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The Search for Liberal Halakhah

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The Search for Liberal *Halakhah*

A Progress Report

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It is appropriate, at the inaugural conference of the Institute of Liberal *Halakhah*, to ask whether the concept of a "liberal *halakhah*" is anything more than a contradiction in terms. That is, can the system of rabbinic law accommodate contemporary values of justice, morality and progress? Is *halakhah* capable of the growth and development required to respond in a positive way to changing socio-cultural circumstances and ethical insights? Or does "liberality" suggest the translation (read: distortion) of Jewish religious law into a mechanism by which ethical values drawn from a secular culture may be draped with an appearance of sanctity? For some, it is an absurd notion that a legal system claiming divine origins can simultaneously "change with the times." There is, indeed, no shortage of thinkers on either the right or the left of the Jewish theological spectrum who deny the phenomenon of "creative change" in Jewish law. There are others, however, who view *halakhah* as dynamic and open to an affirmative encounter with modernity and its accompanying cultural transformations. These "liberals" are generally associated with liberal Jewish religious movements but are not restricted to them. Such "Orthodox" scholars as Emanuel Rachman and Irving Greenberg, for example, speak of the possibility of making directed changes, "within the frame and by its own methodology," in traditional Jewish civil, political, family and ritual law.[1]

In Israel, Effraim Urbach calls upon observant Jews to ensure "the revival of the *halakhah*" to its historic vitality and its adaptation to the needs of a modern state by wresting Jewish law from the control of "extremists" who reject both modernity and statehood. The structures and problems of modern life require that

rabbis return to the activism that once characterized *halakhic* decision and adjust their methods of analysis to reflect changing economic and social reality.[2] Urbach and his colleagues, who writings fill the pages of *Amudim*, *Mahalkhim*, *De'ot* and other journals, deny that contemporary Orthodox extremism is synonymous with "*halakhic* Judaism."[3] While these groups and individuals differ in their sectarian attachments, they share the conviction that Jewish law can and must change to meet the challenges of our time, that *halakhah* is "much more open to diversity and to 'modern' sensibilities than the modern Orthodox myth is ready to acknowledge."[4]

The problem for these liberal *halakhists* - and indeed for our new Institute--is that this portrait of a dynamic and flexible *halakhah* is difficult to maintain in the face of concrete practice. Whether the *halakhah* can be or ever was "liberal", it is certainly not "liberal" today. The plight of the *agunah* and the *mamzer*; issues of conversion and Jewish status; the role of women in ritual and communal life; attitudes toward non-Jews and contact with them; questions of new technology and medical ethics; challenges to traditional Jewish life raised by the establishment of the state of Israel--these are but some of the areas in which *halakhah* has taken decidedly illiberal positions. Liberals contend that traditional rabbinic law can yield positive, "enlightened" solutions to these problems, and their suggested solutions have made up what might be termed the liberal *halakhic* agenda. Nevertheless, the vast majority of recognized *halakhic* authorities have invariably denounced these proposals as invalid. This yawning gap between theory and practice is the Achilles heel of liberal *halakhah*. One can hardly argue that there is no conflict between *halakhah* and liberal values when every suggestion for mending that apparent breach is rejected by the leading authorities as contrary to Jewish law.

It is customary to blame this rejection on a reactionary Orthodox rabbinate who intransigence stems from identifiable historical causes.[5] This, however, overlooks the essential theoretical objections raised by Orthodox *halakhists*, who contend that rabbinic law, as defined by its traditionally accepted criteria of validity, cannot sustain the innovations which the liberals suggest. If they are to prove their case, *halakhic* liberals must respond directly to these theoretical objections. It is not enough for them to claim that *halakhah* can be flexible; they must show that it is flexible *enough* to support the items on their *halakhic* agenda. This requires a detailed and precise theory of *halakhah* which will determine the criteria of *halakhic* legitimacy and demonstrate that the solutions advocated by today's liberals meet those criteria. As if to take up this challenge, three booklength studies of liberal *halakhic* theory have appeared during the past decade. Each author, in his own way, addresses himself to the criteria of legitimacy in *halakhah*: just what is it that determines whether a specific proposal is valid under rabbinic law? Taken together, these works constitute the present "state of the art" in liberal *halakhic* thought. This essay is an attempt at evaluation of those efforts. What have these scholars accomplished, and what remains to be done?

In *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law*, [6] Louis Jacobs adopts an "historical" approach to liberal *halakhah*. This method offers much promise for the liberal *halakhist*, since the vast rabbinic-*halakhic* literature contains numerous instances of interpretation and legislation that display a heightened ethical consciousness and a sensitivity to the needs of the age.[7] The difficulty lies in basing a legal theory upon scattered cases, in proving that these reflect the rule rather than the exception in *halakhah*. To overcome this problem, Jacobs produces a thoroughgoing history of the post-Talmudic *halakhah*. The work, marked throughout by Jacobs' considerable Talmudic and theological erudition, is to date the most comprehensive such history ever published. His thesis is that *halakhah* is not an

