the property and agree to the sale. The theory here is that coercion does not automatically nullify the seller's agreement (*g'mirat da`at*), since agreement to sell property can be an entirely reasonable response to coercive circumstances. Should the seller subsequently wish to annul the sale he may file a protest (*moda`a*).

82. As indicated by the fact that the *kinyan* of marriage is redacted in the Mishnah (*Kiddushin*, chapter one) as part of a list of similar private acts of acquisition.

83. *M. Kiddushin* 2:1.

parties, it is the wife who bears the heavier legal burden; while the husband can extricate himself from the marriage by divorcing her, the wife, who is not empowered to divorce the husband, may not be able to extricate herself from the union. These problems have led the rabbinical leadership of every Jewish community over the past two thousand years to exert communal supervision and control over the marriage procedure. Although the form of *kiddushin* remains the same, marriage has now become a public as opposed to a private matter. The public nature of the ceremony can be seen in the fact that both *kiddushin* and *ḥupah* are surrounded by liturgical acts (*birkat erusin, birkat ḥatanim / "sheva b'rakhot"*) performed in a **[p. 56]** public setting, in the universal custom that weddings are overseen by a rabbi, and in the persistence of annulment (*hafka`at kiddushin*; see below) as a last-resort solution to problematic marriages. The history of the transformation of the marriage ceremony from a private to a public matter, involving the community's exertion of legal control over the ritual and the parties, is a long and complex affair.[84] For our purposes here, let it suffice that this communal control was extended in large part in order to grant protection to women who are otherwise, as "passive" parties, comparatively powerless in the marriage transaction.

5. *The Wife's Right to Sue for Divorce*. Not only does the husband initiate *kiddushin* under Jewish law; he is the one who brings it to an end. Biblical law grants the power of divorce exclusively to the husband (Deuteronomy 24:1). It is he who issues and authorizes the writing of the *get* (document of divorce) and its transfer to his wife; as in *kiddushin*, her role is a passive one, namely the reception of the *get.* Should she determine upon divorce, she is not empowered to initiate the process. More than that: in the event that the husband either cannot divorce her (for

84. For a detailed history see Avraham Freimann, *Seder kiddushin v'nisu'in aḥarei ḥatimat hatalmud* (Jerusalem: Mosad Harav Kook, 1964).

example, he may have disappeared without a trace or may be legally incompetent due to illness to issue a *get*) or refuses to divorce her, the wife can be rendered an *agunah*, figuratively "chained"[85] to her existing marriage even when it is clearly and irretrievably broken.[86] This imbalance of power places the wife at a severe legal disadvantage, and the Rabbis adopted significant measures to right it. Already in Mishnaic times the wife is entitled to sue for divorce in a variety of cases.[87] The *beit din* may find for the wife and require the husband to divorce her; in some instances it will even coerce him to issue a *get*.[88] The *halakhah* on this subject involves numerous complexities, and this is not the place to deal with them.[89] I do, however, want to focus on the matter of coercion. The court's power to coerce a divorce would seem to contradict the fundamental requirement that a husband issue the *get* of his own free will.[90] The Mishnah shows its awareness of this contradiction in its formulation of the coercion rule: "he (the recalcitrant husband) is coerced (to divorce) until he **[p. 57]** says 'I will do so willingly.'"[91] This wording catches the irony of the situation: the husband must "willingly" authorize the *get*, even

85. Hebrew root ע-ג-ן; cf. Ruth 1:13.

86. In contemporary parlance, the wife who is refused a divorce is more technically called a *m'surevet get*, even if the word *agunah* is commonly used to describe both cases.

87. *M. Ketubot* 7:10. To this list of causes the Amoraim add the husband's infertility; *B. Y'vamot* 65b.

88. On the distinction between "require" and "coerce" see *SA Even Ha`ezer* 154:21.

89. One major question: is the power of the *beit din* to require and/or coerce divorce limited to the explicit grounds cited in the Mishnah, or may the court utilize these powers in other cases? For sources and discussion, see "Domestic Abuse, Divorce, and Progressive *Halakhah*," *The Freehof Blog*, January 25, 2016, http://blog.huc.edu/freehof/2016/01/25/domestic-abuse-divorce-and-progressive-halakhah/ (accessed December 20, 2016).

