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Re-examining progressive halakhah

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Taking Precedent Seriously. On Halakhah as a Rhetorical Practice

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Chapter 1



TAKING PRECEDENT SERIOUSLY

On Halakhah as a Rhetorical Practice

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The concept of precedent is both characteristic of and unique to the activity of law. By "precedent," I mean the practice of deciding disputed questions on the basis of earlier decisions. By "characteristic," I mean that deference to precedent is endemic to every system of thought and practice that we call law. Every legal system, each in its own fashion, recognizes precedent as a factor which to some extent constrains the freedom of decision enjoyed by the present judge. And by "unique," I mean that in no other intellectual discipline does the doctrine of precedent enjoy the respect and acceptance that law accords to it. No other field of inquiry is as receptive to the argument from precedent, the claim that something ought to be done or an issue ought to be resolved in a particular way now precisely because it was done or resolved that way in the past. Other disciplines, to be sure, have *histories*, records of past achievement which command the respect of the practitioners of the field. Yet the past as such has no

recognized power to confer legitimacy in these disciplines; "truth," as conceived by philosophers and scientists, is not arrived at through a process of conversation with the past but by methods of inquiry accepted as proper in that particular subject area. "Whatever conclusion you reach, the fact that Plato (or anyone else) held a certain view will not be for you a reason to adopt that view yourself. You must make up your own mind as to which view is correct, and however informative the positions of your predecessors, it does not count in favor of any position ... that some or all of them held it."¹ Truth, in other words, is a standard entirely independent from time; truth may be present in the words and writings of the sages of the past, but it is separate from those words and theoretically can be attained without recourse to them. For jurists, by contrast, the past *does* confer legitimacy.² An argument from precedent is not only acceptable before a court of law, it is often the crucial factor that determines the judge's ruling.

Why law should differ so essentially in this regard from other intellectual practices³ is a question that has provoked much interest among legal theorists. Some note that the practice of following confers a number of important benefits upon a legal system.⁴ Among these are fairness (similar cases and circumstances ought to be treated in a similar fashion); predictability or stability (the knowledge that courts will continue to apply existing rules introduces an element of certainty into the law, allowing individuals to plan their affairs accordingly); and efficiency (following precedent allows judges to conserve their decision-making energies, saving their limited time and resources for the creative resolution of problems that are truly new and different and which demand much careful attention). Reasoning by analogy (the search for "prototypical cases," another way of saying "precedent") limits the judge, reducing the likelihood that a decision will be controlled by prejudice or bias. Precedent, by serving as an agreed-upon fixed point in legal reasoning, also facilitates agreement among members of a legal community who may diverge on many other matters. It is also possible to justify the doctrine of precedent as a value in and of itself, on the grounds that culture, of which law is a principal constitutive element, is historical in nature, founded upon a kind of partnership between the contemporary generation and all those that have preceded it. We respect and seek guidance from the past, in other words,

because it is our dialogue with the past that makes us what we are as cultural beings.⁵

Yet despite its ubiquity and obvious importance in law, the doctrine of precedent is a deeply problematic one in every legal system. I would divide this problematic into two major categories, the theoretical and the practical. The theoretical problem lies in an apparent contradiction between the practice of deciding according to past cases on the one hand and the very conception of "law" on the other. The *law*, as we generally understand it, exists prior to and separately from the rulings of the judges. This is because we do not tend to understand the judge's role as that of legislator; the duty of the judge is to find and to apply the law, not to make it. A legislator creates law through an exercise of political authority. The creation of law is an expression of legislative will which need not be justified according to the terms of existing law; by definition, the act of the legislator cannot be legally "incorrect."⁶ The court, on the other hand, does not establish law on the basis of its own will. It resolves questions of law by justifying its answers as correct interpretations of the existing legal materials. A judge therefore owes primary fidelity to the law and *not* to the rulings of other judges who, after all, are also engaged in finding and applying the law. If the law is something other than the judge's ruling, then it is possible for a judge to err, to *misinterpret* the law and to render an *incorrect* decision. If I find that a previous judge ruled incorrectly, why should I be constrained to follow that ruling merely because it preceded me in time? Are not both of us, I and the earlier judge alike, equally bound to decide our cases "according to the law"? If that earlier decision is, in my considered opinion, *not* according to the law, why should it exercise binding authority over my own good judgment? Against all of this, the doctrine of precedent asserts that to some significant extent the ruling of a prior judge *is* law, *is* binding upon me, precisely as though it was an act of legislation. This idea would seem to run counter to our conception of law.

The practical problem flows from our contemporary view of law as a progressive phenomenon; that is, law changes and has always changed to meet the needs of its community. And this is as it should be. Judges must be free to innovate, for even if we concede that a particular decision may have been "right" at one time, we do not thereby concede that the same decision is right for *all* time. We would agree with Justice Holmes that "it is

revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁷ Yet precedent, which requires the judge to decide a question in precisely the way it was decided before, precisely *because* it was decided that way before, would seem to run counter to any sensible notion of legal progress.

I would argue that every successful legal system is characterized by a creative tension between a healthy respect for the doctrine of precedent and a cast of mind and a set of techniques to address and solve the problems that precedent causes.⁸ By this I mean that a legal system must possess the means by which to reconcile its reverence for the past with the need to preserve judicial freedom. And "reconciliation" here is a must, for law cannot do without either side of the tension. Without precedent, the tendency for past decisions to influence or even constrain the decisions of present-day judges, the system is hardly a system of "law" as we understand law. And without some measure of judicial freedom from the constraint of precedent, judges would never be able to distinguish between the "law" and the at-times mistaken application of the law by their predecessors, nor would they be able to derive new solutions to new legal problems.

How does Jewish law (*halakhah*) reflect and respond to this challenge? Does Jewish law recognize the power of judicial precedent to constrain the decision-making freedom of present-day authorities, the *poskim*? If these constraints exist, how do the *poskim* cope with or, when necessary, evade them in the search for what they regard as the correct answer to a halakhic question? How do they respond to a perceived conflict between precedent, the accepted and settled understanding of halakhic texts and rules, and a situation that seems to call for a new approach to the law? These questions form the basis of the essay which follows. I ask them in part because I think that the issue of precedent in Jewish law holds some profoundly important implications for us as practitioners of liberal *halakhah*. Indeed, the answers to these questions will do much to determine whether we have a right to call our enterprise *halakhah* in any genuine and plausible sense of that term. While "liberal *halakhah*," like most other intellectual disciplines, is difficult to define with precision and while we may disagree profoundly over any number of its aspects, I think I am

on safe ground in suggesting that its practitioners are united upon two core propositions: first, that an authentic Jewish practice must express itself largely, though not exclusively, in halakhic terms; and second, that this *halakhah* does not and need not conflict with the progressive values that must form the basis of our Jewish experience. Accordingly, our scholars have written extensively on numerous questions of Jewish law, seeking to demonstrate that the *halakhah* is sufficiently flexible and dynamic to support liberal and progressive solutions to questions of ritual and ethical observance.⁹ These solutions, by their nature, often involve the sort of creative interpretation that will elicit new meanings from the literary sources, frequently departing from the decisions of past authorities.¹⁰ It is here that the doctrine of precedent poses a potentially serious and even crippling difficulty to us. Putting it bluntly: to the extent that *pesak*, halakhic decision-making, is constrained by the weight of past decisions, then the Orthodox are right and we are wrong: Jewish law is *not* sufficiently flexible and dynamic to support the kind of *pesak* that we favor, so that our attempts to read it as such amount to a distortion of the essence and substance of the *halakhah*. On the other hand, should precedent operate in a strictly limited fashion within Jewish law, then we would have strong grounds on which to contend that the *halakhah* supports a maximum degree of freedom of interpretation and that *our* interpretations, even though new and "unprecedented," are as halakhically legitimate as those of Orthodox *poskim*.

The results of my inquiry are decidedly mixed. While academic scholars of Jewish law, drawing upon theoretical and programmatic statements scattered through the Talmud and the post-Talmudic literature, declare that the *halakhah* recognizes no doctrine of binding precedent, sufficient evidence exists to suggest beyond much doubt that precedent, the collected weight of post-Talmudic Jewish jurisprudence, exerts a powerful constraining force upon the decision rendered by the contemporary authority. Yet I also hope to show that this situation closely parallels that which prevails in two other representative legal traditions—European "civil law" and Anglo-American "common law." In both of these systems we find the creative tension, of which I spoke earlier, between the healthy respect for precedent and other tendencies that serve to free the judge from slavish dependence upon the rulings of the past. A balance is struck,

therefore, between tradition and continuity on the one hand and legal progress and flexibility on the other. I want to argue that Jewish law, too, achieves this balance through the use of techniques that are particularly well-suited to its history and development. I will conclude with some observations on the application of these findings to our liberal halakhic endeavor.

Precedent in the Civil Law Tradition

"Civil law" is the term generally used to describe the legal traditions of continental Western Europe (excluding Scandinavia), Latin America, and other jurisdictions such as Louisiana and Quebec whose law is presently or was at one time identical with or heavily influenced by Justinian's *Corpus iuris civilis*.¹¹ Of the many substantive and procedural differences between the civil law and other legal systems, the one that concerns us here has to do with what we might call the ideology of lawmaking. In civil law systems, legislation holds pride of place as the dominant source of the law.¹² This flows partly from its Roman antecedents.¹³ Justinian viewed his Code as the single, exclusive source of authoritative law in his empire, which sought "to replace and did replace all former statements of law, both in literature and in legislation."¹⁴ The ideology of this "post-classical" period of Roman jurisprudence therefore saw the Emperor as the source of all law. Where legalists had previously preferred that their law remain flexible and adaptable to new circumstances, "under an absolute monarchy all law tends to be thought of as royal command. ... Thereby further juristic controversy would be precluded, the uncertainty attending all juristic law [*i.e.*, law as it had been developed by prior legal scholars—MW] would be got rid of, and stability of law would be produced. What had previously floated on the mobile waters of juristic doctrine would now be solidly based on statute."¹⁵ Civil law ideology is based as well upon the intellectual trends that dominated the West during the late-eighteenth and nineteenth centuries and that led to the widespread activity of legal codification in Europe during this period. One of these, nationalism, expressed itself in the politico-legal doctrine of state positivism: only the sovereign state can make law, and only statutes enacted by the legislative power can *be* law.¹⁶ Customary law, which pre-

dates the organization of the political state and certainly exists prior to the enactment of the legal codes, is the great exception to this rule. All civil law jurisdictions recognize custom as the other "source" of law; hence, the theorists tend to divide the civil law into the broad categories of "written law" (*ius scriptum*) or legislation and "unwritten law" (*ius non scriptum*) or custom.¹⁷ Yet they tend to dismiss custom as being of slight importance compared to legislation.¹⁸ The second great intellectual trend was the rationalism that dominated Continental philosophical thought during the Enlightenment and that was congenial toward codification. Ever since Justinian, the civil law has assumed a systematic and formally rational style, one accessible to philosophers who are not necessarily lawyers, as opposed to "the common law, with its mass of cases and its lack of theory, especially until the nineteenth century, (which) is largely impenetrable to anyone not specifically trained in the common law."¹⁹ Codification contributes to this systematic outlook; when the law has become fully rational and set forth in clear terms, the answer to a legal problem should consist in the simple application of the relevant statute rather than the interpretation of a line of cases.²⁰

The supremacy of legislation as a source of law parallels the comparatively inferior position of the judiciary in civil law jurisdictions. Just as the Roman law judge was frequently a layperson not especially trained in the law,²¹ the civil law judge does not exert a significant influence over legal development. Limited by the doctrine of the separation of powers, the judge is not to make law or interpret unclear legislation; he is rather to refer such difficulties to the legislature, the ultimate source of the law.²² He simply applies the law to the facts of the case and reaches a decision in that case alone, in a supposedly deductive manner. He must base his case solely upon "the law," and this does not include previous judicial decisions.²³ In interpreting the law, the judge must give paramount weight to the intent of the legislator rather than to the practice of the courts, which may be rejected or modified at any time, depending upon the case.²⁴ The doctrine of binding precedent (*stare decisis*) is rejected in civil law theory.²⁵

Civil law practice, on the other hand, accords the rulings of judges a much greater degree of influence than the theory would seem to allow. Judges perforce must interpret the law when applying its provisions to cases. And if there is no formal doctrine of binding precedent, civil law judges are in fact guided by

prior decisions. Lawyers and judges alike refer to prior cases in briefs and decisions; "the fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States."²⁶ The situation in France, where the force of precedent is somewhat weaker than it is in other civil law countries,²⁷ serves as an example. In theory, precedent does not bind a French judge; he may even be forbidden to treat a prior decision as the obligatory reason for his ruling in the instant case.²⁸ Indeed, the decision of a regular court will be reversed for "absence of legal basis" if the only justification it offers for it is an earlier decision of the high court (*Cour de Cassation*).²⁹ Yet the citation of precedents is common in French law, where the prior decisions of the courts are the most important factor in predicting how the present court will interpret the relevant legislation.³⁰ It is understood that while the *Cour de Cassation* can change its mind whenever it so chooses, it will not do so readily. The reasons for this are similar to the reasons for the emphasis upon precedent in common law countries: the requirements of reasonable certainty and predictability in the law; the desire of judges to conserve intellectual energy or to avoid embarrassing reversals by higher courts; the demand that like cases be treated alike; and the consideration that justice not only be done but should appear to have been done.³¹ Thus, the "caricature" that civil law systems are free from the constraint of precedent "is certainly no longer remotely accurate, if ever it was." Rather, "precedents are generally recognized at least as providing strong (but defeasible or outweighable) force."³²

The clash between the ideology and the practice of the civil law underscores the inevitability of precedent even in legal systems that formally renounce it as a source of law. It also suggests the ways in which the civil law, intentionally or not, negotiates the "creative tension" between respect for precedent and the need to escape it. The civil law begins with an assertion that law is fundamentally a legislative endeavor. Legislation, especially codification that strives to impose order and system upon the legal materials, is the innovative force within civil law, for it is the essence of legislation that its power lies in the here and now, with the authority of the current legislator, rather than in the rulings of past judges or the statements of ancient authorities. It is thus a force for reform, for an observed defect in the law can be remedied much more simply and quickly through comprehensive leg-

islative act than through the slow and piecemeal development of judicial interpretation.³³ Yet reliance upon precedent remains a vital part of the judicial function. This demonstrates that the respect for tradition and the desire to solve legal issues by proceeding on the basis of prior decisions is a basic element in the conception of "law" even in jurisdictions which officially refuse to bind their judges by the rulings of the past. Precedent, we might say, is not binding, but it is persuasive, a means of mapping the way for the judge so that he will not likely stray very far from the paths blazed by his predecessors. If legislation insures that the law in civil law countries remains flexible, forward-looking, and open to change, the practice of judicial precedent insures that it remains *law*, a conversation in which the sages of the past are asked to confront the problems of the present.