exclusively academic enterprise; it takes shape within history and is thoroughly shaped *by* history. Jewish law "is influenced by the attitudes, conscious or unconscious, of its practitioners toward the wider demands and ideals of Judaism and by the social, economic, theological, and political conditions that occur when the ostensibly purely legal norms and methodology are developed." The *halakhic* decisions of rabbinic scholars are thus guided by "extra-*halakhic*" motivations that represent the scholars' interpretive understanding of "general Jewish values." Jacobs charts the variety of outside factors that have influenced *halakhah* through its history, showing how each of them - philosophy, mysticism, Hasidism, and encounter with the non-Jewish world - has left its mark on Jewish law. He describes in detail the adaptations made by the *halakhic* tradition to changing social needs, popular practice, and new technologies. Responding to these extra-*halakhic* influences, *poskim* have found ways to justify numerous innovations in the law. They have set aside Talmudic assumptions on human nature and behavior when subsequent observation has shown that these have changed. They have incorporated new conceptions of ethical conduct and good manners (*derekh eretz*) into the process of legal decision. While rabbis often describe this process as purely conceptual and theoretical in nature, history shows that Jewish law results from a dynamic interaction between Judaism's legal tradition and its highest ethical and spiritual ideals. Legitimacy, then, is to be found in the historical process: If Jewish law has always accommodated to change, there is no reason to suppose that such change cannot continue.[8] The rich detail provided by Jacobs proves beyond any reasonable doubt that *halakhah* has a history characterized by "diversity, flexibility, and creativity." It serves as well to support his contention that innovative and dynamic answers to the pressing problems on today's Jewish legal agenda[9] are fully in keeping with the spirit of the *halakhic* tradition.

It is questionable, however, whether any historical treatment, even one as extensive as *A Tree of Life*, is really helpful to contemporary *halakhists* who advocate specific solutions to these problems. *Halakhah*, like law, is a normative, rather than a historical discipline. An innovation in law is legitimate, not because lawyers have always made innovations, but because this innovation is justified by the criteria of validity recognized by the relevant legal system.[10] Historical factors which induce changes in a legal system are not to be confused with the internal rules that govern the system and its procedure.[11] That sages in the past have rendered decisions which can be seen as "liberal" does not by itself establish the *halakhic* validity of any particular innovation suggested to contemporary authorities. For example, that Jewish law has historically provided economic and social relief to women - the *ketubah*, the permit for the *agunah* to remarry through the relaxation of Toraitic rules of evidence, and the *takanot* of Rabbenu Gershom are examples which come readily to mind--does not mean that any measure undertaken to improve the status of women (e.g., annulment of marriage, inclusion of women in a *minyan*, their acceptance as witnesses) is *halakhically* legitimate. To win acceptance, each of these proposals must be justified through convincing *halakhic* argumentation rather than by appeal to the invisible hand of history.

The historian may respond that the notion of "criteria of *halakhic* legitimacy" is a fiction, a rationalization that hides the real motivation of the rabbinic judge. Jacobs, at the beginning of his book, assumes this position. The *halakhist*, he tells us (pp. 11-12), approaches a legal question by first determining the best answer according to his own understanding of Jewish "ideals"; he then searches for *halakhic* rules and principles - "acceptable legal ploys," Jacobs calls them - to support his opinion. This account of rabbinic reasoning is, of course, an anathema to Orthodox scholars.[12] Still, if Jacobs is correct in his reading of *halakhic* history, then any decision which is just and compassionate can, in the hands of a

skillful textual scholar, be proven legally valid. Jacobs here is reminiscent of the "realist" school which once exerted much influence over American jurisprudence. Like Jacobs, the extremists among the "realists" downplayed the importance of legal rules, contending that judges begin with predetermined conclusions and move "backwards" to formal justification by means of the manipulation of the "paper" rules of law.[13] Legal realism in its extreme form is today considered *passé*; the dominant jurisprudential theories recognize that analytical reasoning places firm, objective limitations upon judicial discretion.[14] Jacobs eventually admits as much with respect to rabbinic law. In an appendix, he considers the plight of the *mamzer*, the offspring of an incestuous or adulterous union whose status is "the most stubborn and embarrassing problem traditional Jewish law has to face" (p. 257). He concludes that this injustice cannot be remedied through textual interpretation. The traditional *halakhist*, no matter how liberal his sensibilities, is ultimately bound by loyalty to the sacred texts of the Jewish legal tradition. He may read these texts in a creative manner, but he is not free to ignore them or make them say what they manifestly do not say. Unlimited judicial discretion does not exist in *halakhah*. When the clash between liberal values and sacred texts is unavoidable, it is the texts that must prevail.

To solve such intractable problems, Jacobs calls for a "non-fundamentalist" *halakhah* which would combine tradition with the dynamism and flexibility that Jewish law has displayed through the ages. While committed to the tradition, non-fundamentalist *halakhic* scholars would be willing to change the law, whether or not that change can be supported by the legal texts, whenever the existing *halakhah* leads to "the kind of injustice that reasonable persons would see as detrimental to Judaism" (p. 236). Jacobs thus abandons the attempt to demonstrate the legal validity of liberal *halakhic* innovations. It is not the text but the "higher values of Judaism" which establish the correctness of a decision. In this way,

he would insure that Jewish law would always conform to liberal values. The premium he pays for this insurance is the abandonment of the traditional legal system. His solution is of little help to liberal *halakhists* who seek to prove that justice and compassion can be achieved within the traditional *halakhah*.[15]

If the method of history cannot, on its own, establish a theory of liberal *halakhah*, the "analytical" approach offers a more promising solution. This approach characterizes the work of Eliezer Berkovits in *Hahalakhah: Kohah Vetafkidah*.[16] This is an analytical study concentrates not upon what rabbinic authorities have done in the past but upon the rules of the rabbinic legal process. Granted that changes have taken place, just what is it that makes these changes legitimate from a normative point of view? The analyst undertakes a "dogmatic" study of the law to determine the immanent procedures by which the particular legal system justifies its rulings.