90. *B. Y'vamot* 112b; *MT. Hil. Gerushin* 1:2.

91. כופין אותו עד שיאמר רוצה אני; *M. Arakhin* 5:6, cited as well in *B. Bava Batra* 48a.

if that consent is obtained by force.[92] Still, the legal conundrum remains in place: how can we regard a *get* obtained through coercion as an expression of the husband's free will and consent (*r'tzono*)? The Talmud (*B. Bava Batra* 48a) resolves the difficulty on the grounds that "it is a *mitzvah* to heed the instruction of the Sages": the court recognizes the husband's expression of consent, even if he makes it under pressure, as valid consent because we know that his true will is to do the right thing and to obey the *halakhah* as interpreted and applied by the court. Maimonides famously explains that the court's action is not truly one of "coercion," a word that applies only to cases where a person is forced to perform an act which the Torah does not command. With respect to a *mitzvah*, however, the only reason one refuses to perform it is the malevolent influence of the evil impulse that drives him to sin. "Therefore, since this recalcitrant husband truly wishes to be part of the community of Israel, keep the *mitzvot*, and keep far from transgression, and (is prevented from doing so because) his evil impulse has seized him, when the court beats his impulse into submission so that he says 'I do so willingly,' this is truly an act of his free will."[93] Whether or not one accepts Rambam's psychological theory, the *halakhah* of coercion expresses the Rabbinic determination that a husband has no right to abuse the power granted him by the Torah to issue divorce of his own free will in order to cause harm to his wife. The *beit din* effectively ignores his free will, or better, allows justice to override it.

The power of the *beit din* to coerce divorce is another example of legal evolution, of the historical tendency for the community to extend its supervision to matters that originated as private legal acts. Here again, the goal is clearly to protect the wife in an area where Biblical law leaves her especially vulnerable to abuse by her husband. At one point, this tendency seemed

92. See *M. Gitin* 9:8, which outlines the conditions under which coercion of the husband is legally permissible.

93. *MT, Hil. Gerushin* 2:20.

poised to arrive at a rough balance of power between them. The Mishnah and Talmud address the case of the *moredet*, the "rebellious wife" who denies **[p. 58]** sexual relations to her husband.[94] At least one *posek* – it's Rambam, a rather estimable one – interprets the passage as requiring a divorce be coerced in a situation where the wife claims that "my husband is disgusting to me (*ma'is alai*), and I cannot bear to live conjugally with him"; after all, "she is not like a captive who must submit to intercourse with one whom she despises."[95] Had this position become dominant in the *halakhah*, it would have marked a dramatic shift toward the balance of power in the realm of marriage and divorce. A wife, though she cannot issue a *get*, through her act of "rebellion" could have set into motion a legal chain reaction that in almost all cases[96] (presuming that Jewish courts would continue to wield the power to enforce their decisions) would have resulted in her husband's divorcing her. Rambam's interpretation was ultimately rejected by most *poskim*,[97] but its traces have not disappeared. It is still followed by communities that accept Rambam as their ultimate *posek*, and some Orthodox scholars[98] advocate its adoption

94. *B. Ketubot* 63a-64a.

95. *MT, Hil. Ishut* 14:8. Rambam's position is actually more conservative than that of the Babylonian *geonim*; they decreed for coerced divorce in *all* cases where the wife refuses conjugal relations with her husband, even when she does not claim *ma'is alai* but is apparently taking the action as part of an ongoing marital quarrel. See Alfasi, *Ketubot*, fol. 27 and R. Zeraḥyah Halevi and R. Nissim Gerondi *ad loc.*, and *Hagahot Maimoniot* to *MT, Hil. Ishut* 14, no. 30. Rambam himself rejects this *takanah* (*Hil. Ishut* 14:14), but he believes that the Talmud itself permits coercion when the wife claims *ma'is alai*. On the subject in general, see Avraham Grossman, *Ḥasidot umordot* (Jerusalem, Merkaz Shazar, 2001), pp. 433-452.