Precedent in the Anglo-Saxon Legal Tradition

While the civil law is rooted in legislation and codification illuminated by the writings of university-trained jurists,³⁴ the "common law," the basic legal doctrine of English-speaking countries, emerged from "a unique, 'unwritten' constitution and the recorded, but orally rendered decisions of an extraordinarily gifted and respected judiciary."³⁵ In saying this we should take care not to overlook the significant role played by legislation in common law systems. Still, it is correct to state that England's common law, originating in the efforts of the Plantagenet magistrates to extend the authority of the king's courts, is to a great extent the product of judges rather than legislators or academicians. It is a system of case law, and the distinguishing characteristic of such a system is precedent.³⁶ This is only natural: if the basis of a legal system lies in the rulings of judges rather than in the abstract principles and provisions of an enacted code, those rulings constitute the major source material upon which a judge can draw for his decisions. "A judge in a subsequent case *must* have regard to (prior decisions); they are not, as in some other legal systems, merely material which he *may* take into consideration."³⁷ To the extent that a precedent is recognized as binding, especially—but not necessarily³⁸—upon a court that ranks lower in the legal hierarchy than the tribunal which issued the original ruling, the court applies the doctrine of *stare decisis* ("let the deci-

sion stand"): the prior decision becomes a formal reason for the ruling in a subsequent case and therefore a formal constraint upon the subsequent judge's freedom of decision. By "formal," I mean a reason that is sufficient in itself: if a precedent is "binding" the subsequent judge *must* decide in accordance with the legal rule or "holding" of the earlier decision,³⁹ whether or not he or she likes or agrees with it.⁴⁰ It is in this sense that a system of case law differs so starkly from the civil law tradition, for there is little doubt that, say, a French judge would overrule the decision of a prior court should he consider it wrongly decided.⁴¹ Common law systems differ as to just how binding the "binding" precedent is,⁴² and there is no unanimity among legal theorists as to how precisely to identify that part of the prior decision which in fact obliges the subsequent judge to decide in the same way.⁴³ Yet most common law countries have adopted some version of the doctrine of *stare decisis* and recognize a significant body of binding precedents.⁴⁴

Not all precedents are regarded as binding. Common law theorists speak of "persuasive" precedent, a ruling "which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve."⁴⁵ Among these are the decisions of foreign courts, particularly those of other common law countries, and those parts of judicial decisions regarded as *dicta*, or extraneous to the decision's legal holding. And it has been suggested that, at one time, *all* precedents in the English tradition were held to be persuasive rather than binding in nature. I refer here to the so-called "declaratory theory" of the common law, according to which a judicial decision is regarded as evidence of the pre-existing law rather than as an act of law-creation. Thus, Sir Matthew Hale (d. 1676) writes that judicial decisions

do not make a law, properly so called; for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons.⁴⁶

Similarly Blackstone (d. 1780): "the common law, properly so called" consists of "general customs" established by "immemor-

ial usage." The decisions of the judges, the "living oracles," are "the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law." Judges, therefore, while obligated by practice to follow prior decisions, may overturn these "where the former determination is most evidently contrary to reason." But even in such a case, the judge does not legislate; "for if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined."⁴⁷ In this view, a precedent is "binding" only to the extent that it is *right*, a correct application or interpretation of the law that exists prior to and apart from the judge's decision and that acts as a standard by which lawyers can measure that decision's correctness. Yet the declaratory theory has gone out of fashion; it seems much more reasonable now to concede that common law is *judge-made* rather than "judge-declared." The judicial decisions are precedents because they lay down the legal rule to be followed. This view proceeds from the jurisprudential theory generally known as legal positivism, rooted in the nineteenth- and twentieth-century reactions against the more "mystical" conceptions of law championed by earlier theorists.⁴⁸ Positivism asserts that law is a human artifact; it is "legal" because it is *posited*, enacted, created by an authoritative law-making agency.⁴⁹ From now on, a precedent is not judged "correct" to the extent that it accords with the law; a precedent *is* law, having been established by proper judicial authority, whether or not the subsequent judge thinks the earlier case was rightly decided.⁵⁰ A precedent cannot be "wrong." A precedent *binds* as an act of legal power; it need not "persuade." Thus, referring back to that "theoretical problem" of which I spoke earlier, the doctrine of binding precedent as it has come to be understood effectively blurs the distinction between *law* and the judicial interpretation or application of that law.

As though recognizing this dilemma of theory, however, the common law tradition provides remedies for it. Even if a precedent is an act of judicial legislation and hence, like a legislative enactment "binding" upon the courts, the common law judge is not rigidly subservient to it. He or she may in some cases overrule a precedent, either explicitly or implicitly, or simply disregard an earlier ruling should it prove troublesome.⁵¹ A famous

tactic for loosening the hold of precedent is that of distinguishing, whereby the present court will find that, though a precedent is "binding," the rule stated by its predecessor was too wide or vague, or that it does not cover the fact situation of the present case. This reflects the reality that legal reasoning is primarily analogical in nature: the court must decide whether the present case sufficiently resembles the precedent in order to determine whether to apply the precedent's rule.⁵² And distinguishing is not the only intellectual tool that makes for judicial innovation and maneuver. The American legal scholar Karl Llewellyn devoted much research to documenting the fact that the case law system provides judges with "leeways" as well as with constraints in dealing with precedents.⁵³ From his study of hundreds of appellate opinions, he derived a long list of techniques by which American courts construe the rulings of their predecessors, broadly or narrowly. Llewellyn noted that legal practice regards all of these "canons of construction" as proper rules of interpretation: that is, a judge is procedurally entitled to employ them in deciphering the meaning of the legal texts before him or her. Yet these rules are not all of one piece; they are diverse, divergent, even contradictory. A judge may decide to follow, restrict, ignore, redirect, or "kill" the holding of a precedent, all with equal legitimacy, by utilizing these techniques. And since the decision *which* technique to use cannot be determined by some other, overarching set of principles, it follows that judicial decision is not simply a matter of logical deduction from premises (precedents) to conclusions. Rather, in the application of precedent the court must inevitably expand or contract it, creating new legal meaning in the process. The current judge, in other words, does not merely read precedent but rewrites it; in every citation of a prior ruling the judge effectively determines what that ruling shall mean in the present context. This does not mean that judges operate without constraints upon their freedom of decision; such constraints exist, as Llewellyn took pains to point out. It does mean, though, that these constraints take the form of social and professional factors that determine the environment in which the craft of judging takes place.⁵⁴ They do not operate as a conceptual straitjacket that coerces a predetermined interpretation upon the judge, who might legitimately understand a precedential case in a variety of ways. "Later courts ... are not content to be completely fettered by their predecessors,

and wisely so: for the development of the common law has been an empirical one proceeding step by step."⁵⁵ Or as Llewellyn himself put it: "one does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases."⁵⁶

At first glance, the legal theory of the Anglo-American tradition stands in stark opposition to the ideology of civil law. Common law is derived from judicial decisions, and those decisions, as precedents, create law that constrain the freedom of subsequent judges. Binding precedent deprives subsequent courts of the opportunity to reach beyond the controlling cases to some higher or background legal standard by which, as it were, to judge the judges. Yet as we have seen, the common law tradition plays host to a competing, if no longer dominant theory of precedent, which sees the judicial ruling not as law properly so called but as evidence of law, a persuasive argument that the law—a reality distinct from any particular judicial decision—is best interpreted in this particular way. It has also created, alongside its numerous precedents, a host of tools through which those precedents can be and are overruled, eliminated, re-fitted, and re-created—as well as upheld, preserved, strengthened and solidified. Thus does the common law respond to the theoretical and the practical problems that emerge from a doctrine of precedent. On the theoretical side, judges are equipped with "leeways" whereby to adjust precedents to what in their view is the correct interpretation of the law. On the practical side, judges can develop the existing so that it coheres with the demands of the contemporary scene. Common law judges are therefore endowed with considerable judicial freedom, both to arrive at what they think is the right answer and at what they think is a good and useful answer, even though they are formally bound to follow the decisions of the past. No less than judges in civil law countries, those of the common law tradition have found the means whereby to accommodate the "creative tension" between the two great conflicting needs of a legal system: to honor precedent and to overcome it.

Precedent in Jewish Law

While the civil law and the common law proceed from opposite poles on the jurisprudential spectrum—the former is primarily

"legislative" in origin while the latter is at heart "judicial"—both display the sort of creative tension over the concept of precedent which I have suggested is symptomatic of legal systems. Both traditions pay deference to the rulings of the past and established judicial practices; even civil law courts cite cases and tend to follow the general thrust of judicial interpretation. And both traditions also have means of freeing the contemporary judge from the fetters of precedent when this is necessary; even common law judges (and, perhaps, *especially* the common law judges) have developed sophisticated techniques for doing so. I now want to turn to the consideration of Jewish law in the light of these realities. In what ways does the Jewish legal tradition acknowledge the power of precedent as a constraining factor upon a rabbi's freedom to decide an issue of *halakhah*? And in what ways does it accommodate the value of adherence to the authority of the past with the need for flexibility and innovation in halakhic decision?

1. *The Conventional Wisdom: There Is No Binding Precedent in Jewish Law.*

Among the scholars grouped under the rubric of *mishpat ivri*, the academic study of Jewish law, we encounter a broadly-accepted consensus that precedent exerts no binding, obligatory constraining force over the decision-maker in any case at rabbinic law. The words of Zerach Warhaftig, who has produced a major work on the subject, summarize this consensus rather well:⁵⁷

A decision found in the responsa literature or among a collection of court cases is a valuable source from which to learn the *halakhah* ... but the court is not constrained to follow a previous ruling. The judge's task is to render the correct decision as he sees it. He is permitted, and even obliged, to seek advice from those more knowledgeable than he, to study the sources and the precedents, but the decision is his and his alone. We therefore learn that the precedent (*takdim*) in Jewish law (*mishpat ivri*) may have a persuasive value (*mancheh*), but it is not binding (*mechayev*) upon the judge.

To these we might add the observations of Eliav Shochetman:⁵⁸

A rabbinical court is indeed required to consult the rules of decision-making as formulated in the halakhic literature, a literature which includes responsa based upon actual cases. Yet these

responsa are not actual cases but rather expressions of halakhic opinion. Therefore, they have the same weight and influence enjoyed by other legal sources (depending, of course, upon the reputation of the writer). A rabbinical court decision that emerges from a certain constellation of facts exerts no obligatory influence over the decision of another court, for the guiding rule has always been: "the judge must rule on the basis of what he sees."⁵⁹

And finally, the comments of Menachem Elon, the *doyen* of *mishpat ivri* scholars:⁶⁰

... the doctrine of binding precedent conflicts with the basic approach of Jewish law to decision making ... no code of Jewish law has ever been accepted which presents to the judge only a single opinion stated unqualifiedly as the law ... Within this dynamic and flexible conception of law, there is, of course, no room for the doctrine that the *ratio decidendi* of a judicial decision can bind the judicial system to reach the same result in other cases.

This conventional wisdom draws its support from a number of factors. The first of these is what we might call linguistic evidence: the legal term "precedent" does not exist in the Talmud or in the other traditional legal sources. Modern Hebrew had to invent such a term—*takdim*⁶¹—which serves the purposes of the Israeli legal system that has followed the doctrine of binding precedent since the period of the British mandate.⁶² Traditional halakhic language does have terms which denote the judicial decision—*pesak din*, *ma`aseh beit din*, or simply *ma`aseh*—but these refer to the ruling of the *posek* or *dayan* in the instant case and do not carry the sense of "binding precedent." The second factor is based upon evidence drawn from Jewish judicial practice. Talmudic law does not generally require that a court explain the reasoning behind its decision,⁶³ and the absence of an explicitly-stated rationale—a holding or *ratio decidendi*—in turn renders it virtually impossible to draw analogies and to use the decision in one case as a precedent upon which to decide another.⁶⁴ This practice helps to explain why traditional Jewish law does not know of the appellate court:⁶⁵ the lack of arguments and explanations in the judicial ruling gives an appellate court nothing to critique and renders such an institution superfluous.⁶⁶ It helps to explain, as well, the Talmudic statement: "one should not learn the *halakhah* either from a theoretical statement (*limud*) or from a ruling in a case (*ma`aseh*)." As Rashbam explains, we do not learn

from the *ma`aseh* because "one may mistake the reason upon which that particular ruling is based; indeed, this mistake is frequently made."⁶⁷ The inference is that the actual ruling was generally not accompanied by the sort of argumentation that allowed one to learn from it and to apply it as a precedent to other cases.