Thus Berkovits, like Jacobs a *halakhist* as well as a theologian, does not follow Jacobs in drawing conclusions on the basis of historical circumstance. He also does not advocate a new, "non-fundamentalist" *halakhah*. The traditional *halakhah* is fully capable of securing justice and progress. As the eternal bridge upon which Torah traverses from abstract ideal to the concrete world of reality, *halakhah* can by its nature respond to the changing conditions of Jewish existence. This generation has experienced a more rapid rate of change than any other since the destruction of the Temple. Our time requires *halakhic* solutions to problems in all areas of religious and social life. It is imperative to show how this task can be accomplished within the traditional *halakhic* framework. In his first chapter, Berkovits argues that rabbinic law shows a marked preference for reason over arbitrary authority. He proceeds to discuss the principles by which the theoretical *halakhah* has made significant adjustments in light of *metsiut*, the realities of human nature and existence. There follows a consideration of the

ethical principles evoked by Talmudic authorities when calling upon individuals to go beyond the letter of the law and guide their conduct by a higher moral standard. The material is presented not as history but as *hiddushim*, novellae in the familiar *yeshiva* style. Berkovits cites historical examples, but his point is not merely to show that the rabbis have from time to time issued "progressive" rulings. The examples illustrate the underlying rules and principles, defining the extent to which the rabbis are empowered to depart from the traditional understandings of Jewish law.[17] Cases of rabbinic "liberality" are not coincidental. They are evidence of principles embedded in the fabric of *halakhah* which guide rabbinic decisions in concrete situations.

An example of such principles at work, to which Berkovits devotes considerable attention, lies in the area of marital law. Although normally a husband must issue a divorce of his own free will, in certain cases his consent may be obtained through coercion. In Ketubot 63a-b, we read of the wife who denies conjugal rights to her husband on the claim that he is repulsive to her (*mais alai*). Some authorities, notably Maimonides and Rashi, hold that this husband may be coerced into issuing a divorce. If the *halakhah* follows them, then the legal position of the wife, who cannot under Toraitic law divorce her husband, is dramatically improved. By moving out of the marital home and claiming "*mais alai*", she would set into motion a chain of events which would lead inexorably to her freedom to remarry. Especially in Israel, where government coercion may be employed against a husband who refuses to issue a *get* at the order of a rabbinic court, a remedy would exist for women who currently suffer as *agunot* because of the recalcitrance of their husbands. While most authorities reject the use of coercion in this instance, Berkovits concludes that "there is no solid Talmudic evidence against the position of Rashi and Rambam." [18] Since our ethical sense forbids us to force a woman to remain with a husband whom she detests, the rabbinic court may coerce the divorce if

necessary. He reasons similarly on the question of rabbinic annulment of marriage.[19] While the sources dispute that question, he believes that the rabbis can indeed declare marriage null and void when the situation warrants such an extreme step. Morality demands that they utilize this power to improve the lot of the wife and protect her from exploitation.

Unlike Jacobs, Berkovits thus identifies the normative criteria of *halakhic* legitimacy. A proposed decision is valid in Jewish law 1) when it can be justified by source argumentation at least as plausible as that which supports other alternatives, and 2) when it expresses the principles of fairness and morality integral to the *halakhic* system. On this basis one may posit that the items on the liberal *halakhic* agenda fall within the parameters of legitimacy set by the internal processes of Jewish law. The only remaining question is whether today's rabbis are empowered to diverge from the rulings and interpretations of the sages of past generations and adopt new and innovative solutions. Berkovits argues that they are. Over fifty-eight pages of text, quoting extensively from classic comments of the *rishonim*, he constructs a theory of virtually limitless rabbinic discretion in *halakhic* judgement.[20] If a contemporary scholar, upon his honest reading of the sources and his estimation of the demands of the hour, determines that the *halakhah* must be understood differently than it has been understood in the past, he may rule accordingly. Even if the collective weight of legal tradition stands against him, "Jepthah in his generation is as Samuel in his own."[21]

Why then, if Berkovits is correct, does such discretion almost never happen? The *poskim*, in fact, seldom diverge from traditional understandings of Jewish law to create innovative solutions to *halakhic* problems. It seems that in exalting the freedom of the contemporary authority, Berkovits ignores the very real and powerful limit which historical consensus exercises over *halakhic* decision-making. The issue of coercion of divorce on the claim of

mais alai is a case in point. The "lenient" opinion of Rashi and Rambam is rejected in no uncertain terms by R. Tam, Ramban, R. Shelomo b. Adret, R. Asher b. Yehiel,[22] R. Nissim Gerondi, R. Yitschak b. Sheshet Perfet and other luminaries, a rejection so complete that the position is not mentioned in the *Shulhan Arukh*. The commentators are in no doubt that the law here follows the consensus opinion,[23] and that opinion has never been challenged by subsequent authorities.[24] Thus, it is doubtful whether the rejected opinion is still an available alternative to the *halakhist*. What happens when a rabbi *does* challenge the historical consensus is illustrated by Berkovits himself. In 1966 he proposed his own *halakhic* innovation, a pre-nuptial stipulation agreed to by bride and groom that would annul the marriage in the event that the husband would one day arbitrarily refuse to issue his wife a divorce. This provoked a sharp response from R. Menachem Kasher, who contended that the Berkovits proposal did not overcome technical difficulties which had buried similar proposals in the past. Kasher's main point, however, was that Berkovits has no business contradicting the unequivocal ruling of the great *poskim* who prohibit the use of such a stipulation. During the course of the century a total of 1500 rabbis have explicitly rejected the institution of conditional marriage under any circumstances. The quality and quantity of this rabbinic opposition demonstrates that "there is no excuse to raise again a question which has already been examined and decided by all the sages of Israel. Their ruling must not be doubted."[25] Kasher expresses his scorn by never referring to Berkovits by name, but only as "a certain rabbi". Such is the fate of Jepthah when, even in the name of morality, he challenges the *halakhic* consensus.