96. "Almost all cases," because this stratagem would not have applied to instances in which the husband has disappeared. But given the autonomy of the Jewish legal system during the Middle Ages, a wife would have enjoyed a powerful remedy in cases of unhappy marriage. And that would have been no little thing.

97. Beginning, apparently, with Rabbeinu Tam, a French contemporary of Rambam; *Tosafot, Ketubot* 63b, *s.v. aval*. For a full discussion, see *Ḥiddushei HaRashba*, *Ketubot* 64a, *Magid Mishneh* to *Hil. Ishut* 14:8, R. Nissim Gerondi to Alfasi, *Ketubot*, fol. 27b, and *Beit Yosef* to *Tur Even Ha`ezer* 77. The final codified *halakhah*, in *SA Even Ha`ezer* 77:2, omits mention of Rambam's ruling.

98. See Sh'ear Yashuv Kohen, "K'fiat get baz'man hazeh," *Teḥumin* 11 (1990), pp. 195-202 and Shlomo Riskin, *Women and Jewish Divorce* (Hoboken, NJ: Ktav, 1989).

today in the state of Israel, where the state bureaucracy can enforce the *beit din*'s decree for coercion. At the very least, the development of the law of the *moredet* exemplifies the evolutionary tendencies of the *halakhah* of marriage and divorce toward an equality of power between the two parties and its goal of providing justice and equity for the wife.

6. *The Ḥerem of Rabbeinu Gershom*. Among the most famous acts of post-Talmudic rabbinical legislation are the *takanot* ascribed to Rabbeinu Gershom b. Yehudah, "*M'or Hagolah*" ("The Light of the Exile"), of Mainz, ca. 1000 C.E.[99] The most important of these for our purposes is the ban (*ḥerem*) against the divorce of a wife without her consent.[100] It directly addresses the imbalance of power in Biblical law, which permits the husband to divorce his wife whether she agrees to the divorce or not; now, the agreement of both parties is required, and in return for her consent the wife may negotiate for more generous financial terms than those promised in the *ketubah.* Indeed, the authorities recognize that if divorce requires the wife's consent, the *ketubah* becomes a purely symbolic document and possesses no practical legal relevance.[101] Along with **[p. 59]** the other well-known *takanah* ascribed to him, that prohibiting polygamy,[102] this *takanah*, which was universally accepted in the Ashkenazic world, contributes to what Professor Avraham Grossman sees as a tendency toward raising the legal status of Jewish women in that segment of medieval Jewish society.[103] That is certainly the impression it

99. On the attribution of the *takanot* to R. Gershom see Avraham Grossman, *Ḥakhmei ashkenaz harishonim* (Jerusalem: Magnes, 1988), pp. 138 and 147. On the *takanot* concerning marriage and divorce see Grossman (note 95, above), pp. 118-173.

100. Isserles, *SA Even Ha`ezer* 119:6.

101. Isserles, *SA Even Ha`ezer* 66:3: דבמקום שאין מגרשין רק מרצון האישה אין צריך לכתוב כתובה.

102. *SA Even Ha`ezer* 1:10.

103. Grossman stresses this theme in *Ḥasidot umordot*, note 95, above. See also Elimelech Westreich, *T'murot bama`amad ha'ishah bamishpat ha`ivri* (Jerusalem: Magnes, 2002).

made upon R. Asher b. Yeḥiel (Rosh), who explained that in seeking to protect women from impetuous divorce, R. Gershom "acted to equate (להשוות) the woman's power with that of the man: just as the man cannot divorce accept of his own free will, so the woman cannot be divorced except of her own free will."[104] This, obviously, is an exaggeration. Since the wife is still not empowered to initiate the divorce, the husband can still render her an *agunah* by refusing to issue her a *get*; she is in no way his equal before the law. Yet Rosh's point, when stripped of his hyperbole, is well taken: the rabbinical authorities, responding to the potential for abuse of the wife under the existing *halakhah,* granted her powers with which to protect herself. No, it is not equality; but as Rosh tells us, it's a big step in that direction.