The third factor which diminishes the binding power of precedent in Jewish law is that of legal theory, by which I mean the understanding of the nature of law and its authority in the halakhic system. A powerful stream of rabbinic jurisprudential thought insists upon a clear and definite distinction between "law" on the one hand and applications of that law by judges on the other. The law is declared in the Torah, both written and oral, and given its authoritative literary formulation in the Babylonian Talmud and its cognates. All subsequent decisions by Jewish legal authorities are based upon the Talmud and are correct insofar as they comport with the *halakhah* as set forth in the Talmudic sources. The ruling (*pesak*) of any decisor is not to be identified as "law" but rather as an interpretation or application of the law. The decision does not make law; at best, it serves as evidence of what the law truly is. It follows, then, that on this subject Jewish legal thought parallels the dominant theory of the civil law and the declaratory theory of the common law: no prior decision can constrain a judge from ruling as he sees fit in the case before him. The duty of the *posek* is to interpret the law—that is, the Talmud—according to his own best understanding, regardless of the opinions of other judges. As the Talmud puts it: "a judge must rule on the basis of what he sees" (*ein ladayan ela mah she`einav ro'ot*).⁶⁸

Two statements of this legal theory, both of them "classics" in the literature of Jewish jurisprudence, illustrate this point with special clarity. The first is taken from the Introduction to the *Mishneh Torah (Yad Hachazakah)* of Maimonides (Rambam), wherein the author spells out the guiding methodology of his massive undertaking. Rambam draws a sharp distinction between two different sets of legal materials: those interpretations, legislative enactments and other practices which are included in the Babylonian Talmud and those which arose following the Talmud's redaction. "All Israel is obliged to follow the decisions of the Babylonian Talmud ... because all Israel accepted these decisions upon themselves (*hiskimu aleyhem kol yisrael*)." By contrast, those legal materials cre-

ated following the redaction of the Talmud are binding only upon the communities which adopted them; the *beit din* of one community cannot coerce the court of another community to follow its interpretation or enactment. Nor can the court of one generation expect that a successor will follow its rulings. "If one of the *geonim* should interpret the law one way while another court concludes that such is not the correct interpretation of the Talmud, we need not follow the first ruling but rather whichever ruling is more persuasive (*lemi shehada`at notah*)." Two points deserve particular mention here. First, it is the Talmud, and *not* the decisions of any post-Talmudic authority, which determines the law, so that the halakhic decisor may presumably overrule or ignore generations of accumulated precedent when he believes that those rulings do not comport with the best interpretation of the Talmudic sources.⁶⁹ And second, there is no hierarchy among post-Talmudic scholars. Rambam pointedly refers to them all as *geonim*—"those *geonim* who hail from the land of Israel, or Babylonia, or Spain or France"—a subtle indication of his rejection of the claim to special halakhic authority on the part of the post-Talmudic Babylonian sages were customarily designated as *geonim*.⁷⁰ No one scholar or group of scholars deserves our legal acquiescence on the basis of his or their position or prestige; we follow them when they are right—that is, when their view of the law accords with the correct interpretation of the Talmudic sources—and we dissent from them when they are wrong. This statement, a declaration of halakhic independence from the rulings of the past, should not blind us to the extent to which Rambam follows those rulings in fact. The *Mishneh Torah* has been called by one of its most perceptive students "a sturdy link in the great chain of Gaonic-Spanish Talmudic commentary." Rambam's use of the *geonim* was "pervasive," as was his reliance upon the interpretations and decisions of Rabbenu Chananel, R. Yitzchak Alfasi and R. Yosef ibn Migash.⁷¹ If Maimonides is a radical in the manner in which he presents the *halakhah*—in concise Hebrew, arranged in logical order, legal rules presented without dispute or minority opinions—he is a conservative in terms of its content: the *halakhah* of the *Mishneh Torah* is largely the *halakhah* of his predecessors. Precedent, therefore, is for Rambam a powerful factor in the determination of the correct legal decision. But we are dealing with "persuasive precedent" here, precedent that teaches the student yet does not constrain him from expressing dissent. If Maimonides is influenced by his teach-

ers, what of it? Such is the way that legal traditions in general, and the halakhic tradition in particular, develop and grow. "One naturally relies upon a crystallized and respectable tradition, knowingly or unknowingly drawing upon it."⁷² So long, however, as Maimonides insists upon his freedom, and that of every other halakhic authority, to make his own decisions according to his best understanding of the Talmud, then we are safe in citing his writings on halakhic theory as evidence that Jewish law does not recognize a doctrine of binding precedent.

The second "classic" statement affirming the halakhic jurist's independence from binding precedent is that of R. Asher b. Yechiel, or Rosh (d. 1327), the author of a renowned halakhic compendium (*Sefer Hilkhhot* [or *Piskey*] *Harosh*) that takes the form of a supplement or commentary to the *Halakhhot* of R. Yitzchak Alfasi. Rosh, a leading student of the tosafist R. Meir of Rothenburg, emigrated from Germany and arrived in Spain in 1305, eventually settling in Toledo, where he maintained a Talmudic academy until his death. His biography plays a significant role in most estimations of his approach to halakhic decision-making. Born and bred in the halakhic traditions of Ashkenaz, Rosh expresses serious reservations over the tendency of *poskim* in his adopted land to rely uncritically upon the decisions of Rambam's *Mishneh Torah* for legal guidance. These reservations stem partly from Rosh's dissatisfaction with the literary form of the Maimonidean Code—Rambam presents the law without accompanying source citation or argumentation⁷³—and partly from the fact that Rosh believes that the teachings of his own countrymen offer a superior interpretation of Talmudic law than do those of the Sefardim.⁷⁴ Rosh, moreover, exhibits a more general opposition to the reliance upon legal precedent, whether that of Maimonides or anyone else, which brings us to the "classic" statement found in his *Halakhhot*.⁷⁵ His discussion relates to the Talmudic *sugya* on the two forms of judicial error, specifically the more blatant error which causes a judgment to be annulled (*hato`eh bedavar mishnah*) and the lesser error which leaves the judgment intact but which imposes a duty of compensation upon the offending judge (*hato`eh beshikul hada`at*).⁷⁶ I shall have more to say on this question; here, I want only to consider Rosh's reaction to a previous dispute, between the twelfth-century Provençal scholars R. Zerachyah Halevy (Razah) and R. Avraham b. David (Rabad). Razah⁷⁷ quotes the opinion of an unnamed sage that

nowadays, when all of Jewish law has become *halakhot pesukot* ("decided law"), the second, "lesser" error no longer exists. Since the law is so clear and available to all, all judicial errors are errors over the obvious and decided truth, serious enough to annul the judge's decision and to warrant a new trial. Razah rejects this position: "blatant error" is only the ruling which can be proven beyond doubt to contradict the law as formulated in the Mishnah or the Talmud. By contrast, legal rulings of the post-Talmudic "*geonim*" do not enjoy the status of decided law. Thus, an error concerning those rulings is not the "blatant" sort of mistake which nullifies the ruling. Rabad⁷⁸ defends the opinion of the unnamed sage: the opinions of post-Talmudic authorities do carry substantial precedential weight. Indeed, he goes farther, extending the sage's words beyond the range of "error" to cover even intentional departures from the rulings of the *geonim*. He writes—uncharacteristically for him⁷⁹—that "we do not have the authority to dispute the ruling of a *gaon* on the basis of our own opinion, neither may we interpret a text differently so as to support a legal decision that departs from that of a *gaon*, except in the case of a well-known halakhic controversy." To all this, R. Asher draws a clear distinction between "error" and "intention." If a judge, unaware of the decisions of the *geonim* on the matter before him, issues a ruling that contradicts those decisions, and if that judge would surely have ruled differently had he known of the geonic precedents, then his ruling is annulled. This applies, says the Rosh, not only to the decisions of the outstanding *geonim* of the past but even to the writings of the sages in one's own generation. This surely stands to reason: if knowledge of any decision, even a recent one, would cause a judge to alter his opinion, ignorance of that decision must qualify as the sort of "blatant error" that strips his ruling of its validity. However,

if he knows of a geonic ruling yet finds it unconvincing, and if he can support his own view with evidence that persuade his contemporaries, then we apply the rule "Jephthah in his generation is the equal of Samuel in *his* generation." That is, you have no judge save the one who lives in your own time.⁸⁰ And that judge may depart from the decisions of his predecessors, for one is entitled to depart from, expand upon or even reject all rulings not clearly supported by the Talmud of Rav Ashi and Ravina ...

This goes beyond the somewhat more circumscribed opinion of Razah, who confines his remarks—at least here⁸¹—to the concept

of "error": that is, whether ignorance of the opinions of post-Talmudic authorities is equivalent to a mistaken understanding of the Talmud itself. And it most certainly takes issue with Rabad's statement that the knowing departure from the rulings of past authorities constitutes "blatant error." Rosh, for his part,⁸² champions the principle of judicial freedom. The test for the correctness of any halakhic decision is not its coherence with some prior judicial ruling but its agreement with the Talmudic sources of all *halakhah*. Just as the later *amoraim*, Rosh writes, permitted themselves to dissent from the rulings of the earlier *amoraim*, despite the fact that "earlier" sages tend to enjoy greater intellectual stature in our eyes, so does every *posek* possess that authority. Thus, "in a case where two prior sages disagree, let the judge not say 'I shall rule in accordance with whichever one I wish'; such is a false judgment." Rather, the judge should determine the law on his own, according to proof and evidence drawn from the texts.

In its essence, Rosh's statement parallels that of Rambam, described above, in drawing an unmistakably clear distinction between the *law* as formulated in the Babylonian Talmud and *interpretations of the law* represented by the rulings of post-Talmudic authorities. The former is binding, the latter is not; when confronted with a decision by an earlier *posek* that appears to conflict with the correct understanding of the Talmud, the later judge has the discretion to modify that ruling or to overturn it. The *law* constrains the judge's freedom; precedent, in the form of earlier judicial decisions, is not *law* and therefore does not constrain. "Precedent" does exist, to be sure, in Jewish law, since it is assumed in all these discussions that the judge will at least give careful consideration to the words of his predecessors. In this way, Jewish law reflects the tendency of all legal systems to rely heavily upon the record of past thinking and action. But this "precedent," it would seem, is not of the binding sort (*takdim mechayev*); it is a "persuasive precedent" (*takdim mancheh*) in the manner of the civil law and of the "declaratory theory" of the common law.

2. *The Other Side of the Story: Precedent as a Constraining Factor in Halakhah*

The evidence considered thus far, proof drawn from linguistics, legal practice, and legal theory, supports what I have called the

conventional wisdom among the scholars that Jewish law does not recognize a doctrine of binding precedent. In the final analysis, the judge enjoys the discretion to rule as he sees fit on any halakhic matter, even when his ruling flies in the face of the preponderance of post-Talmudic opinion. As Joel Roth puts it, this principle of judicial independence—"a judge must rule on the basis of his own best understanding of the law"⁸³—is the "systemic principle" and the "*sine qua non*" of halakhic jurisprudence, its "ultimate judicial guide."⁸⁴ The question remains, however, whether this description of the Jewish legal tradition is entirely accurate. For we can point to at least three indications which, *contra* the conventional wisdom, argue that the halakhic decisor is much more constrained by the rulings of the past than has been indicated thus far.

a. THE CONCEPT OF JUDICIAL ERROR

As noted above, *halakhah* speaks of two categories of judicial error that are causes for action by the losing party in a case at monetary law (*diney mamonot*).⁸⁵ The first is an error concerning *devar mishnah*, a matter of law that is clearly settled in the Mishnah or the Talmud.⁸⁶ Such a mistake is tantamount to deciding a case in a manner that contradicts the law itself. The decision is not "law" at all; the judgment is annulled and the case is retried.⁸⁷ The second sort of error is a mistake of *shikul hada'at*, "the weighing of opinions." In this instance, the case remains settled and the decision is a valid one. At the same time, the decision is erroneous, and the judge must compensate the losing party for the damage caused by his ruling.⁸⁸ The Talmud defines this error as a case in which a judge rules according to one side of a tanaitic or amoraic dispute ("and it is not stated that the *halakhah* accords with either view") while general judicial practice (*sugya de'alma*)⁸⁹ is to rule according to the other view.

Two points are worth special mention here. The first is that Jewish law recognizes the possibility of judicial error at all. The decision of the court is not final; it can be overturned when it is wrong, when it does not conform with the law as that law ought to be decided. As we have seen, this reversal is not enforced by a "higher" court, since Talmudic jurisprudence does not know of a system of appeals. It occurs when the court that issued the decision is made aware of its own error. The second noteworthy point is that "general judicial practice" is a criterion for dis-

cerning error. It is one thing to say that a judge's decision is "wrong" if it contradicts a settled matter of Talmudic law. Had the judge but known of that passage in the Talmud, he surely would have ruled differently; thus, we can say that his ruling is invalid on its face. It is not so obvious, however, why a decision is erroneous when it conflicts with the general tendency of judges to rule differently on the matter at issue. The decision, indeed, remains a valid one despite this error, for so long as it does not clearly run counter to settled Talmudic law we cannot declare it unequivocally to be "non-law." Still, the judge is said to be at fault, to owe compensation, because the litigants have a reasonable expectation that the judge will decide their case as most judges decide it, in accordance with the interpretations of the legal sources which prevail in their community. The judge, too, participates in this expectation. As Rambam explains the "error of *shikul hada`at*":⁹⁰

for example, a matter comes before the court which involves a dispute among the *tannaim* or the *amoraim*, yet the *halakhah* has not been explicitly (*beferush*) declared in accordance with either side of the dispute. The judge rules in accordance with one side, yet he does not know that the universal tendency is to rule in accordance with the other side.

The implication, of course, is that had the judge but known of that tendency, he would have followed it. Not to follow that tendency is regarded as a mistake, something resulting from his lack of knowledge of the judicial practice that constitutes precedent within his community. The judge, in other words, wishes to rule according to precedent; the community expects that he will rule according to precedent; and if he does *not* so rule, his ruling—though it is not technically in contradiction to settled Talmudic law—is nonetheless presumed to be in error.

This rule, of course, is subject to the strictures of R. Asher b. Yechiel recounted above. That is, the judge is technically permitted to dissent from the rulings of post-Talmudic authorities, inasmuch as his supreme duty is to halakhic truth—"for such is the path of Torah"⁹¹—rather than to precedent. Yet R. Asher explicitly limits this permit for judicial discretion to those judges who are intellectually capable of achieving the formidable task of "deciding according to one opinion or the other on the basis of clear and convincing proofs." On the other hand,

if the judge cannot do this, let him not take disputed property from either litigant and award it to the other, since in every case where the law is in doubt we leave the disputed property with its current possessor. ... And if he is unable to decide according to either side of the dispute, then should he rule one way in a case where most scholars would rule the other way, this is an instance of an error of *shikul hada`at*.⁹²

Even though the *posek* is free to rule in accordance with the *law* rather than with precedent, in practice this freedom is enjoyed only by those *poskim* who possess the confidence to decide the law in cases where the authorities are in dispute. As we shall see, this confidence is a precious commodity in a discipline like *halakhah* that places much weight upon the opinions of much-admired predecessors. In any event, R. Asher's words support the presumption that in most cases, where the presiding judge will not view himself as capable of declaring the law with such certainty, a departure from established precedent will be regarded as an instance of judicial error.

b. EXPLICIT RELIANCE UPON PRECEDENT

Although most judges, and surely those who do not possess extensive Talmudic training, will rule in accordance with "general judicial practice," R. Asher leaves the distinct impression that the truly knowledgeable authority may rule on questions of *halakhah* as he sees fit. So long as he decides in accordance with the *law*—that is, avoiding errors of *devar mishnah*—he is unencumbered by the constraints of precedent. Yet while this impression comports with the "conventional wisdom" that sharply distinguishes between law and judicial precedent in Jewish legal theory, it is contradicted by a powerful stream of halakhic thought and practice. I refer to those scholars and sages who by rights *ought* to declare their freedom from precedent but who in fact argue that contemporary halakhic decision should conform to the rulings of the outstanding *geonim* of the past. Taken together, their statements constitute the second counter-argument to the "conventional wisdom"; they create the contradictory impression that in almost all instances even the greatest authorities will adhere to precedent. This adherence, moreover, will not be a matter of convenience or scholarly habit. Rather, it is entirely right and proper for them to submit to the constraints of past judicial practice.