This consensus, as understood by Kasher and by the leading *halakhic* scholars whom he cites, is not merely a tendency among rabbis toward extreme conservatism. It is presented as a working factor in *halakhic* theory, a principle that is recognized by the legal

system itself and which places strict limitations upon the freedom and discretion which the *halakhist* enjoys. That is, proposed rabbinic decisions, no matter how extensive their Talmudic justification or how urgent their appeal to ethical necessity, are invalid when they run counter to the consensus opinion of the preponderance of *halakhic* authorities. It hardly needs emphasis that the innovations championed by liberal *halakhists* generally do contradict the consensus. One who wishes to argue for the *halakhic* validity of these suggestions must therefore prove that the contemporary rabbi may safely ignore the weight of consensus. Berkovits, it must be concluded, does not do this. His portrayal of a *halakhic* process in which rabbinic discretion is the rule is thoroughly one-sided. It explains neither the realities of *halakhic* practice nor the rabbis' own conception of how the system functions.

On the other hand, there exists a rabbinate which does conduct its *halakhic* business according to the Berkovits guidelines. The rabbis of the Conservative movement of North America have long declared their loyalty to the traditional *halakhah*. At the same time, speaking as individuals or through the Committee on Jewish Law and Standards of the Rabbinical Assembly, they have frequently taken stands which are totally at odds with the position of the *halakhic* consensus. In *The Halakhic Process: A Systemic Analysis*,[26] Joel Roth, a leading *halakhic* authority for the Conservative movement, sets out to prove that the legal decisions of his movement meet the criteria of validity recognized by rabbinic law. He therefore confronts the same theoretical problem which faces Berkovits: may the contemporary authority ignore or overrule the *halakhic* consensus?

Like Berkovits, Roth studies the immanent rules and procedures of *halakhah*. He differs, however, in his effort to explain *halakhah* as a system much like all other legal systems. He draws heavily upon the literature of modern jurisprudence,

particularly the works of Hans Kelsen and John Salmond,[27] in helping to identify the "systemic" structure of rabbinic law. From Kelsen he adopts the notion of a *Grundnorm*, a postulated, pre-legal principle from which all other precepts of the legal system are derived. Such a concept exists in every system; in the *halakhic* system, the *Grundnorm* would read: "the document called the Torah embodies the word and will of God, which it behooves man to obey, and is, therefore, authoritative" (p. 9). Roth borrows Salmond's classification of all legal questions into questions of law and questions of fact, with the former divided into questions of law in the first sense (questions which the law has definitively answered) and questions of law in the second sense (questions as to what the law is). A question of law in the second sense is also a question of fact: that is, the judge must determine the true meaning of the words of a text, statute, or precedent. In the early stages of a legal system, most questions fall into this latter category. Over time, matters of uncertainty are gradually transposed into fixed, precise definitions and presumptions. Here the *halakhic* system differs from most others, since with the disappearance of the Sanhedrin there is no universally recognized body empowered to turn questions of fact into questions of law in the first sense. This implies a wider range of judicial discretion in *halakhah* than that existing in other systems. On all matters of legitimate *mahloket* - that is, "such that none of the positions can be legally demonstrated to be untenable or false" - the rabbinic arbiter remains free to exercise his discretion, even when an earlier authority has decided otherwise.

This discretion thrives in the *halakhah* even though a sense of the holiness of his task and of his inferiority compared with earlier scholars may deter the contemporary *halakhist* from rendering a decision "at variance with common practice or precedent." His freedom is guaranteed by the principle which Roth calls "the *sine qua non* of the system": *ein ladayan ela mah sheeinav*

ro-ot ("a judge must be guided by what he sees"). Indeed, Roth calls this "the ultimate systemic principle" of the *halakhah,* the "systemic legitimization of judges to exercise judicial discretion as they deem appropriate." *Halakhah* does not recognize a doctrine of authoritative precedent; the rulings of earlier sages do not attain the status of *davar mishnah* (uncontrovertible legal presumptions) but may be challenged by later scholars who can support their viewpoint through source citation and reasoning.[28]

If judicial discretion enjoys the status of "systemic imperative" in rabbinic law, then there is simply no room for "consensus" as a working principle in *halakhah.* Consensus has a certain predictive value: if rabbis have always ruled in a certain way on a particular issue, it is probable that they will continue to do so. Nevertheless, this tendency to legal stability in no way restricts the discretion of later authorities to dissent from that ruling. The only limit upon rabbinic discretion in a system whose ultimate principle is *ein laayan ela mah sheeinav ro-ot* lies in the integrity of the *halakhic* authority himself. This implies that he conform to two demands. First, the potential *halakhic* authority must be characterized by *yirat hashem,* religious behavior indicative of his fundamental commitment to the system. That is, he accepts the *Grundnorm* as the reflection of God's word and will and recognized the rabbis as the sole legitimate interpreters of the *Grundnorm.* Second, the decisions of this authority must be supported according to the rules of *halakhic* reasoning and interpretation. These constitute the criteria of validity in Roth's "*halakhic* process"; any ruling meeting these criteria is, by definition, valid *halakhah.*

On this basis, the *halakhic* innovations of the Conservative rabbinate qualify for *halakhic* legitimacy. If, for example, a potential authority committed to the *halakhic* system should drive to synagogue on Shabbat, this highly unprecedented practice is valid *halakhah* so long as the authority believes it to be

"systemically defensible." His may be a minority view, but by the systemic rules of *halakhah* it must be recognized as a legitimate option. The same would apply to other Conservative *halakhic* innovations, such as the *kashrut* of wines and cheeses, the counting of women in a *minyan*, and the resort to conditional marriage. All of these positions are justified through traditional methods of *halakhic* argumentation and issued by rabbis committed to the *halakhic* system and its basic norm. All of them may therefore claim validity, even though they run counter to the consensus positions among the *poskim*.