7. *Annulment of Marriage*. In addition to divorce, the halakhic tradition knows of another legal means for dissolving a marriage: the process called *hafka`at kiddushin*, or marriage annulment, in which the *beit din*, wielding its power to confiscate property (*hefker beit din hefker*),[105] "breaks"[106] the ownership connection between the husband and the object (customarily a ring) that he originally gave to the wife in order to contract *kiddushin*. The ring is declared retroactively to have been *hefker*,[107] ownerless, at the time it was handed to the wife, so

104. *Resp. Harosh* 42:1. The *t'shuvah* in which this statement appears involves a case where the wife, relying upon R. Gershom's *takanah*, refuses to accept a *get*. Rosh thinks that the wife is abusing the rights granted by that enactment to render her husband an *agun* and make it impossible for him to remarry, which certainly cannot be the purpose of the legislation; R. Gershom may have "equated" the wife's power to that of the husband, but he assuredly did not intend to make her *more* powerful than he! The irony, of course, is that the Torah itself grants the husband precisely that power to refuse a *get* to his wife and thereby render *her* an *agunah*. Rosh seems to recognize the inequity of such an imbalance of power, at least as it pertains to a rabbinical enactment. He cannot seem to bring himself to state that the Torah itself legislates such an imbalance into its law of divorce.

105. The confiscatory power is derived from Ezra 10:8. See *B. Y'vamot* 89b and *B. Gitin* 36b; *MT, Hil. Sanhedrin* 24:6; *SA Ḥoshen Mishpat* 2:1.

106. From the root פ-ק-ע, the basis for הפקעה, or "annulment."

107. On the close relationship between the roots פ-ק-ע and פ-ק-ר see Shamma Friedman, "Hamilon hameḥkari lilshon ha`ivrit shel hatana'im," *Sidra* 12 (1996), pp. 113-127.

that as a legal matter the marriage never took effect.[108] The possibility that marriage annulment might serve as a legal remedy for the wife in cases where the husband is unable or unwilling to grant her a divorce has attracted the attention of halakhists (and not only "progressive" ones) for quite some time.[109] The Conservative movement in North America routinely utilizes annulment when husbands refuse to grant divorces to their wives.[110] On the other hand, the Orthodox rabbinical establishment has insisted that the power to annul marriages, if it exists at all in this **[p. 60]** day and age, cannot be utilized as a general measure to free *agunot*.[111] My intention here is not to re-litigate the question[112] but simply to emphasize the legal significance of the very idea of *hafka`at kiddushin*. As noted above, the institution of marriage originates in Jewish law as a private transaction conducted between two parties. The community, at that early stage, has little

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108. See *B. Y'vamot* 90b and 110a; *B. Ketubot* 3a; *B. Gitin* 33a and 73a; *B. Bava Batra* 48b. Rashi (*B. Y'vamot* 90b, *s.v. v'afka`inho rabanan*) presents the legal theory described in the text. In each of these cases, the Talmud discusses how "confiscation" might apply to *kiddushin* effected by sexual intercourse rather than by an object of monetary value.

109. See, for example, Elon (note 57, above), pp. 641-642 and 877; Shlomo Riskin, "Hafka`at kiddushin: pitaron l`aginut," *Teḥumin* 22 (2002), 191-209; *idem*, "Hafka`at Kiddushin: Towards Solving the Aguna Problem in Our Time," *Tradition* 36:4 (2002), pp. 1-36; B. Lifschitz, "Hafka`at kiddushin l'mafre`a," *Emdot* 4 (2016), pp. 181I*ff*., Available at SSRN: https://ssrn.com/abstract=2718973. It is important to note that the retroactive annulment of a marriage would have no effect upon the legitimacy of the offspring of that marriage. Hence, a *beit din* could find for annulment without declaring the children to be *mamzerim*.