R. Yosef Karo and R. Moshe Isserles, the two preeminent halakhic authorities of the sixteenth century, illustrate this tendency quite well. Their stories, recounting the motivations and methodologies which produced the *Shulhan Arukh*, are familiar ones. They deserve retelling, however, as a means of emphasizing the fact that Jewish law is not as "precedent-free" as the conventional wisdom would have us believe and that the reliance upon precedent as an indicator of correct legal decision is a practice of great antiquity in the history of the *halakhah*.

R. Yosef b. Efraim Karo (1488-1575) is most widely known as the author of the *Shulhan Arukh*, which remains the standard "code" of Jewish law to this day. His *magnum opus*, however, is his massive compendium entitled *Beit Yosef*, cast as a commentary upon the *Arba`ah Turim* of R. Ya`akov b. Asher. The *Shulhan Arukh*, indeed, is the essence of the halakhic product of the *Beit Yosef*, the *summa* of its conclusions, "a bouquet of its choicest blossoms."⁹³ He wrote the *Beit Yosef*, as he tells us in the book's Introduction, to help bring order out of the halakhic chaos in which the Jewish people finds itself due to the many persecutions and dispersions that have befallen it. The prophecy of Isaiah 29:14—"the wisdom of (the people's) sages is no more"—has been fulfilled, and "the energy of the Torah and its students has been spent." The problem, ironically enough, is not that the vicissitudes of history have prevented us from studying the Torah—a theme that dominates the Introduction to the Code of Maimonides—but that, if anything, we have studied it too well. The Torah "has become not two *torot* but numberless *torot*, on account of the many books that have come into being for the purpose of explaining its laws." No great devotee of halakhic pluralism, Karo reminds the reader that the goal of every good halakhist is to arrive at the right answer to every legal question. The best way to do this, of course, is to study each issue in light of its sources in the Talmud, the commentaries, and the literature of the *poskim*. Yet working one's way through the massive halakhic literature is a daunting task, especially when it is difficult in the first place even to locate the appropriate Talmudic passages with which to begin the analysis. Accordingly, Karo will collect in one literary compendium all the information necessary to halakhic decision.⁹⁴ His work will recite⁹⁵ the Talmudic source passages for every law, the applicable commentaries to those passage by Rashi, the Tosafot and the *rishonim*, and the discussions of the

issue that are found in over thirty works of *halakhah*, so that one who studies the *Beit Yosef* will possess a virtual library of Jewish law and be able to locate the materials required for legal judgment. This judgment, the determination of the *halakhah*, "is the very purpose (*takhlit*) of our work: that there should be but one Torah and one law." But how should this determination be accomplished?

Perhaps, it occurred to me, we ought to decide among the conflicting opinions of the *poskim* on the basis of persuasive Talmudic proofs and evidence. Yet the *Tosafot* and the novellae (*hidushim*) of Nachmanides, R. Shelomo b. Adret and R. Nissim Gerondi are filled with evidence and proofs for every one of the conflicting opinions. It is a haughty thing to say that we can add anything of substance to these discussions. And who is arrogant enough to claim that he can intervene into the disputes of the giants of our halakhic past, refuting that which they have made clear or deciding that which they have left in doubt? For on account of our many sins, our mental capacity is insufficient to understand fully the words of our predecessors, let alone to improve upon their findings. Moreover, even were we able to take this path, it would not be advisable to do so, since it is an exceedingly long path indeed.

Karo, in this revealing passage, does not deny the existence of judicial discretion in the *halakhah*. The individual halakhic authority does enjoy the right to study the sources and to arrive at his own carefully-considered decision. It is for that very reason that the decisor ought to have at his disposal the vast collection of legal materials that the *Beit Yosef* makes available. Yet precisely because they are so vast, the individual student of Torah cannot grasp them with the confidence necessary to arrive at a sure decision. And given the multiplicity of opinions and the ubiquity of dispute within the *halakhah*, the claim that "I can arrive at a clear answer on the basis of my own understanding" is evidence of hubris rather than a healthy self-confidence. Judicial discretion, in other words, exists in theory, but in the application of the *halakhah* within the context of our real world few can adopt it as a practical means of reaching legal decisions. To resolve this dilemma, Karo declares that the *halakhah* is to be decided according to the opinions of a "banc" of leading *poskim*. As a first step, he writes, he will decide the *halakhah* in accordance with the unanimous or majority view among the three great "pillars" of the law (*amudey hahora'ah*) "upon whom rest

the whole house of Israel: Alfasi, Rambam, and R. Asher b. Yechiel." He will follow that view except in those cases where the preponderance of halakhic opinion and practice diverges from it. In the event that a majority decision cannot be derived from among the "big three" *poskim*—for example, should one of them not refer to a certain matter while the other two are in dispute over it—Karo will resort to a second tier of authorities, deciding the law according to the majority view among Nachmanides, R. Shelomo b. Adret, R. Nissim Gerondi, the *Sefer Hamordekhai*, and the *Sefer Mitzvot Gadol*.

This "mathematical" method for determining the law was not without its critics.⁹⁶ Still, its existence demonstrates that the tendency toward binding precedent, to declare the *halakhah* in accordance with the opinions of particular post-Talmudic sages, was advocated by a halakhist of towering reputation. And he by no means was the innovator of this method of decision. Sefardic and "Oriental" Jewish communities had followed such a rule for centuries, adopting either by an act of communal legislation (*takanah*) or by general custom (*minhag*) the practice of establishing one or more outstanding halakhic works as the supreme legal authority.⁹⁷ Maimonides especially wore the title of supreme authority (*mara de'atra*) in Egypt, the land of Israel, and in many other localities, a fact that Karo himself recognizes as a virtually universal custom in his region⁹⁸ and which goes far in explaining the tendenz of his own *Shulhan Arukh*.⁹⁹ The custom in some Sefardic communities was to decide the *halakhah* in accordance with the opinion of R. Asher b. Yechiel. This is another of the ironies of halakhic history, since R. Asher himself opposed such an "automatic" approach to legal decision-making.¹⁰⁰ Yet it, like those tendencies in favor of Rambam, Alfasi, Nachmanides and others, reflected a disposition in Sefardic halakhic thought to defer in legal decision to the judgment of the great *rishonim*, the authorities of the distant past, even when one's own reasoning would lead to a different conclusion.¹⁰¹ The acceptance of binding precedent thus has a long and honored history among the legal practitioners of a large segment of the Jewish community.

A similar custom emerged among the Jews in Ashkenazic lands during that period. R. Moshe Isserles (d. 1572), whose *Darkhey Moshe* commentary on the *Tur* paralleled the *Beit Yosef*, posited that the law should be decided according to "the latest authorities" (*hilkheta kevatra'ey*). This decision-making rule has a

long and rather complex history. It originated in geonic times as a rule of thumb to help decide the *halakhah* in disputes among the sages of the Talmud: "even though the Rabbis may declare that 'in disputes between scholar A and scholar B the *halakhah* follows scholar A,' when later *amoraim* share the opinion of B, the law is in accord with his view."¹⁰² During the Middle Ages, rabbinical authorities began to apply the rule to disputes among post-Talmudic *poskim*. The question which divides contemporary observers is this: when the medieval *poskim* cite the rule *hilkheta kevatra'ey*, do they refer to a particular group of authorities in the recent past, or do they include among "the latest authorities" the scholars of their own generation?¹⁰³ The difference here is significant. If *hilkheta kevatra'ey* means that the decisions of the contemporary sage take precedence over those of all previous generations, then we do not have here a rule of "precedent" at all but a rule that permits, very much in the spirit of the remarks by Maimonides and R. Asher, the individual judge to decide questions of *halakhah* on the basis of his own independent reading of the sources. If, on the other hand, "the latest authorities" are an identifiable group of relatively recent sages and books, then the demand that the *halakhah* be decided in accordance with their opinion is indeed a rule of binding precedent, albeit a different standard of precedent than that set by R. Yosef Karo and the Sefardic tradition. However other halakhic scholars defined this rule,¹⁰⁴ there is little doubt that R. Moshe Isserles adopted the latter definition. We are not the "latest authorities; the *batra'ey* are rather the most recent authorities whose *written* decisions are customarily followed in our communities.¹⁰⁵ These authorities, rather than the "banc" of earlier scholars (*rishonim*) assembled by Karo, are our teachers. While Isserles disagrees with Karo as to the *source* of binding halakhic precedent, the two are in accord on the notion that there *is* such a thing as binding precedent in *halakhah*, a set of past rulings which ought to determine our legal practice and constrain the freedom of the contemporary halakhic authority.

Like the concept of judicial error, the reliance upon precedent displayed by both Karo and Isserles is no absolute guarantee of the absence of judicial discretion in the *halakhah*. Rabbinical authorities are still entitled to rely upon their independent judgment in determining the law,¹⁰⁶ particularly on matters their predecessors have not adjudicated. What the examples of these

scholars tell us, however, is that in theory as well as in practice the tendency to seek out and rely upon past decisions exerts considerable constraining force over the discretion of the contemporary *posek*. Facts such as these ought to give us pause before we proclaim, along with the "conventional wisdom," that Jewish law does not recognize a doctrine of binding precedent.

c. THE HALAKHIC CONSENSUS

Over time, a question that has long been a subject of lively dispute within a legal community will become settled. Though the community may have in the past entertained disagreement and divergent approaches to its solution, this multiplicity of views becomes out of place once a widely accepted answer has been arrived at. That answer now holds the status of "law," so that the burden of proof rests heavily upon those who claim that it is not in fact the only correct answer or even the best answer. This process occurs in Jewish law whenever the community of *poskim* reach a consensus as to the right answer to a previously-disputed halakhic issue. At that point, while students of the *halakhah* will continue to study the "rejected" approaches, those will be regarded as purely theoretical possibilities. The law in practice (*halakhah lema`aseh*) will be identified by most observers with the consensus view among the *poskim*. Other, conflicting views, however plausible they may be as interpretations of the halakhic sources, will be seen as incorrect.

This consensus performs a precedential function in *halakhah*, a constraint upon the freedom of rabbinic scholars to derive solutions to legal problems that differ from the consensus view. We see evidence of this consensus throughout the history of Jewish law, every time a community adopts through formal or informal processes the practice of deciding their legal issues in accordance with a single *posek* or a group of *poskim*.¹⁰⁷ We see it in the form of "rules" for halakhic decision-making, designed to create a uniform interpretation of legal sources that in theory could be read in two or more different ways.¹⁰⁸ And we see it operating on substantive halakhic questions as well, forging agreed-upon solutions to issues otherwise susceptible to a variety of approaches. In a significant sense, what we today call "Orthodox Judaism" is an example of halakhic consensus, a collective stipulation by a particular Jewish community to adhere to the particular halakhic interpretations championed by a particular set of rabbinical

authorities. Consensus thus enables the Orthodox community to identify itself, to its own members and to the rest of the Jewish world. The controversy over abortion in Jewish law serves as a good example of this consensus at work. I say "controversy" because the halakhic literature supports either one of two general approaches to the permissibility of abortion. A number of authorities, including some outstanding Orthodox *poskim* of our own time, hold that a pregnancy may be terminated for a variety of reasons, including the desire to safeguard the physical and emotional health of the mother. Others, however, rule that abortion is permitted only when the procedure is necessary in order to save the life of the mother, when the fetus can be termed a "pursuer" (*rodef*) that poses a mortal danger to her. The debate has a long history; it is involved, complex, and nuanced. Yet one who reads today's Orthodox halakhic literature, particularly those writings such as compendia on "Jewish medical ethics" intended for a general audience, finds little evidence that the more lenient position remains a legitimate option under Jewish law. The more stringent position, which has now been assumed by the preponderant majority of Orthodox halakhists, has become *the law*, while the comparatively lenient alternative (which itself is far from a permit for abortion "on demand" but sets careful requirements before permitting the procedure) is treated as a deviation from the mainstream—*i.e.*, the "correct"—understanding of the *halakhah*.¹⁰⁹

Consensus also operates as a constraining factor in the area of marital *halakhah*. In 1966, Rabbi Eliezer Berkovits, the well-known theologian, proposed a solution to the problem of the *agunah*, the wife unable to remarry under Jewish law because her husband either cannot or will not issue her a valid divorce document (*get peturin*). The injustice of this situation has long been evident. Under traditional *halakhah*, the wife cannot divorce the husband; he must divorce her, and if he does not she may be left with no recourse but to live alone or to accede to whatever exorbitant demands the husband will make of her as his price for issuing the *get*. Over the years, halakhists have sought to construct legal remedies that would enable the *agunah* to remarry in cases where the husband ought to but does not authorize a divorce.¹¹⁰ Berkovits, for his part, suggested that prior to the wedding the bride and groom stipulate that their marriage would be annulled retroactively should the husband one day

refuse to comply with the order of a valid rabbinical court (*beit din*) to issue her a *get*.¹¹¹ In support of this idea, he marshaled an impressive array of halakhic texts, from the Talmud, the codes and the responsa, from the *rishonim* and the *aharonim*, texts which he analyzed and elucidated in the customary rabbinical style. Yet none of this argumentation impressed his critics. One of these, R. Menachem M. Kasher, sternly rebuked Berkovits for his temerity in raising the idea of stipulations in marriage, given that the use of such stipulations had been unequivocally rejected by the great *poskim* of previous generations. The stature of these authorities, along with their sheer number (Kasher estimated that 1500 rabbis had explicitly rejected "conditional marriage" [*kiddushin al tenai*] under any circumstances), 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."¹¹² The rabbinical opposition Kasher cited had been stirred by a previous proposal, floated in 1907 by an assembly of rabbis in France, that called for the use of stipulations in marriage as a remedy for the *agunah*.¹¹³ Berkovits, too, mentioned that proposal but argued that his own plan was free of the difficulties that had led the *poskim* to reject it. Yet the halakhic consensus had been formed: "stipulations" of whatever kind are not to be entertained in Jewish marriage, no matter the Talmudic and halakhic argumentation that might be brought in their favor.