Still, this theory of *halakhic* validity will not be persuasive to most *halakhists*. Despite his sophisticated explanation of *halakhah* as a legal system, Roth, like Berkovits, underestimates the power of the *halakhic* consensus as a working factor within that system. Consensus, a widespread agreement among *halakhic* scholars on points of law, is more than a guide to and prediction of future rabbinic decision. It is itself a "systemic" principle, a controlling mechanism that restricts the rabbinic discretion which, according to Roth, is the ultimate "systemic" principle in *halakhah*. Rabbinic decision-making, in this view, involves considerably more than the purely intellectual confrontation between the individual scholar and the authoritative text. The *halakhic* tradition is more than text. It contains as well that which R. Joseph Soloveitchik calls the "Massorah of conduct," the generally accepted modes of Jewish religious observance. The effect of this Massorah upon the understanding of *halakhah* is underscored by an Orthodox critic in his review of Roth's book. "Once a particular opinion has become normative for the entire Jewish community," he writes, "it becomes an integral part of the 'Massorah of conduct' which can no longer be changed on the basis of purely intellectual considerations." Rabbis loyal to *halakhah* as traditionally conceived would never violate this practical Massorah. Thus, they would never permit driving to synagogue and turning on lights on Shabbat, regardless

of the textual justification that could be marshalled in defense of such rulings.[29] Liberal rabbis, who deviate from the 'Massorah of conduct' as defined by the preponderance of *halakhic* opinion, do not qualify as *halakhic* authorities; their writings, no matter how proficient in Talmudic analysis, are not to be regard as *halakhic* literature.[30]

Roth's theory, which attempts to explain the *halakhic* process while explaining away the *halakhic* consensus, is a conceptual model which explains how *halakhah* ought to work. Like other liberal approaches, however, it does not account for the way in which *halakhah* functions in the concrete world of rabbinic practice. For example, Roth's theory does not discuss the dominant role played by the *gedolei hador*, the leading *halakhic* authorities, in shaping *halakhic* practice. Unlike judges in a Kelsenian system, the *gedolim* are not selected through a rational procedure governed by systemic legal rules but by "a sure and subtle process which knows its leaders and places them in the forefront of a generation."[31] These men identify the *halakhic* consensus for their time and determine, in fact if not in theory, the parameters of legitimacy in *halakhic* argument.[32] To ignore their formal/informal function as a "Sanhedrin in exile" is to present an inaccurate picture of the *halakhic* system as it really is. Consider as well Roth's treatment of the phenomenon of codification in *halakhic* history. Since the writing of codes tends to limit the exercise of judicial discretion, he seeks to minimize the importance of codification by citing the remarks of well-known opponents of the *Mishneh Torah* and the *Shulkhan Arukh*. In theory, he has a point. Perhaps the views expressed by Ravad, Maharsha, the *Penei Yehoshua* and the *Sheelat Yaavetz* opposing the exclusive reliance upon codes *ought* to be seen as the "royal road" of *halakhic* practice. Yet this fervent theoretical wish is controverted by the fact that codes *have* been written; that they *have* been produced in response to a perceived need for legal clarity and certainty; and that these books *have* functioned to limit the scope of permitted decision-

making. A more balanced view of *halakhic* history would have to place at least as much emphasis upon the factors which encourage codification as upon those which argue against it.[33]

If liberal theory holds that the *halakhic* consensus does not limit the freedom of the rabbinic judge, the *halakhic* facts are otherwise. Rabbinic discretion gives way to consensus, which operates as a working, "systemic" principle that cannot be explained away by means of theoretical construct. Indeed, it is difficult to imagine *halakhah* without such a principle. The Talmudic sources of Jewish law are an incredibly rich and varied treasury of rules, principles, custom and commentary from which almost any analogy can be made and almost any distinction can be drawn. Rabbinic lore recounts examples of sages who could declare reptiles to be kosher: i.e., they could offer rational, logical argumentation for every possible *halakhic* conclusion, including those which are obviously false. A religious legal system that values coherence and consistency could hardly survive if it permitted its scholars a largely unlimited discretion to rule on the basis of its classical sources. A controlling device that determines *which* analogies, distinctions and conclusions are the correct one to draw from the sources is thus a virtual necessity. In *halakhah* that control has been exercised primarily by two factors: 1) the use of "discretion," of creativity in reaching *halakhic* judgement, is restricted to the handful of outstanding scholar-saints of the generation; 2) the "correct" answer to a *halakhic* question is that which is accepted by the preponderant majority opinion among these sages.[34] *Halakhah*, in other words, is synonymous with the opinion of the *gedolim*, and the liberal innovations that run counter to the consensus view among them will be rejected as invalid. Any theoretical construct which ignores the very real power of this consensus is a description of something other than the *halakhah* as it operates in the real world. As long as the consensus stands unchallenged, no historical or analytical treatise can prove that *halakhah* is compatible with liberal values.

To return to our original question: Is there such a thing as a "liberal *halakhah*"? In order to answer in the affirmative, liberals need to advance beyond theory and to adopt a strategy of direct confrontation with the *halakhic* consensus. Granted that the consensus exists and that it functions as a "systemic principle" in *halakhah*, the task is now to show that the consensus position, when examined on its own terms, is intellectually weak and wanting. For example, utilizing accepted procedures of *halakhic* analysis, liberals may show that the viewpoint of the "preponderant rabbinic majority" is based upon poor reasoning, improbable analogies and misreadings of the Talmudic and *halakhic* sources. In other cases, where the consensus view is textually sound, analysis might reveal that the decision of the *gedolim* is no more than an arbitrary choice, and not necessarily the best one, from among a number of equally valid *halakhic* alternatives. Such an "inner critique" of rabbinic decisions would do much to strip the aura of inevitability from the consensus position. Indeed, if the observant community were to be made aware of the kinds of reasoning and argumentation that often support the consensus view, they might be less likely to grant it automatic recognition as *the* correct *halakhic* opinion.