110. See the Rabbinical Assembly resolution "Rabbinical Assembly Reacts to Rabbi's Guilty Plea of Kidnapping," http://www.rabbinicalassembly.org/story/rabbinical-assembly-reacts-rabbi-s-guilty-plea-kidnapping, Accessed December 20, 2016.

111. See the responses to Riskin (preceding note) contained in the same volumes of *Teḥumin* and *Tradition*. For a particularly harsh rebuke of Lifschitz see David Malka, "Ein hafka`at kiddushin l'msurevot get," http://www.daat.ac.il/daat/maamar.asp?id=99 (accessed December 20, 2016). For extensive scholarly analyses that ultimately support this restrictive position see Eliav Shochetman, "Hafka`at kiddushin: derekh efsharit l'fitaron ba`ayat m'ukevot haget?" *Sh'naton hamishpat ha`ivri* 20 (1995-1996), pp.349-397, and Avishalom Westreich, "The 'Gatekeepers' of Jewish Family Law: Marriage Annulment as a Test Case," *Journal of Law and Religion* 27 (2011), pp. 329-357.

112. Though I did address it several decades ago; see Mark Washofsky, "The Recalcitrant Husband: The Problem of Definition," *Jewish Law Annual* 4 (1981), at pp. 150*ff*.

or no power to intervene into this private relationship and to adjust or modify its contours. The court, to be sure, exercises a proper adjudicatory role in the event that the husband and wife or their families dispute the legal details surrounding the marriage, but the act of marriage itself remains a private affair. It is contracted and dissolved by the actions of the parties involved and not by an act of the "state". The notion that the *beit din* can reach back years into the past and invalidate that act of marriage by declaring the ring with which it was effected to have been ownerless at the time – a patent legal fiction – represents a daring instance of communal intervention into what had been the couple's private sphere. The Talmudic precedents indicate that the Rabbis relied upon this power as a means of protecting women otherwise subjected to abuse due to their unequal status under the *halakhah* of marriage and divorce.[113] Even more daring – the word "chutzpah" comes to mind –are the legal justifications offered in defense of the measure, theories that range far beyond the established principle *hefker beit din hefker*. The first justification is that all marriage is contracted on the stipulation that the Rabbis will agree to it (*kol d'm'kadesh ada`ata d'rabanan m'kadesh*); thus, should the Rabbis withdraw their agreement, the marriage loses whatever legal validity it once possessed.[114] (According to one theory, the reason that the husband recites the formula "according to the law of Moses and Israel" – *k'dat moshe v'yisrael* - as part of the *kiddushin* formula is to declare his acceptance of this stipulation.)[115] It is difficult to imagine a more blatant legal expression of the takeover of the

113. As in the following: 1) *B. Gitin* 33a: a husband sends a *get* to his wife and seeks to revoke it before it reaches her; this will render her an *agunah*, and should she marry while unaware that the *get* has been revoked, the children of her subsequent marriage will be *mamzerim*. 2) *B. Ketubot* 3a: doubt as to whether the husband has fulfilled a stipulation in the *get* means that a law-abiding wife will never remarry or, conversely, that a promiscuous wife will remarry even if the *get* proves invalid. 3) *B. Y'vamot* 110a: a man kidnaps a woman and performs the *kiddushin* ritual with her. 4) *B. Bava Batra* 48a: *kiddushin* contracted without the woman's consent.

114. *B. Ketubot* 3a; *B. Gitin* 33a; *B. Gitin* 73a.

115. *Tosafot, Ketubot* 3a, *s.v. ada`ata d'rabanan m'kadesh*.

institution of marriage by the community and its legal institutions. The second justification, used in cases where the man initiates the *kiddushin* transaction in an unethical manner (and therefore explicitly did not stipulate that the validity of the marriage rests upon rabbinical consent), is "just as he **[p. 61]** acted unfairly, so he is treated unfairly":[116] *i.e.*, an admission that the rabbis engage in an extraordinary act of rough justice in order to free the wife to remarry. All of which leads to the conclusion that the Rabbis were quite prepared to countenance communal intervention into the heretofore private matter of marriage, especially as a measure to right the imbalance of power that the wife suffers under the original *halakhah*.