A similar fate befell Rabbi Shlomo Riskin, who called in 1989 for the rabbinical courts in Israel to coerce husbands to divorce their wives when the latter refuse conjugal rights on the claim that "he is repulsive to me" (*ma'is alay*).¹¹⁴ This claim, mentioned in the Talmud, is taken by such medieval authorities as Maimonides and Rashi as grounds for coerced divorce,¹¹⁵ and were the rabbis to accept it as such today, the legal position of the wife would be vastly improved. By "rebellious" against her husband—that is, by declaring him repulsive and refusing him conjugal rights—she would set into motion a chain of events that, given the power of the Israeli rabbinical courts to adjudicate divorce law and to enforce their decisions, would lead inevitably (in most cases) to her freedom. The difficulty is that the rabbis do *not* accept that claim today as grounds for coerced divorce. Riskin attributes this state of affairs to the influence of R. Ya'akov Tam, the leading Tosafist, who feared that the stability of marriage

would suffer if the wife were to enjoy such easy access to divorce.¹¹⁶ R. Tam's position was adopted by virtually all subsequent *rishonim*, to the point that the *Shulhan Arukh*, which frequently recites Rambam's opinion as *halakhah*, makes no mention of his position on this issue.¹¹⁷ Riskin's argument for restoring the practice of coerced divorce in these cases is two-fold: Rashi and Rambam present an interpretation of the Talmudic sources that is as good as if not better than that of R. Tam; and the social concerns which seem to have led R. Tam to his ruling are far outweighed today by the need to rescue deserted wives from their status as *agunot*. We have here, again, a, apparently legitimate halakhic argument, crafted by a rabbi whose solicitude for *halakhah* is beyond reproach. Yet here again, his proposal is rejected out of hand by Orthodox commentators on the grounds that R. Tam's opinion "has been accepted into the fabric of the *Shulhan Arukh*, the basic code of practice for halakhic Jewry." Instead, Riskin is advised to join in the search for remedies for the *agunah* problem that have some chance of being accepted.¹¹⁸ The halakhic consensus once more makes itself felt. The consensus having been established—in this case, it has been established for centuries—a conflicting view of the *halakhah* is rejected out of hand, despite the plausibility of that view as a matter of textual interpretation. The rejected opinion certainly retains its theoretical and historical significance, for it is of deep interest to the scholar that Rashi and Rambam read the Talmud differently on this point than do R. Tam and his successors. The "scientific" scholar, too, may want to consider the social, cultural, and other factors that might have led to these variant interpretations. But the rejected opinion is not taken seriously as an alternative approach to the real-life application of Jewish law.¹¹⁹ Indeed, the very fact that it *has* been rejected by the halakhic consensus is itself a criticism against those like Riskin who might think to raise it again.

To all of this, one might respond that consensus is not a formal constraining rule in the *halakhah* but rather a social fact, the tendency within legal or religious communities to unify over time around particular resolutions to contentious issues. Once a resolution has gained wide acceptance, it may be quite natural for the community's members to "gravitate"¹²⁰ toward that resolution, affirming it as one of the accepted truths defining the community's beliefs and actions. Those who question these long-

accepted truths will be seen as dissenters, troublemakers perhaps, for raising issues that had been thought settled. But a fact of social life should not be confused with the *theory* of law by which the group lives. That theory may well permit the community's members to revive arguments that have lain dormant for some time. So, too, in the *halakhah*: regardless of the tendency of the community to coalesce around the "accepted" opinions, this social fact does not—in theory—prevent competent scholars from reconsidering other opinions that, though not reflected in communal practice, still exist as plausible interpretations of the legal sources. Against this, however, we can discern two major reasons why the halakhic consensus operates as a precedential force in Jewish law. First, the examples cited above show that the existence of a consensus does constrain the decisions of rabbis, making it much less likely that they will issue rulings that conflict with the widely-accepted view of the scholarly community. True, this constraint may be one of practice rather than abstract theory, but it is after all practice which decides the law. Against this reality, theoretical possibilities may matter very little; the *halakhah* that the people actually know will be the *halakhah* that is constrained by consensus. And second, some writers do attempt to construct theoretical justifications for the workings of the halakhic consensus. One such theory attributes special insight, an almost charismatic knowledge to the *gedoley hador*, the leading halakhic sages of the day; the view that they accept should accordingly be seen as the correct one, even if other interpretations of the sources could be advanced.¹²¹ Another approach, that of R. Yosef Dov Soloveitchik, derives a distinction between two types of authoritative tradition (*masoret*) in Jewish law: a "tradition of learning," the Talmudic arguments and proofs that lead to legal rulings; and a "tradition of practice," formed when the community (*kelal yisrael*) adopts particular behaviors as its way of performing the *mitzvot*. This "tradition of practice," the way in which the *halakhah* is observed in fact, bears a strong affinity to what I have termed the halakhic consensus, and as Soloveitchik notes, "reasoning and proofs cannot prevail against a tradition of practice ... in such a case, it is the tradition itself and not Talmudic reasoning which determines the observance."¹²² It is because of this "tradition of practice," "which can no longer be changed on the basis of purely intellectual considerations," that observant Jews will reject out of hand interpretations of the *halakhah*

that diverge from those that make up the consensus view shared by the recognized authorities.¹²³ We must conclude, therefore, that the halakhic consensus is real, that it is a factor of considerable weight in identifying the "correct" understanding of Jewish law for the observant community, and that it functions as precedent, constraining the freedom of the halakhist to derive other decisions on the basis of the sources.

The Leeways of Halakhic Precedent: A Look to the Responsa Literature

What then *is* the role of precedent in Jewish law? The answer that emerges from the halakhic writings and the academic research cited above is equivocal or, better, dichotomous, revealing an apparently deep chasm between theory and practice. The theory holds that *halakhah* does not contain a doctrine of binding precedent. The *law*, the standard of Jewish practice, is to be derived from the recognized sources of the law, primarily the Babylonian Talmud and its cognate literature. The rulings and decisions of post-Talmudic scholars are not strictly speaking "law" but interpretations of the law; possessing no inherent authority, they do not constrain the freedom of the contemporary *posek*. The individual *posek* who finds such a ruling inconsistent with the Talmudic sources is accordingly free to ignore it or to set it aside. In practice, however, the decisions of the post-Talmudic sages exert a powerful precedential force upon subsequent generations. As a matter of practice, a litigant legitimately expects that the judge will avoid judicial error, a ruling on a controversial issue that conflicts with the dominant opinion among the *poskim*. As a matter of practice, halakhists have adopted methods for deciding the law in accordance with the opinion of one post-Talmudic authority or a "banc" of such authorities. And as a matter of practice, the community will tend to identify the correct *halakhah* with the consensus view of its scholars, severely limiting thereby the likelihood that alternative points of view will enjoy a careful and considered hearing.

This theory-practice dichotomy ought to make us wary of conventional wisdoms. To put this another way: a theory is only as valid as the data it purports to explain. It is tempting to isolate a few key phrases and remarks that bob on the surface of the

halakhic literary sea—"a judge must rule on the basis of his own best understanding ...", "Jephthah in his generation is the equal of Samuel in *his* generation", among others—and to construct from them a general principle (in Joel Roth's terminology, a "systemic principle") that supposedly governs the halakhic process. It is all the more tempting to do this when such luminaries as Maimonides and R. Asher b. Yechiel make sweeping endorsements of the right of every halakhic authority to reach his own decisions on matters of Jewish law without having to pay deference to the rulings of judges who preceded him. Yet when the practice of a legal community so frequently and clearly diverges from the path set down in the theoretical statements which presume to account for that practice, then the least we can do is to consider the possibility that our theory is flawed. Perhaps the best that can be said for this particular theory is that it operates exclusively on the level of formality. That is to say, Jewish law does not insist upon a doctrine of binding precedent as an *a priori* requirement of legal correctness. Such a doctrine is lacking because halakhic theory insists upon a clear distinction between law and the interpretation of law. The rabbinical decision does not stand alone; it must in the final analysis be justified and supported by Talmudic argumentation. In that sense, Jewish law resembles both the European civil law tradition and the "declaratory" theory of Anglo-American common law in asserting that a judicial decision is *wrong* if it does not cohere with the ultimate legal sources. On the other hand, the notion that every rabbinical judge enjoys the discretion to issue whatever ruling seems correct to him, unconstrained by the opinions of past authorities, does not begin to describe the *halakhah* as it actually functions in Jewish life. It is here that I would differ from Roth: judicial discretion cannot be the *sine qua non* or the "systemic principle" of the *halakhah* because, simply put, the *halakhah* just doesn't work that way. Jewish law, as it is lived and experienced by the community in its daily life, is not so much what the Talmud says it is as what the rabbis say it is. On this level, the level of practice, the *halakhah* shares the tendency of other legal systems to pay great deference to precedent, to the accumulated weight of rabbinical legal thought and experience. The long history of *pesak* plays a role equivalent to that of precedent in other systems. True, in theory this precedent is persuasive in nature, *takdim mancheh*, formally non-binding, meant to guide but not to

bind the contemporary authority. But in practice, the record of past halakhic decision can shape the legitimate expectations of the members of the community. It becomes codified; it may achieve the status of consensus among the system's practitioners. When it does so, it can exert upon the decision-maker a constraining force tantamount to that of *takdim mechayev*, binding precedent, making it exceedingly unlikely that he will stray far from the course charted by his predecessors.

Yet this portrait of the Jewish legal process is not yet complete. We saw in our analysis of the role of precedent in the two great Western legal traditions that deference to the rulings of the past is a hallmark of those systems; even civil law courts tend to follow the general thrust of judicial interpretation. We also saw, however, that these traditions have developed means to free the contemporary judge from the influence of precedent when necessary. Even common law judges, supposedly subservient to the doctrine of binding precedent, employ a set of techniques—"leeways," in Karl Llewellyn's terminology—that enable them to expand, contract, escape or re-create a precedent or a series of precedents which would otherwise prevent them from reaching the "right" answers in cases at law. Through the use of these techniques, judges exploit the "creative tension" between the respect for the past and the solicitude for judicial freedom that lies at the heart of their legal tradition. With this in mind, we turn to consider whether Jewish legal practitioners have at their disposal similar techniques for exploring the leeways of halakhic precedent. Granted that the *posek* is expected in practice to adhere to the path of halakhic tradition, to what extent does this practice grant him the flexibility, similar to that recognized in other legal systems, to turn this expectation on its head?

The only way to answer this question with accuracy is through a careful study of the rabbinical responsa literature (*she'elot uteshuvot*). This is because, far more than any other genre of halakhic writing, the responsum (*teshuvah*) conveys its author's considered answer to a specific question (*she'elah*) of Jewish law. This question might be a theoretical or hypothetical one, or it may stem from an actual case. In either event, the questioner (*sho'el*) seeks from the responsum's author (*meshiv*) an opinion as to how the issue should be decided. The *meshiv* will send his answer, almost always accompanied with a detailed discussion of the halakhic argumentation which supports it. By

means of this argumentation, the responsum's reader enters as if were the author's study, catches a glimpse of the process of halakhic decision at work, watches as the *meshiv* reasons through to an answer to the question before him.¹²⁴ As opposed to a "code" of *halakhah*, which might present the legal conclusion with no accompanying argumentation, a responsum represents a sustained attempt to persuade its readers why they should understand the *halakhah* on this particular issue in this particular way and why they should reject other possible but conflicting interpretations of the law. It is in this literature that we should expect to discover just how rabbinical decisors deal with legal precedents, since in justifying his ruling the *meshiv* will have to take cognizance of those past decisions by noted scholars that either support or conflict with his opinion. Whatever might be the "general" position of Jewish law on the subject, the responsum will offer the clearest indication of how the *posek* actually deals with the authority of precedent. Does he defer to it? Does he reject it? Does he "distinguish" it and thus explain it away? Or does he find a technique, à la Llewellyn, to transform that past ruling into something new and different in the history of halakhic interpretation?

It goes without saying—though in the interests of deflecting criticism I will say it anyway—that "a careful study of the rabbinical responsa literature" lies far beyond the scope of a single article. That sort of study, by which I mean an analysis of responsa as a genre of legal literature, would fill numerous monographs; although some useful preparatory steps have already been taken,¹²⁵ the responsa literature awaits its Llewellyn. What I can try to do here is to offer but one responsum as an example of the "leeways" which a rabbinical authority can take with the legal precedents that would otherwise dictate his decision. This example, if and to the extent that it reflects a methodology that is typical among the *poskim*, may teach us much about how halakhists who honor precedent can nonetheless escape its constraining force when overriding considerations call upon them to do so.

The responsum I have chosen to study here was penned by R. Yitzchak b. Sheshet Perfet (Rivash; 1326-1408), an eminent Spanish and North African halakhist, in answer to a query from the community of Tunis.¹²⁶ The question, as rephrased by Rivash, concerns a certain Shmuel Aramah, who was to marry a ninety-

year-old woman said to be worth eighty gold doubloons. The community leadership objected to the proposed union on the grounds that "his goal is not marriage, but her wealth." Moreover, Shmuel did not yet have children, so that his obligation under the commandment to "be fruitful and multiply"¹²⁷ remained unfulfilled and manifestly could not be fulfilled by means of the proposed marriage. Shmuel for his part rejected the community's instruction and went promptly to the Muslim ruler of the city, protesting that "the Jews are preventing me from taking a wife" and that Jewish law does not forbid a man from marrying a woman much older than he; "such is the custom in every Jewish community." The community leaders responded that the *halakhah* forbids a marriage of this sort until such time as a man has fulfilled his duty of procreation. The two sides, perhaps at the local ruler's suggestion, agreed to submit the issue to Rivash for his opinion.