This approach can be illustrated with examples culled from the realm of medical *halakhah*. We may begin with the question of abortion, which has become the subject of bitter controversy in the *halakhic* literature. Although liberals point to lenient opinions by various *poskim*, drawing upon solid support in the classical sources, concerning the warrant for abortion,[35] the emerging *halakhic* consensus restricts the procedure to cases of mortal danger to the mother. A major factor behind this conservative trend is the 1978 responsum by R. Moshe Feinstein. As the ruling of perhaps the preeminent *halakhic* authority of contemporary times, this opinion exerts an enormous influence upon Orthodox practice and the political activity of Orthodox organizations. Yet few Orthodox Jews

are aware of the processes of "reasoning" by which Feinstein reaches his conclusion. Confronted by important *halakhic* sources which support the opposing lenient position, Feinstein simply declares that those sources do not exist. The one, he claims, is a scribal error, the other a forgery.[36] This rabbinic *tour de force* brought a stinging rebuke from R. Eliezer Waldenberg, a leading champion of the more lenient view, who notes that to erase inconvenient evidence in such an arbitrary fashion is an unacceptable form of *halakhic* argumentation.[37] In considering the Feinstein-Waldenberg exchange, liberals might point out to all who are interested that even rabbinic giants are not immune from the occasional temptation to bend the basic standards of scholarly integrity until they break.

Indeed, Waldenberg himself does not enjoy such immunity; witness his responsum condemning the practice of in vitro fertilization (test-tube babies).[38] The *posek*, widely regarded as the leading authority on medical *halakhic* issues, bases his opposition largely on the grounds that the husband cannot fulfill the *mitzvah* of procreation through a child conceived in this manner. His argument is derived from the *Mishnah* in Kiddushin 69a, which declares the offspring of a Jewish father and a Gentile mother to be a Gentile. In an unprecedented interpretation of this passage, Waldenberg asserts that the reason that the child does not follow the father's status is that the conception occurred in an unnatural place, outside the womb of a Jewish woman, where no relationship is possible (*makom sheein hityahasut*). Since test-tube fertilization also takes place outside the womb of a Jewish woman, we must conclude that the child is not related to the semen donor. He does not stop there: it is also doubtful that this child is related to its mother. After all, Maimonides in *Moreh Nevukhim*, I, 72, holds that a human organ separated from the body ceases to be truly human; once the ovaries are removed, they no longer belong to the woman, and neither does the child conceived therein. This

gadol hador, in other words, is willing to deny technological hope to infertile couples on the strength of a truly imaginative Talmudic interpretation and the scientific opinion of a twelfth-century philosophical work that is rarely cited in *halakhic* discourse. He goes on to cite what are undoubtedly the real reasons for his opposition to the procedure: the frightening potential for abuse, for science run amok, for a brave new world of genetic engineering. These fears are understandable, and we may share them. But where Waldenberg's social concerns are by far the stronger part of his responsum, his *halakhic* reasoning is weak, far-fetched and just plain bad. While it is true that the subjective judgments of the *posek* and his concern for the welfare of the community are integral parts of the process of rabbinic decision, it is intellectually dishonest to try to cover these motivations with a thin veneer of legal respectability.[39] By carefully distinguishing between legal and extra-legal concerns in the writings of the *gedolim*, liberals can help observant Jews identify cases where the decisions of those sages amount to no more than the translation of personal opinions and prejudices into the language of *halakhah*.

At times, the majority position, while textually sound, must give way to other viewpoints on grounds of reason and common sense. A case in point is the autopsy controversy, which continues to flare from time to time into the public consciousness. *Halakhah* is strictly opposed to routine autopsies, and the vast majority of *gedolim* also forbid autopsies upon the corpses of Jews for the purpose of medical education. Even here, the procedure is forbidden as a desecration of the corpse and the deriving of benefit from the dead.[40] Against the majority stands the ruling of R. Ben-Zion Uziel that autopsy for medical study involves the saving of life and cannot be construed as desecration, nor does medical education fall under the traditional definition of profit or benefit.[41] If, as usual, the *halakhah* here follows the majority, liberals would suggest that the victory of the consensus comes at a high cost. Listen to the kind of argument advanced in support of that position.

In response to concern that this ruling would render medical education impossible in *Eretz Yisrael*, Rav Kook suggested in 1931 that medical schools engage in the purchase and importation of gentile corpses for research. We should not worry, assures Kook, that this practice would inflame anti-Semitism. The Gentiles, at least the best among them, will recognize that "this nation, chosen to spread the light of holiness in the world...is entitled to a certain perquisite of holiness." While this statement merely insults the intelligence of its readers, it compares favorably to the position more recently enunciated by Dr. Yaakov Levy, who suggested that the science of pathology be left virtually in its entirety to the Gentiles, "whose world view does not insist that they show special reverence for their dead."[42] He demands, in other words, that the observant Jew adopt a stance of blatant moral hypocrisy: Jews may benefit from vital scientific information derived by Gentiles through procedures which Jewish law forbids as immoral. Such are the arguments raised on behalf of the opinion of the "preponderant rabbinic majority." It is certainly questionable whether many in the observant community could accept the reasoning and the value positions embedded in them. Liberals, for their part, would simply challenge observant Jews to confront these arguments and to consider whether, compared to the ruling of Uziel, the consensus view constitutes the best available interpretation of Jewish law.

These examples, along with others that could be cited, demonstrate that liberals can successfully challenge the *halakhic* consensus on "systemic" grounds. The notion that the opinion of the *gedolim* is the authoritative voice of *halakhah* rests, in the final analysis, on the presumption that this opinion is textually defensible, that it meets the objective standards by which the rightness of all rabbinic decisions must ultimately be judged. Even the *gedolim* do not claim to rule by the power of *takanah* or charisma. They claim rather that their authority derives from the sacred texts of the legal tradition and that their rulings constitute

the best available interpretation of its literary sources. It follows that when these rulings are shown to be devoid of reasonable textual justification or founded upon arbitrary and debatable value choices, that authority disappears, and their decisions are no more "correct" than any other textually defensible interpretation of *halakhah*.