To repeat: this seven-item survey comes to support the claim that the Jewish law of marriage and divorce is an evolutionary reality, one that begins with significant inequity but that shows "a consistent tendency toward the equalization of the legal status of women and men." These items constitute only a partial list, but my purpose has been illustrative rather than exhaustive, to chart the basis upon which we progressive halakhists can defend the concept of egalitarian *kiddushin* as our halakhic framework for Jewish marriage. As I note above, this defense addresses criticisms of egalitarian *kiddushin* raised by both Orthodox halakhists and feminist theorists, even if, as is altogether probable, it does not persuade those critics of the rightness of our position.

With respect to the Orthodox critique, we progressive halakhists contend that egalitarian *kiddushin* is an authentic expression of Jewish law. The textual record demonstrates that since early Rabbinic times the Sages of the *halakhah* have struggled to repair the damage caused by the non-egalitarian structure of the Jewish law of marriage and divorce. The Reform movement's

116. *B. Y'vamot* 110a and *B. Bava Batra* 48a: הוא עשה שלא כהוגן, לפיכך עשו בו שלא כהוגן.

takanah that the woman shall betroth the man according to the same formula through which he betroths her is simply a natural progression of the evolutionary tendency of the *halakhah* toward equality and the empowerment of women; it is the logical next step, the goal and purpose to which all these earlier measures point. Egalitarian *kiddushin* provides ritual form to the Ḥatam Sofer's insight the marriage is an exchange of mutual obligations,[117] and it is but the latest example of the historical tendency for the Jewish community to exert its supervision over the marriage ceremony. We recognize that Orthodox halakhists will disagree with us. They will **[p. 62]** say that egalitarian *kiddushin* is not an "authentic" expression of Jewish law because it conflicts with the form of *kiddushin* as laid down in the Talmudic sources and that any effort to revise the concept of *kiddushin* with a "radically" different content is erroneous to the extent that it is "contrary to previous rabbinic rulings."[118] And therein lies the difference between their approach to *halakhah* and ours. We hold that it is not only the letter of the law that guides us but also the *tendency* of the law, the goals to which it evidently aspires, its capacity to develop and change in response to the felt needs of history. In this case, that need is the requirement to remedy the injustices built in to the original law of marriage and divorce. The *halakhah*, as it has *evolved*[119] over time, serves as a critique of that original law. And progressive *halakhah* is guided by that evolution, the long arc of Jewish law that bends toward justice and equity.

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117. At note 73, above.

118. See Landau, at note 24, above.

119. And here is the right place to cite the *magnum opus* of our colleague and teacher Moshe Zemer, ז"ל, *Evolving Halakhah* (Woodstock, VT: Jewish Lights, 1998). The book is the English version of his *Halakhah sh'fuyah* ("Sane Halakhah"; Tel Aviv: D'vir, 1993). The choice of the two titles says much about the progressive halakhic outlook: for us, a healthy and well-adjusted Jewish legal tradition is one that evolves to speak to the world in which the Jews live.]

To the ethical critique, particularly as raised by Jewish feminist theorists, we would say that egalitarian *kiddushin* meets the ethical standards demanded by our commitment to justice. That it is *egalitarian* means that our *takanah*, which reflects the *halakhah*'s historical tendency toward gender equality in marriage, rejects the connection between traditional Jewish marriage and the subjugation of women. And that it retains the form of *kiddushin* does not mean that it partakes of the nature of acquisition symbolized by the original understanding of the ritual. Our understanding adopts the insight of the Ḥatam Sofer, namely that *kiddushin* has more to do with the law of contract, of mutual obligation, than of purchase. True, some call upon us to reject *kiddushin*, even in its egalitarian form, because of its roots in the patriarchy and its original connotation of the acquisition of a wife. Our response is that we maintain *kiddushin* as the form of Jewish marriage because it *is* the Jewish form of marriage. For us, authentic Jewish expression is deeply halakhic in nature, and we progressive and Reform Jews continue to participate in the tradition of Jewish law and legal discourse. Our goal is not to replace authentic forms of Jewish practice with others of our own devising (particularly in cases where **[p. 63]** those alternatives suffer the same problems that their advocates wish to solve[120]) but rather to adapt those halakhic forms to the standards set by our progressive ethical values. The challenge we face is whether we can do this honestly and with intellectual integrity, and here some feminist theorists join with Orthodox halakhists to say that we cannot: genuine *kiddushin*, in the view of both sides, is a one-sided acquisition of the wife by the husband, and any effort to modify that inequitable structure distorts the true nature of the ritual. Our position, which I have tried to spell out here, is that the concept of egalitarian *kiddushin* captures not the original meaning of that term but rather the