I choose this responsum in large part because the established law on the subject, expressed in the form of Talmudic sources and prior rulings, is apparently unambiguous. Rivash, indeed, begins his presentation in precisely that manner:

A man who has not yet fathered children should marry only a woman who is capable of bearing children. A man who has fathered children and has already fulfilled the *mitzvah* of procreation may if he wishes marry a woman who is not capable of bearing children. This position is stated in the Mishnah [M. Yevamot 6:6] ... and in the Talmud [BT Yevamot 61b]. And these are the words of Rambam [*Yad*, Ishut 15:7]: "A man should not marry a woman who is barren, or too elderly to bear children, or an *ailonit* [a woman with male-like features incapable of conceiving], or a minor girl who cannot yet bear children unless he has already fulfilled the *mitzvah* of procreation or has another wife with whom he can fulfill it."

Not only does the *halakhah* forbid this marriage; it demands that the communal authorities take action to prevent the wedding and, should it take place, to bring a forced end to the union. Rivash brings several Talmudic passages to this effect, among them *BT Ketubot* 77a: "when one has lived with his wife for ten years and she has not given birth, he is coerced (*kofin oto*) to divorce her." This is essential, even though the husband can technically take a second wife, because so long as the couple live together he will not be inclined to avail himself of that remedy

(BT Ketubot 64a). All of this, Rivash reminds us, is said concerning the barren wife (*`akara*), whose barrenness might be temporary, the result of some illness; how much more is this the case, then, with an elderly woman who will never be able to bear children. Moreover, the Talmud cautions that a man should never stop engaging in this *mitzvah* but should always strive to marry a woman capable of bearing children (BT Yevamot 62b). As Rambam puts it (*Yad. Ishut 15:16*): "Although a man may have already fulfilled his obligation to procreate, it is a rabbinic commandment that he not refrain from attempting to father children so long as he is physically able, for when a person adds one more life to the Jewish people, it is as though he has built an entire world."

Rivash presents this material in a magisterial way, a narrative unbroken by controversy, disagreement, or minority opinions, one that sets forth the unchallenged, settled law. The Talmudic sources, confirmed by the rulings of Maimonides, the leading *posek* of Spain and North Africa, make clear the existence of a "halakhic consensus" on the impropriety of this proposed marriage and on the duty of the *beit din*, as the representative of Torah law, to do all in its power to frustrate this couple's intention to wed. Yet now Rivash tells us that the law, however clear and undisputed it may be, conflicts sharply with the general practice of the courts.

The above is the formal law (*shurat hadin*). Yet what can I do? I have never seen nor heard that a *beit din* in our time has actually coerced a man to divorce his wife when she has lived with him for ten years without giving birth or if she is too old to bear children. This is true even in those cases where he has not yet fulfilled his *mitzvah* of procreation, where the law (*din*) would permit the court to compel a divorce.

This situation, too, is no coincidence. It seems that the rabbinical courts have intentionally adopted a "hands-off" policy with respect to a variety of issues in marital law.

Likewise, I have never seen a *beit din* protest when a man seeks to marry a minor girl not yet capable of bearing children ... Even though a father is prohibited from giving his daughter in marriage until she is old enough to say that 'I wish to marry so-and-so' (BT Kidushin 41a), I have never seen anyone protest against this practice. (Nor do the courts interfere) in cases where the daughter of a *kohen* or of a *talmid chakham* (scholar) is to marry an ignorant man.¹²⁸

Rivash thus sets up the sharpest kind of contrast between *halakhah* and *minhag*, between the clear and undisputed interpretation of the Talmudic sources and the actual practice of the courts. This gap, he confesses ("Yet what can I do?"), is a serious intellectual problem for the judge. The *halakhah*, in this case confirmed by the rulings of Maimonides and other *poskim*,¹²⁹ would demand that he support the Tunis authorities in their bid to prevent this marriage. Yet the practice of the courts ignores the law, and Rivash must decide whether to acquiesce in that practice. He answers this question in the affirmative, supporting the courts on strictly practical grounds.

If the courts were to rule according to the letter of the law in all its detail in matters concerning proper marriage arrangements (*zivugim*), it would be necessary to compel divorces in all these cases. Since most of these wives would have to receive their *ketubah* and dowry, and since there is no *ketubah* which is not the subject of financial dispute, strife and contention would increase. For this reason the sages have over many generations ignored these issues. They have not sought to block these marriages from taking place, to say nothing of trying to separate the couples who marry in violation of these rules. So long as the union does not violate the laws of forbidden relationships (*ervah*) or the laws concerning prohibited marriages to priests, it is enough to leave them alone unless the couple bring a marital dispute before the judges.

This is a "practical" defense of the custom because it offers no theoretical justification for it. Rivash does not adopt here the tendency of many medieval *poskim* to reconcile the practice with the controlling halakhic standard or to show that it enjoys its own independent legal validity.¹³⁰ On the contrary: he concedes the technical correctness of the claim that these marriages do depart from the halakhic standard. Yet he invites his readers to look beyond the formality of the law to the wider purposes of the legal system, arguing that the attempt to enforce these admittedly valid halakhic requirements would lead to chaos in the administration of justice and to an increase in social discord.¹³¹ It is to avoid these devastating consequences that the sages of many generations have wisely chosen *not* to enforce them. Rivash here sounds not unlike a twentieth-century legal pragmatist,¹³² suggesting that in this instance the legal reasoning of the judges has been determined (and rightly so) by their concern for the ends and purposes of the legal system rather than by the

formal logic of the law. In making this point, he cuts the legal ground from beneath the feet of the authorities of Tunis. The case, as he presents it, is no longer to be decided by "law," the interpretation of the Talmudic sources and post-Talmudic precedents, but by the practical consequences that can be predicted from the application of that law according to its clear and unambiguous understanding. The authorities cannot act upon their eminently legal desire to frustrate the wedding plans of Shmuel Aramah without creating the sort of "strife and contention" that as responsible leaders they surely wish to avoid. Since they manifestly wish to view themselves as responsible leaders, they have no real alternative but to allow the marriage to proceed.

What does this opinion tell us about precedent in Jewish law, at least in the eyes of R. Yitzchak b. Sheshet Perfet? Since he advocates that the communal authorities defer to the practices of the courts, even though these practices conflict with the Talmudic legal standard, it would seem at first glance that precedent plays an influential role in determining his decision. Indeed, we might say that his approach accords with that of the positivistic theory of the common law, the notion that law is judge-made: we follow precedent because the judicial decision *is* law, whether or not it agrees with the earlier sources upon which it is putatively based. Yet Rivash does not in fact say this; he does not make a claim for the *validity* of the courts' practice. The judges do what they do for good and practical reasons, but their *minhag* remains in conflict with the *halakhah*. It is still, in that sense, a deviation from correct law. Such a deviation cannot exist in the positivist theory, which sees the judicial decision as a self-authenticating act. Moreover, the *minhag* is itself a departure from precedent, from the consensus view of the law among *poskim* like Maimonides whose rulings have already achieved the status of precedent in this community. Deference to the past would have required the judges to follow those rulings, but they clearly have not done this.

Nor does Rivash's decision support the opposite view, the "conventional wisdom" that binding precedent does not exist in Jewish law. True, he endorses the courts' departure from the existing legal standard, the authoritative precedent as handed down by the *poskim*, but he never rejects their ruling as the correct reading of the legal sources. It remains the law; it continues to express the *halakhah*, the legal ideal, the goal to which the community is called upon to aspire and by which it is to measure

the rightness of its actions. So long as the precedent remains good law, the *minhag* of the courts—though necessary and unavoidable in practice—is legally incorrect.¹³³ The long introduction to the responsum, in which Rivash presents the *halakhah* in great detail, serves to underline the enduring gap between law and *minhag*, which is also a gap between legal aspiration and social reality. Such a gap represents a disappointing failure by the community to live its life in accordance with the ideals to which it purportedly pledges its allegiance.¹³⁴

There is, however, a hint in this *teshuvah* that the *meshiv* wishes to close the gap. In a reference to a Talmudic passage that until now has not figured in his discussion, Rivash indicates a new interpretation of the “law” in support of the judicial practice.

Therefore, in the present case, if this elderly woman desires to be known as “married,”¹³⁵ to have a husband in place of a son to be a staff in her hand and a hoe for burial (*hutra liyadah umarah lekevurah*); and if she has found this man who is willing to marry her on account of his difficult economic situation (*mipnei dohako*), even though he has no children—if you wish to avert your eyes in the way that many great and good communities, communities full of scholars and sages, have done—you may do so.

This passage is a brilliant example of legal rhetoric. I want to say more in principle about that subject below; for now, it is enough to point to several examples. First, like any good rhetorician, Rivash shifts the burden of proof from Shmuel Aramah to those who would deny him the right to marry this woman. Where the community describes Shmuel as acting out pure greed—hence, their mention of the eighty gold doubloons and their statement that “his goal is not marriage, but her wealth”—the *meshiv* now portrays him as a man suffering under severe economic pressure. We are no longer to regard him as a transgressor against accepted communal standards but as a human being like all others, seeking to make the best of his difficult lot. Second, Rivash appeals to the authority of the “great and good” communities and scholars who have permitted this sort of marriage in the past. Even though the Tunis communal leaders have the *halakhah* on their side, they surely do not imagine that they are holier and more righteous than those luminaries. In this way, the *meshiv* suggests that it is the Tunis authorities, and not Shmuel, whose conduct departs from the desired norm. Third, Rivash lets us hear the “woman’s voice”

in this matter. Until now, the question had been discussed solely from Shmuel's perspective, and the only relevant issue had been whether he is allowed under the law to marry a woman incapable of bearing children. Rivash asks his readers to think about the question from the woman's point of view. When we do, we realize that this is not simply a question concerning Shmuel. Both parties, *she* no less than he, wish to marry, and when we consider her desires as well as his, we are more inclined to respond positively to their (and not simply "his") intention to marry.

For our purposes, however, the most interesting feature of this passage is the phrase "a staff in her hand and a hoe for burial," taken from *BT Yevamot* 65b. The *sugya* there deals with the *mitzvah* of procreation, in particular with the rule that this obligation is incumbent upon males and not females.¹³⁶ As we have seen, it is because of this obligation that the *halakhah* can require a man to marry a woman capable of bearing children and to divorce a wife who is barren. So long as he has not fulfilled his duty under the *mitzvah* of procreation, he is entitled and even obliged to divorce his wife if she cannot give him children. It follows that the woman, who has no such obligation, enjoys no such entitlement: she cannot sue for divorce if her husband is sterile, for his condition does not frustrate her fulfillment of a *mitzvah*. As if to support this deduction, the *sugya* reports several cases involving wives who seek divorce from husbands incapable of fathering children. In each case, the rabbinical authority rejects her request on the grounds that she is not obligated by the Torah to bring children into the world and that she therefore lacks a valid claim for divorce. Yet in each case, the woman argues that her desire for children, even though it does not come to fulfill a *mitzvah*, ought nonetheless to entitle her to the freedom to find another husband. In each instance, this argument persuades the judge to grant her request.

One of these cases is reported as follows:

A woman came before the court of Rav Nachman (seeking a divorce).

He said to her: "You are not obligated (under the *mitzvah* of procreation)."¹³⁷

She said to him: "Does this woman not require a staff in her hand and a hoe for burial?"

Rav Nachman responded: "In a case such as this, we certainly require the divorce."

The woman argues that although the commandment to "be fruitful and multiply" does not apply to her, there are other good and legitimate reasons for her to want children. A child will serve her as a "staff," as a support in her old age, and will see to her burial when the time comes.¹³⁸ Rav Nachman's answer, meanwhile, is more than just a sympathetic response to an emotional plea. By listening to the "woman's voice" in this case, he redefines the law, re-ordering the conceptual framework within which it adjudicates her claim. Until now, the relevant issue in evaluating the claim for divorce in cases of childlessness was the *mitzvah* of procreation. A husband may divorce an infertile wife, because her infertility frustrates his performance of that *mitzvah*. A wife is not entitled to a divorce from an infertile husband, because "you are not obligated"; she has no such *mitzvah* to perform and hence cannot demand a divorce. Here, however, the court accepts her desire for children as in and of itself a legitimate justification for divorce, even though she is under no halakhic requirement to procreate.

Rivash, too, expands the existing law beyond its explicit limits. Rav Nachman's ruling concerns a woman's desire for offspring; it says nothing about a woman's "right" to a husband apart from the possibility that she may bear children from him. The phrase "a staff for support and a hoe for burial" refers in the Talmud to children and not to a husband. By citing that phrase here, applying the Talmud's language to the present case, Rivash removes it from its original context and lends it a more general meaning. If a woman is entitled to a "staff" and a "hoe" in her old age, it now follows that this support may come from a spouse as well as from children. Her "right" to children now includes her "right" to a husband, even when she is too old to bear children from him. This "right," moreover, is sufficient to permit the marriage even though the union will frustrate the husband's fulfillment of the *mitzvah* of procreation. Rav Nachman's ruling, of course, says none of this, yet Rivash presents his conclusion as a logical derivation from it. His conclusion provides a legal justification for the practice of the courts to allow marriages such as that contemplated in our case. This marriage is acceptable, in other words, not simply on the grounds of *min-*

hag, not simply because the courts have refrained from enforcing the Talmudic prohibition. Rather, the *halakhah*—the ruling of Rav Nachman, as re-read by R. Yitzchak b. Sheshet Perfet—positively approves of this marriage.

This re-reading is a good illustration of the ways—or, as Karl Llewellyn would say, the leeways—of precedent in Jewish law. The “precedents,” the applicable Talmudic law and post-Talmudic decision on this subject, are clear. The accepted, “consensus” view of the law classifies the case of R. Shmuel Aramah and his intended bride under the *mitzvah* of procreation. The case, in other words, is “about” a man’s obligation to “be fruitful and multiply” and his consequent duty to marry a woman capable of bearing children, especially if he has not yet fulfilled that obligation. These obligations have been thoroughly discussed in the halakhic tradition; the relevant Talmudic sources and post-Talmudic rulings, along with the accepted interpretations of these, are well-known. So long as it is defined in this way, the question before Rivash can have only one proper legal outcome, as he himself notes in his long introduction and discussion of the applicable *halakhah*. Now, however, Rivash invites his readers to define the question differently. He suggests that it is no longer “about” procreation but “about” a woman’s legitimate need for a husband to support her in her latter years. He accomplishes this redefinition by locating a new “precedent,” a text that had not previously been brought to bear on the issue, and by fitting that text to the circumstances of the present case. This tactic can be said to parallel the “leeway” Llewellyn entitles: “Enlarging the Standard Set of Sources or Techniques,”¹³⁹ introducing into the legal discussion of a question a new set of precedential material that allows the judge to issue a more innovative ruling than would otherwise be possible. Rivash thus pays deference to precedent, to the established understandings of the law, while at the same time finding the means to allow the law—using its own texts and sources—to expand beyond the boundaries of those understandings.