The ultimate goal of liberal *halakhic* writing is to encourage among the observant community an openness to alternative interpretations of law. Liberals cannot accomplish this objective by ignoring the *halakhic* consensus, a functioning and decisive element in the process of *halakhic* judgement. Still, we have seen that it *is* possible to refute the consensus by testing it against the criteria of validity recognized by all *halakhists*. Should they succeed in establishing such a refutation in a significant number of cases, liberals may well convince Jews who live by *halakhah* and take it seriously that there can be more than one "correct" answer to a *halakhic* question. Put differently, liberals seek to break the monopoly of the *gedolim* over *halakhic* decision. This ambitious goal will take much hard work. To challenge the consensus position over the broad range of legal issues will require the publication of books, articles, studies, reviews and responsa which by their quantity as well as quality will guarantee that liberal alternatives receive their fair share of attention in the marketplace of *halakhic* ideas. My hope is that our new Institute will contribute significantly to this end. In this way it will surely perform a vital and indispensable role in the continuing search for a liberal *halakhah*.

1. Emanuel Rackman, "A Challenge to Orthodoxy", *Judaism* 18, 1969, pp. 143-158; Irving Greenberg, "Jewish Values and the Changing American Ethic", *Tradition* 10, 1968, pp. 42-74.

2. Effraim Urbach, "Al Hachayat Ha-Halakha", *Publication of The Movement for Torah Judaism*, 2, Jerusalem 1968; reprinted in *Al Tziyonut Veyahadut*, Jerusalem, 1985, pp. 311-321. See also "Samkhut Ha-Halakha Biyameinu", *Al Tziyonut*, p. 330.

3. Perhaps to this list should be added the name of Haim David Halevy, the Chief Rabbi of Tel Aviv-Yafo, who has some interesting things to say about the "flexibility" of the *halakhah* to arrive at new answers to contemporary problems; *Aseh Lekha Rav*, 7, Tel Aviv, 1986, n. 54.

4. Peter J. Haas, "Responsa Reconsidered," *Journal of Reform Judaism*, XXX, 1983, p. 41.

5. Menachem Elon points to the loss of Jewish juridical autonomy at the beginning of the Emancipation period as the primary factor in Jewish law's loss of vitality; see *Hamishpat Haivri*, Jerusalem, 1978, pp. 73-74. Solomon B. Freehof traces Orthodox stringency to a reaction against widespread non-observance of ritual and civil law; see *Reform Responsa*, Cincinnati, 1960, pp. 3-12.

6. Louis Jacobs, *A Tree of Life*, Oxford, 1984.

7. See, for example, Robert Gordis, "A Dynamic Halakhah: Principles and Procedures of Jewish Law," *Judaism* 28, 1979, pp. 263-282, who cites the *prosbul*, the *heter iska*, and the *takanot* of Rabbenu Gershom among other examples.

8. An assumption which Gordis, p. 264, makes explicit.

9. Jacobs' version of that agenda (p.247): Women's rights, relations with non-Jews, issues concerning life in a technological society, the needs of the state of Israel.

10. See Novak, p. 6, and Joel Roth, "Halakhah and History," in Nina Beth Cardin and David Wolf Silverman, eds., *The Seminary at 100*, New York, 1987, p. 284. On "criteria of validity" see, in general, H. L. A. Hart, *The Concept of Law* Oxford, 1961, p. 92 and pp. 97-107, and Joseph Raz, *The Concept of a Legal System*, Oxford, 1970, pp. 95ff and pp. 107ff.

11. "The legal sources of law are authoritative, the historical (sources) are unauthoritative"; P. A. Fitzgerald, *Salmond on Jurisprudence*, London, 1966, p. 109.

12. See J. David Bleich, *Contemporary Halakhic Problems*, New York, 1977, p. XV.

13. See Hart, pp. 132-144. For a description of American legal realism, see G. Edward White, *The American Judicial Tradition*, New York, 1976, pp. 272 ff. The most succinct statement of the extremist position among the "realist" school is that of Jerome N. Frank, *Law and the Modern Mind*, New York, 1930. See p. 179: "all legal rules, principles, precepts, concepts, standards--all generalized statements of law--are fictions."

14. G. Edward White, "The Evolution of Reasoned Elaboration", 59 *Virginia Law Rev.* 279, 1973.

15. The difficulty is exacerbated by the connection Jacobs draws between his non-fundamentalist *halakhah* and the acceptance of higher Biblical criticism and modern theories of revelation (chapter 16). Since orthodox Jews would be unable to swallow these modernist theologies, Jacobs has in effect excluded them from participation in his new legal system.

16. Eliezer Berkovits, *Hahalakhah: Kohah Vetafkidah*, Jerusalem, 1981.

17. Examples of such principles: "the Torah was not given to the ministering angels"; *hora'at shaah*; *et laasot*; *lifnim mishurat hadin*; *veasita hayashar vehatov*.

18. Maimonides, *Yad, Hil. Ishut* 14:8; Rashi, *Ketubot* 63b, *s.v. la kayafinan la*; *Tosafot ad loc., s.v. aval*.

19. He refers the reader to his book, *Tenai Benisuin Uva Get* Jerusalem, 1966, where he discusses the issue at length.

20. *Hasagat Harabad, Yad* Hil. Mamrim 2:2, on the power of the contemporary beit din to annul a long-standing decree whose justification has disappeared; *Piskei Harosh*, Sanhedrin 4:6, on the right of the contemporary scholar to disagree with the opinion of the *geonim*; *Yad*, Introduction, on the fact that all post-Talmudic scholars are of equal legal 20.stature.