120. See above at note 21, Adler's suggestion of "partnership" as a framework for Jewish marriage. In Jewish law, a partnership arrangement is also a commercial entity in which each party "acquires" obligations upon the other.

tendency of the *halakhah* of marriage and divorce as it has moved – fitfully, incompletely, not fast enough, but significantly – in the direction of gender equality.

Conclusion. Egalitarian *kiddushin* can perhaps be best understood as the latest chapter in an ongoing narrative, the story of the *halakhah* of marriage and divorce. Like all stories, this one includes numerous individual events; these are the rules and principles, the texts and the *t'shuvot* that fill the halakhic literature. The narrative is the framework that threads these events into an overarching whole that provides them with meaning and purpose. Like all narratives, it is the product of the storyteller who interprets these events as being connected in a particular way and as pointing in a particular direction. In other words, the jurist, the scholar who searches out old texts and precedents in dusty law-books (or, nowadays, who spends large chunks of time chasing them down in Web searches), is a storyteller. To say this is by no means to insult the study and practice of law; as has long been recognized, narrative is an inevitable feature of legal thought.[121] But it is helpful to keep the narrative function in mind as we study the ways in which any legal system makes meaning. In our case, we have seen that progressive *halakhah* reads and tells the story of *hilkhot kiddushin* in such a way that the *takanah* of 1869/1871 is the climax demanded by the centuries-old development of the Jewish law of marriage and divorce from patriarchy toward gender equity. Not everyone tells that story about **[p. 64]** the *halakhah.* Those who approach Jewish law from other halakhic or theoretical perspectives will tell different stories and arrive at different conclusions, either that egalitarian *kiddushin* is a contradiction rather than a

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121. The classic citation here is Robert Cover, "*Nomos* and Narrative," *Harvard Law Review* 97 (1984), pp. 4-68. For a survey with connections to Jewish law, see Mark Washofsky, "Narratives of Enlightenment: On the Use of the 'Captive Infant' Story by Recent Halakhic Authorities," in Walter Jacob, editor, in association with Moshe Zemer, *Napoleon's Influence on Jewish Law: The Sanhedrin of 1807 and Its Modern Consequences* (Pittsburgh: Solomon B. Freehof Institute of Progressive Halakhah, 2007), pp. 95-147 (http://huc.edu/sites/default/files/people/washofsky/Narratives%20of%20Enlightenment.pdf , accessed December 20, 2016).

fulfillment of the *halakhah* or that it is a well-meaning but ultimately insufficient attempt to shore up an institution that is hopelessly tainted by its origins in the property law of an ancient society. In the end, one's conclusions will depend in large part upon the story one wishes to tell about the nature and history of Jewish law.

My goal in this article has not been to attack or refute the narrative frameworks of those who reject egalitarian *kiddushin*, but simply to argue that *our* story, which I have recounted in the preceding pages, can stand on its own merits. Making that argument requires that our discipline, our progressive halakhic discourse, rest on a theoretical basis that is as strong and as well founded as theirs. I have suggested the elements that are necessary to construct a sufficient theory of progressive *halakhah*. Those elements must be expanded, and their details must be filled in. Those tasks will demand considerable work from all of us who participate in the discipline called progressive *halakhah*. In the meantime, the foregoing is a start that I hope will point the way for future thinking and argument.