On Precedent, Rhetoric, and Liberal Halakhah

The argument of this paper is that Jewish law, like any other functioning legal tradition, is characterized by a healthy and creative tension between a respect for precedent and a readiness to

innovate. Respect for precedent is demonstrated by the deference that halakhists customarily pay to the established and accepted understandings of Jewish legal texts and rules. The readiness to innovate expresses itself in novel interpretations of halakhic material and applications of halakhic texts. The responsa literature awaits its Llewellyn, a researcher who will detail the techniques by which individual *poskim* adapt their precedents to fit the context of the *she'elot* that confront them. In the meantime, the example of R. Yitzchak b. Sheshet Perfet indicates the sorts of technique that are available, the potential for creative application of precedential material that rests in the halakhist's hands.

It also suggests a more general point, namely that halakhic reasoning, like legal reasoning in general, can be best understood as a species of rhetoric.¹⁴⁰ By "rhetoric," I do not mean eloquence, the embellishment of language. Rather, I use the term, as do a number of contemporary scholars, to refer to the discourse of argumentation, the methods and processes by which speakers seek to justify claims of value to particular audiences. Rhetoric in this sense can be defined as "a discipline for mobilizing the social passions for the sake of belief in a contestable truth whose validity can never be demonstrated with mathematical finality."¹⁴¹ *Pesak*, especially in the form of a responsum, is "rhetoric" in this sense because the *meshiv* not only lays down the law but seeks to justify his answer to a particular reader or audience of readers. His answer must be justified because it is not the only possible or plausible reading of the legal sources that both he and his readers accept as authoritative. His answer is a claim of meaning, a call to his readers that they should understand their tradition in *this* manner, that they should favor this answer over the other available readings of the sources. His answer will be judged "correct" to the extent that he succeeds in persuading his audience to accept his interpretation and to act upon it. To the extent that we accept this approach, we place less emphasis upon judging the "correctness" of a halakhic decision as measured against some putatively objective standard and more emphasis upon understanding the manner in which its author presents it.

In our example, the goal of the analysis is not to determine whether Rivash's ruling was right or wrong but to chart the argumentative structure by which he *justifies* his answer in terms that his projected audience—his "ideal reader"—will presumably find convincing. This structure can be usefully divided into

three parts. First, Rivash recites the "halakhic consensus," the Talmudic sources and the precedents that so clearly prohibit the proposed marriage of Shmuel Aramah. While this would seem to be an obvious requirement of the responsa-writer, this section serves the vital rhetorical purpose of reinforcing Rivash's "ethical" appeal as a scholar of probity and integrity, one who knows the law and refuses to overlook it even though it weighs against his preferred solution.¹⁴² Second, he portrays the legal reality, noting that Jewish courts have long refused on pragmatic grounds to enforce this and similar rules. This allows him to create in the minds of his readers a difficult dilemma between law and good legal practice. On the one hand, the "law" as constituted in the precedents prohibits the marriage, and responsible Jewish communal leaders are expected to follow the dictates of Torah and *halakhah*. On the other hand, responsible Jewish communal leaders surely wish to avoid the legal chaos and the inequities that Rivash predicts would result from an attempt to enforce the law in this instance. His readers, in other words, are expected to be torn in both directions. Loyal to both the law and to the proper functioning of their institutions of government, they will no doubt want a solution that does justice to each of these ends. Rivash provides it in the third part of his argument, in which he identifies an alternative precedent to govern the case. This, of course, is the most problematic element of his *teshuvah*: how does one establish a "new" precedent when the controlling *halakhah* is so clear and firm? The answer is two-fold. It is based, first of all, upon the logic of analogy. Rav Nachman's ruling has already determined that a woman is entitled to a "staff" and a "hoe" during her old age, and though his decision referred specifically to children as this source of future support, it is not implausible that Rav Nachman would include a husband under this rubric, particularly for a woman beyond childbearing years. Secondly, Rivash uses Rav Nachman's ruling to redefine the relevant legal situation at hand. The case is not truly "about" the male's obligation to procreate but "about" the needs of an elderly woman and, to a lesser extent, a man who seeks financial security. His sympathetic portrayal of both Shmuel Aramah and his intended bride create an alternative narrative structure¹⁴³ around the facts. The reader is now asked to judge the situation from the quite personal vantage point of two human beings who seek not to evade the law but to build lives of personal and

economic security. Measuring the matter in this light, the reader is more likely to agree that the case is no longer "about" procreation at all and that, therefore, the existing precedents are no longer relevant to it.

Note that Rivash in no way challenges the correctness of the precedents. The rule set forth in the Talmud and the codes is still good law. Note, too, his recognition that the rule clearly covers the circumstances of the present case, in which a childless man seeks to marry a woman incapable of conceiving. Yet while maintaining the utmost respect for the precedent, the *posek* sets it aside, ostensibly by locating an alternative precedent in the ruling of Rav Nachman. This alternative precedent is in point of fact new law; a woman's previously-recognized "right" to children now becomes, in the hands of the fourteenth-century *posek*, a "right" to marriage. Thus, through the innovative "translation" of the language and logic of the Talmudic tradition,¹⁴⁴ a tradition his readers already accept as authoritative, Rivash the legal rhetorician seeks to persuade them that *halakhah* speaks with more than one voice to the situation at hand, that it offers more than one possibly correct answer to the *she'elah*, and that his own correct answer is more equitable and efficient than the other, more precedented one.

If law in general and Jewish law in particular exhibit a "creative tension" over the role of precedent, we are now in a position, I think, to better understand how that tension operates. The concept of precedent, as noted at the outset of this paper, is endemic to legal practice, and there exists a broad consensus among lawyers that precedent operates as a constraining factor upon freedom of legal decision. Yet it is the lawyers themselves, as the practitioners of the rhetorical discipline of law, who define the limits of that constraint. Precedent, like every other element of a legal tradition, is the material out of which jurists construct their discourse. It is this very discourse, the give-and-take of legal argument and the sustained effort to persuade the community of practitioners of the correctness of a particular answer, that will determine a case to be a "precedent" and precisely what that precedent means. Whatever the status of the doctrine of precedent in Jewish law, the influence of a precedent upon the ruling of a contemporary scholar is a matter to be determined by the scholar himself, operating as the practitioner/rhetorician of the *halakhah* within a community of fellow practitioners, placing that prece-

dent in relationship to other rules, cases, and considerations. The responsum we have examined, in which the obviously controlling precedents are both honored and set aside through the *posek's* judicial rhetoric, is a powerful example of this phenomenon.

To think of *halakhah* as a rhetorical practice, then, helps account for the ambivalent role of precedent in Jewish law. This becomes a helpful tool with which to address more general issues of legal theory. One such issue is the controversy in the academic literature surrounding what has been called the "turn to Jewish law," a scholarly motif that has emerged in response to a perceived crisis in American jurisprudence.¹⁴⁵ The "crisis" is the breakdown of the liberal consensus that held sway in legal practice in the United States, among practitioners as well as academicians, roughly from the 1930s to the early 1970s.¹⁴⁶ In place of this consensus, which had encouraged the belief of mainstream scholars in the capacity of legal reasoning to arrive at obviously correct answers to legal questions, there now exists a cacophony of theories, ideologies, and "metanarratives" that lead to radically differing conceptions of the nature of law and of legal correctness. The dilemma: can American lawyers speak of their law as a coherent system when the legal community is characterized by broad behavioral and interpretive pluralism? Some authors have suggested Jewish law as a solution, seeing in it a model of a unified legal system that at the same time tolerates *machloket* (dispute) and a plurality of interpretations of legal truth.¹⁴⁷ Others reject this model as a distortion of Jewish law.¹⁴⁸ They stress that Judaism is an essentially religious system, in which law is the product of divine revelation. Belief in the revealed status of the law acts as a firm restraint upon interpretive freedom; the predominant demand in Jewish legal practice is for uniformity rather than plurality in decision.¹⁴⁹ This is a fascinating controversy; unfortunately, the writers on both sides tend to base their positions upon what I would call programmatic texts: that is, statements and stories in Talmudic literature¹⁵⁰ that can be interpreted as providing definition or structure to Jewish law. The difficulty is that these texts are not necessarily meant to serve as essays in jurisprudential theory, nor do they operate in the world of practice as a constitution for a working Jewish legal system. They are abstract pronouncements whose applicability to the process of decision-making is, to put it mildly, ambiguous. Any attempt to define the nature of Jewish

law on the basis of these texts is thus unlikely to advance beyond the realm of speculation.¹⁵¹ A more promising way of measuring Jewish law's capacity for pluralism is to study its concrete *practice*, the decisions rendered by halakhic authorities in actual cases. To the extent we find these *poskim* engaging in creative interpretation and application of their legal materials—making use, we might say, of the leeways of precedent in Jewish law—then and only then might we be able to identify Jewish law as a model of a legal system that—in practice if not in theory—accommodates a variety of conceptions of legal truth.

The rhetorical conception of Jewish law also speaks to our own situation as practitioners of liberal *halakhah*. As I stated near the outset of this essay, we stand accused by the Orthodox of misunderstanding (at best) or distorting (at worst) the substance of the *halakhah* because we diverge from the path of our predecessors. This implies that liberal *halakhah* is *illegitimate*: the decisions we render and the intellectual processes by which we reach them, precisely because they defy the weight of precedent, transgress against the canons of acceptable halakhic practice. How do we respond to this charge? We might, of course, decide to ignore it completely. "Liberal *halakhah*," we might say, "is our own business. We are the ones who determine its definitions and proper procedures; it is legitimate because we say so, contrary assertions by Orthodox critics notwithstanding." Yet however satisfying this response might be as polemic, it fails to suffice as a matter of theory and substance. The underlying assumption of our work as liberal halakhists is that what we are doing is *legitimate*, that our thinking and writing are quite at home within the halakhic tradition, and that our decisions—though they diverge from those issued by non-liberal scholars—are deeply informed by and rooted in the legal values that are the common heritage of the Jewish people. We do not imagine that we have invented an entirely new discipline and called it "*halakhah*"; rather, we call it "*halakhah*" because however new it seems it is seamlessly consistent with the discipline of Jewish law as practiced by rabbis for two millennia. Our position, indeed, is that our rulings and interpretations represent this *halakhah* at its best, that they develop the principles and insights inherent in our legal sources in a way that is compatible with our liberal Jewish values. To establish this assumption, we need a substantive answer to the contention that our work is invalid *because* we diverge from precedent.

A better response to this charge would be to announce that Jewish law does not recognize a rule of binding precedent; we therefore violate no standard of halakhic practice when we depart from the interpretations of the past. This response offers an obvious advantage, enabling us to defend our innovations while claiming to stand well within the circle of halakhic legitimacy. Unfortunately, as we have seen, it offers an incomplete and quite possibly misleading description of the process of Jewish law. Halakhic authorities in both theory and practice do regard the decisions of previous authorities as exerting a constraining force over contemporary *pesak*. In this, Jewish law follows the pattern of law in general. Reliance upon precedent, upon the accumulated wisdom of the past, is characteristic of the activity we call law. As liberals, it is certainly in our interest to portray the halakhic system in a manner congenial to our purposes, but that picture ought to be an honest and accurate one. If we contend that the *halakhah* supports our interpretations of it, the *halakhah* of which we speak should be the discipline of Jewish law as it actually is, not an idealized view of what we would wish it to be. And that actual, real-world *halakhah* is a legal process that respects precedent, honors it, and is suffused by it.

Our best recourse, rather, is that suggested by the title of this paper. If we describe what are doing as *halakhah*, then the way we do it must fit the contours of that centuries-old rabbinical practice. If there is no law—or *halakhah*—without precedent, then liberal *halakhah*, too, must take precedent seriously. This implies more than lip service; it demands a commitment to the set of legal values that have defined and continue to define the practice of Jewish law. Three such values deserve mention here: constraint, language, and tradition.

Constraint is an inherent element of any legal practice that honors precedent—which is to say, of any legal practice. The central function of precedent is to limit the discretion of judges and other legal actors. Constraint, of course, does not operate in a vacuum, independent of all other legal values. Another inherent element of law is innovation, the power to develop new answers and solutions to the problems created by an ever-changing social reality. The co-existence of the values of precedent and innovation produces an unavoidable tension in legal thought, and as we have seen, various legal systems have fashioned techniques to accommodate that tension. Still, one cannot plausibly engage

in the activity of "law" unless one accedes to law's constraining element, an element symbolized by precedent as it operates in different legal systems. For liberal halakhists, this means we must recognize that the texts and sources of Jewish law do in fact *constrain* us; they limit what we are able to say, the claims we might reasonably make in the name of *halakhah*. I stress this point because we occasionally hear suggestions that the discipline of liberal *halakhah* be defined almost exclusively on the basis of moral principles. That is, we should identify those grand ideas and ideals in Jewish legal literature that are congenial to progressive values and make our decisions directly on that basis. For example, since one of the fundamental principles of our religious thought is social justice, and since we discern this ideal quite readily in our sources, we would say that any decision that upon serious reflection strikes us as "moral" or "just" is automatically and for that reason alone "*halakhah*" for us, regardless what the halakhic texts themselves—the Talmud and the accumulated precedents in the post-Talmudic halakhic literature—may say. While I do not doubt that a system so conceived would indeed be "liberal," I cannot call it "law." It is rather an exercise in ideological thinking, wherein decisions on specific issues are made by way of deduction from abstract "first" principles. Law, by contrast, is an exercise in *textual* thinking, which while informed by the ideologies—that is, by the general moral and political commitments—of its participants, proceeds by way of discussion and debate over the meaning of texts. And while the meaning of those texts may be contestable, equivocal, and not etched in stone, neither is it infinitely plastic. An argument over textual meaning implies that the text does mean *something* and therefore does not mean the opposite of that something; we are constrained from claiming for a text a meaning that it does not convey.¹⁵² If we liberals are serious in saying that we are engaged in the practice of *halakhah*, we must accept the essential condition of that practice: the texts of *halakhah*—which serve as precedents—do in fact constrain the choices we can make.