21. Rosh Hashanah 28b.

22. Berkovits submits *Responsa Harosh* 43:8 to a forced interpretation. The clear sense of that responsum agrees with the assessment of Asher's son, Yaakov, that his father rejects Rambam's ruling. See *Tur*, Even Haezer 77, fol. 116a.

23. For a list of authorities see *Beit Yosef*, Even Haezer 77, fol. 115b-116a. The "commentators" are *Magid Mishneh*, Ishut 14:8, *Helkat Mehokek*, Even Haezer 77, n. 5, and Biur Hagra, *Even Haezer* 77, n. 5.

24. R. Ovadyah Yosef, *Responsa Yabia Omer* III, Even Haezer 19, is an exception that proves the rule. R. Yosef does not suggest that the Maimonidean position is the "correct" one or that, on ethical grounds, it ought to be preferred over the consensus view. He permits coercion in a case of *mais alai* only because the couple in

question are Yemenites, whose community, by long-standing *takanah*, follows the rulings of Rambam in all cases. See, however, Shlomo Riskin, *Women and Jewish Divorce*, Hoboken, 1989.

25. R. Menachem M. Kasher, "*Beinyan Tenai Benisuin*," *Noam*, XII, 1969. For compendia of rabbinic opposition to earlier suggestions, see *Ein Tenai BeNisuin*, Vilna, 1930, concerning the 1907 proposal of the French rabbis, and *Ledor Acharon*, New York, 1937, on the proposal of the Rabbinical Assembly. In general, see Mark Washofsky, "The Recalcitrant Husband," *Jewish Law Annual*, IV, 1981, pp. 144-166.

26. Joel Roth, *The Halakhic Process: A Systemic Analysis*, New York, 1986. Roth is perhaps best known for his extensive and detailed halakhic justification for the rabbinic ordination of women and, generally, women's participation in the ritual and legal life of Judaism; see Simon Greenberg, ed., *The Ordination of Women as Rabbis*, New York, 1988, pp. 127-187.

27. Hans Kelsen, *The Pure Theory of Law*, transl. May Knight, Berkeley and Los Angeles, 1967; P. J. Fitzgerald, *Salmond on Jurisprudencey*, 12th ed. London, 1966.

28. See *Baba Batra* 130b-131a, and *Piskei Harosh*, Sanhedrin 4:6; Roth cites other *rishonim* as well. On precedent in rabbinic law see Elon, pp. 768-804, and Z. Warhaftig, "*Hatakdim Bamishpat Haivri*", *Shenaton Hamishpat Haivri*, 6-7, 1979-80, pp. 105-132.

29. Walter S. Wurzburger, "The Conservative View of Halakhah is Non-Traditional", *Judaism*, LVIII, Summer, 1989, p. 378.

30. See Bleich, *Contemporary Halakhic Problems*, p. 78: "The deliberations and publications of the Rabbinical Assembly do not...properly come within the purview of a work devoted to Halakhah. Much is to be said in favor of simply ignoring

pronouncements with regard to Jewish law issued by those *who have placed themselves outside the pale of normative Judaism*" (emphasis added).

31. Emanuel Feldman, "Trends in the American Yeshivot: A Rejoinder", in R. Bulka, ed., *Dimensions of Orthodox Judaism*, New York, 1983, p. 334. This point suggests caution in attempting to explain *halakhah*, which is definitely not a "modern legal system", according to jurisprudential theories designed with such systems in mind.

32. Even a modern Orthodox critic of the *gedolim* bows to their *halakhic* authority; see Oscar Z. Fasman in Bulka, pp. 317-330.

33. See Menachem Elon in I. Eisner, ed., *Hagut Vehalakha*, Jerusalem, 1973, pp. 75-119. At the conclusion of his historical survey, Elon suggests that the needs of the hour require a new codification of Jewish law, thus drawing a very different lesson from halakhic history than does Roth. On the powerful tendencies among Sefardic and Oriental rabbis toward adherence to precedent and the virtual sanctification of the *Mishneh Torah* and the *Shulhan Arukh* in their legal practice, see Y. Z. Kahana, *Mehkarim Besifrut Hateshuvot* Jerusalam, 1973), pp. 8-88; Elon, *Hamishpat Haivri*, pp. 1139- 1144; and R. Ovadyah Yosef in Sefer Hayovel Lerav Yosef *Dov Halevy Soloveitchik*, Jerusalem, 1984, pp. 267-280.

34. See *Eruvin* 13b; *Sanhedrin* 17a-b and Meiri, *Beit Habehirah ad loc.*

35. See David M. Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law* New York, 1975, pp. 268-294.

36. *Responsa Igrot Mosheh*, Hoshen Mishpat II, n. 69. The sources

mentioned are Tosafot, *Nidah* 44a-b, *s.v. ihu* (scribal error) and *Responsa Maharit*, n. 99 (forgery).

37. *Responsa Tzitz Eliezer*, XIV, n. 100.

38. *Responsa Tzitz Eliezer*, XV, n. 45.

39. On the role of subjectivity in rabbinic decision see Avraham Rabinowitz, *Techumin*, 2, 1981, pp. 504-512. The weakness of Waldenberg's legal argument is emphasized by the fact that R. Ovadyah Yosef permits in-vitro fertilization and regards the child as the offspring of its father and mother in all respects. See M. Drori in *Techumin*, I, 1980, pp. 287-288.

40. See the list of "*rov minyan verov binyan shel haposkim*" in A. S. Avraham, *Nishmat Avraham*, Yoreh Deah, p. 256.

41. *Responsa Mishpetei Uziel*, Yoreh Deah, n. 28.

42. Dr. Yaakov Levy in *Sefer Assya*, Jerusalem, 1, 1982, p. 207. Kook's responsum is found in *Responsa Dat Kohen*, n. 199. One can hear the sigh of relief emanating from these writings when they stress that autopsy is no longer as important in medical education as it used to be; see *Nishmat Avraham, loc. cit.*