The second legal value, *language*, flows directly from the first. If precedent constrains us to pay close attention to the texts of the past, it also requires that we argue over the meaning of those texts in the language of the *halakhah*. Law is a language whose vocabulary consists of texts and whose grammar is composed of the techniques by which the jurists who speak the lan-

guage explain and apply these texts. The task of the lawyer is to translate the bare facts of a case, drawn from social reality, into legal language, a discourse of rules, principles, and concepts that inhabit the world of the jurist; the law can resolve the case only by working its way through these rules and principles and concepts.¹⁵³ *Halakhah*, similarly, is a discourse in which issues are talked about in a particular textual language, to the point that literary expressions that deviate from this linguistic context are not recognized as truly halakhic. Liberal halakhists have always recognized this. From the inception of the Reform movement in Europe, legal scholars associated with the cause have utilized halakhic texts and argument to explain and justify its ritual innovations.¹⁵⁴ Reform responsa are themselves halakhic documents; though written in the vernacular of the *sho'el* and the *meshiv*, they speak the classical rabbinic language of Talmudic text and analysis.¹⁵⁵ These points should be kept in mind when we hear calls for a new and different style of Reform responsa-writing that is less dependent upon halakhic text and that draws more heavily from other Jewish and non-Jewish literary genres. Taking precedent seriously requires that place ourselves firmly within the boundaries of Jewish legal practice, and that practice is conducted in the textual language that has served as the medium of expression for Jewish law for two millennia. Responsa that arrive at their conclusions without working through the texts and language of Jewish law are not *responsa* in the truest sense, precisely because they depart from that practice.

Finally, the recognition of precedent as an essential component of legal practice implies that we are working within a *tradition*. I have in mind here the concept of tradition as defined by Alisdair MacIntyre: "a living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition."¹⁵⁶ A tradition so conceived is the moral and cultural context within which the participants of any argument must stand if they hope to persuade their fellow participants of the rightness of their position or even to make themselves understood to each other.¹⁵⁷ A traditional discourse is rooted in the texts of the past ("historically extended"), is carried on with conversation partners who likewise participate in that tradition ("socially embodied"), and its common life is comprised largely of an argument over the precise meaning and application of those texts to questions and

challenges that arise all the time. Seen in this way, a tradition is not to be identified with "stability," with "eternal verities" to be contrasted with the evanescent fads and fashions of the contemporary world. MacIntyre's tradition is rather a dynamic thing, in which a community's self-definition—that is, the understanding and interpretation of its texts—is always up for grabs, always in flux, and constantly tested in the crucible of the community's life and experience. To participate in the tradition of *halakhah* is to discover, as did Rivash, a rich and ample treasure-house of resources for argument, materials out of which new meanings are constantly proposed and frequently accepted. Liberals need not fear, therefore, that adherence to this tradition necessarily stifles their creativity. On the contrary: the halakhic tradition has long been the proving ground for creative legal thought and response. This creativity, however, does require that we see ourselves not as revolutionaries or as inventors of a new language that is all our own but as participants in the ongoing historical argument that is the language of *halakhah*.

Conclusion

Precedent, the tendency to decide disputed questions on the basis of earlier decisions, is an endemic feature of every legal system. While the precise role of precedent in Jewish law is a matter of controversy, there is no question that respect for the interpretations of the past is a central element in halakhic practice. No normative statement can make an authentic claim to the status of *halakhah* unless it pays deference to the role of precedent, unless it is characterized by the three values of constraint, language, and tradition. While those may sound like conservative values, halakhic history reveals that adherence to precedent does not deter the creative *posek* from innovating within the law, from discovering plausible alternative readings of the texts of the past. This last point is of critical importance to our liberal halakhic endeavor. If our own work is to lodge a believable claim to the status of *halakhah*, it must be truly halakhic; it must follow the path that has always defined halakhic practice. That path is not hidebound to old ways and established interpretations. It is the way of constraint *and* innovation, a respect for the past coupled with the readiness to find new meaning in old texts. We

walk that path when we find new meanings in old texts and when we take precedent seriously.

Notes

1. Anthony T. Kronman, "Precedent and Tradition," *Yale Law Journal* 99 (1990), 1029-1068, at 1033.
2. This does not mean that we cannot imagine a kind of law where precedent plays no constraining role. Kronman himself (see note 1) reminds us of Max Weber's notion of "charismatic authority," which recognizes no constraint of any kind upon the right of the inspired leader to declare the law; see Anthony T. Kronman, *Max Weber* (Stanford: Stanford U. Press, 1983), 47-50. The remarks in the text refer to the other "types" of law, those Weber would term "traditional" or "legal-rational," that more accurately resemble the activity of law as we know it in the developed legal traditions.
3. It is possible to argue that precedent exerts a strong influence upon other intellectual activities besides law—one thinks here of the entire range of public social and political discourse—that relies upon argumentation rather than philosophical demonstration as its chief method for arriving at knowledge. Unlike demonstrative proof, which is equivalent to formal logic and is hence universal in its truth claims, argumentation addresses itself to particular audiences, utilizing techniques to gain their assent to a thesis presented for their approval. Precedents, understood here as the agreed-upon starting points for discussion, are absolutely crucial if coherent argument is to take place. "That is why so often the best justification of a course of conduct—the one that dispenses with the need for any other reason—consists in showing that the course is in conformity with the recognized order, that it can avail itself of unquestioned precedents"; Chaim Perelman, *The Idea of Justice and The Problem of Argument* (New York: Humanities Press, 1963), 157. This is certainly correct; however, my goal here is to distinguish law primarily from those more philosophical disciplines that do not grant the past any a priori influence over the present. Even among the public discourses, moreover, I think that Perelman would agree that precedent plays its most systematic and formal role in the discipline of law.
4. The literature is vast; the following is but a partial list. Frederick Schauer, "Precedent," *Stanford Law Review* 39 (1987), 571-605; Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford U. Press, 1996), 76-77; Richard Wasserstrom, *The Judicial Decision* (Stanford: Stanford U. Press, 1961), 39-83; Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* (Brooklyn: The Foundation Press, 1953), 97; Karl Llewellyn, "Case Law," *Encyclopedia of the Social Sciences* (New York: Macmillan, 1930), 3:249; Edgar Bodenheimer, "Law as Order and Justice," *Journal of Public Law* 6 (1957),

- 194ff; Edgar Bodenheimer, *Jurisprudence* (Cambridge: Harvard U. Press, 1974), 426-427; A. L. Goodhart, "Precedent in English and Continental Law," *Law Quarterly Review* 50 (1934), 40ff; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale U. Press, 1921), 149; Chaim Perelman, *Justice, Law, and Argument* (Dordrecht, Holland: Reidel, 1980) 132-134.
5. This argument is developed by Kronman (see note 1) at 1047ff., drawing primarily upon the thought of Edmund Burke.
 6. I leave aside here the problem faced by the legislature in a community possessing a constitution, written or otherwise, which limits the exercise of legislative power, as well as the question of which agency is to interpret and apply the limits set forth in that constitution. My point is rather that a legislature, as the law-creating institution in a society, is not constrained in its lawmaking powers by anything save its own will. This applies to constitutions, which serve as the fundamental legislation of their communities. A constitution, that is to say, is itself a legislative act by which the community enacts limits upon the powers of future lawmakers. Judges, by contrast, according to the definition proposed in the text, do not enjoy the power to create law where none had before existed.
 7. Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897), 457-478, at 469.
 8. Compare D. Neil MacCormick and Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot, UK: Ashgate, 1997), 531-532: precedent plays a major role in the development of all major legal systems; at the same time, all systems accommodate change and evolution in precedent through judicial action.
 9. The following works deserve special mention: Moshe Zemer, *Halakhah she-fuyah* (Tel Aviv: Devir, 1993) / *Evolving Halakhah* (Woodstock, VT: Jewish Lights Publishing, 1999); the collected studies published by the Freehof Institute of Liberal Halakhah and edited by Walter Jacob and Moshe Zemer (*Dynamic Jewish Law*, 1991; *Rabbinic-Lay Relations in Jewish Law*, 1993; *Conversion to Judaism in Jewish Law*, 1994; *The Fetus and Fertility in Jewish Law*, 1995; *Death and Euthanasia in Jewish Law*, 1995; *Israel and the Diaspora in Jewish Law*, 1997; *Aging and the Aged in Jewish Law*, 1998); Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford: Oxford U. Press, 1984); Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary of America, 1986); Eliezer Berkovits, *Hahalakhah: kochah vetafkidah* (Jerusalem: Mosad Harav Kook, 1981). And by no means should we forget the many responsa written by liberal rabbis that serve as examples of liberal *halakhah* in practice.
 10. But not always; at times, it is the liberals who base their arguments upon the accepted, seemingly literal reading of the texts while the orthodox defend their position through deft and creative reinterpretation of those same texts. For an example, see Mark Washofsky, "Halakhah in Translation: The Chatam Sofer on Prayer in the Vernacular," in the forthcoming festschrift for Rabbi A. Stanley Dreyfus.
 11. Following the "working definition" in Alan Watson, *The Making of the Civil Law* (Cambridge, MA: Harvard U. Press, 1981), 4: "a civil law system would be a system in which parts or the whole of Justinian's *Corpus juris civilis* have been in the past or are at present treated as the law of the land or, at the very

- least, are of direct and highly persuasive force; or else it derives from any such system."
12. Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe, *Comparative Legal Traditions* (St. Paul: West Publishing Co., 1985), 194.
 13. Roman law, of course, does not start with Justinian, whose great Code in many ways marked a departure from previous Roman jurisprudence; see below in the text. Yet even prior to Justinian, we can say that "a theory of judicial precedent comparable to that of Anglo-American law was never formally recognized at Rome." Judges (*iudices*) instead rendered decisions on a case-by-case basis. See Hans Julius Wolff, *Roman Law: An Historical Introduction* (Norman, OK: U. of Oklahoma Press, 1951), 80.
 14. Wolff, 164.
 15. Fritz Schultz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 285-286.
 16. John H. Merryman, *The Civil Law Tradition* (Stanford: Stanford U. Press, 1969), 20-26. Merryman (16-17) also notes the emphasis that Enlightenment political theory placed upon the doctrine of separation of powers as essential for rational democratic government. Montesquieu's *Spirit of the Laws* is the primary citation on this point, which for our purposes provides another explanation for the tendency of the nineteenth-century legal codes to deny to judges any power to legislate.
 17. Thus, those parts of pre-revolutionary France whose legal systems were dominated by Roman law were designated as *les pays du droit écrit*, while the northern and less-Latinized regions of the country were called *les pays du coutume*, since the older customary law held sway there; Gabriel Marty and Pierre Raynaud, *Droit civil* (Paris: Sirey, 1972), 1:118. France today, thanks to codification, is a "country of "written law"; i.e., "legislation dominates French law"; René David, *French Law: Its Structures, Sources and Methodology* (Baton Rouge: Louisiana State Press, 1972), 155.
 18. Merryman, 25; Glendon, *et al.*, 204-205. See David, 170-178. Civil law doctrine knows of three types of custom. French courts will recognize the existence of *consuetudo secundum legem* (a custom supporting the law), since this custom is regarded as the definition of the terms of the legal rule. On the other hand, *consuetudo praeter legem* (custom which precedes law), which establishes legal rules that are independent of, but not inconsistent with, legislation is recognized only in areas of the law that have not yet been codified. And the third kind of custom, *consuetudo adversus legem* (custom contrary to law), simply does not exist in a legal system dominated by legislation. When such a custom is discovered in French legal practice, it is generally reinterpreted by the courts so that it does not conflict with the authority of the code or of the relevant statute.
 19. Watson, 83-84. This, he suggests, might help explain the hostility of those English philosophers concerned with legal matters, notably Hobbes and Bentham, to the common law. The common law theorists, of course, could respond with Sir Edward Coke that while "Reason is the life of the law," this was "an artificial perfection of Reason got by long study, observation, and experience"; Coke, *Institutes of the Laws of England*, ed. J. H. Thomas, Esq. (London, 1818), 1.
 20. David, 179.

21. Schultz, 52-53, speaking of the "Hellenistic period" of Roman jurisprudence, when the *iudices* turned for legal advice to the great scholars (*iurisconsulti*) who would hand down learned advice (*responsa*) to them.
22. See David, 180-181, on the situation in French law: the principle of separation of powers prevents the creation of legal rules by the courts. Cf. *Code civil*, article 5: *il est défendu aux juges de prononcer par voie de disposition générale et réglementaire*.
23. ... *non exemplis sed legibus iudicandum est* (legal decisions must be based upon enacted law and not upon prior decisions in particular cases); *Code of Justinian* VII.45.13.
24. René David and John E. C. Brierley, *Major Legal Systems in the World Today* (London: Stevens and Sons, 1985), 120-121, 136.
25. See Merryman, 35-39; Glendon *et al.*, 208.
26. Merryman, 48, contrasting the "folklore" of the civil law, which ignores judicial decision as a source of law, with this reality. See also Robert A. Riegert, "The West German Code, Its Origin and Its Contract Provisions," *Tulane Law Review* 45 (1970), 69-71.
27. Glendon *et al.*, 209.
28. Michel Trope and Christophe Grzegorzczuk, "Precedent in France," in D. Neil MacCormick and Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Aldershot, UK: Ashgate, 1997), 115.
29. David, 180.
30. Trope and Grzegorzczuk, 112-113.
31. Glendon *et al.*, 209; Riegert, 69-70. See also David, 183-184: the primary role of the *Cour de Cassation* is to enforce the uniform application of the law. "This function cannot be fulfilled if the Court of Cassation itself does not have a stable case law."
32. MacCormick and Summers, 532.
33. And see Merryman, 17: the experience in pre-revolutionary France, in particular, was that the judiciary was a conservative, anti-progressive force. Legislation, by contrast, could express the will of the people and keep the judges in check.
34. As Watson writes (p. 25): "Roman law is learned at the feet of specially appointed teachers and not from observing practitioners of all kinds." See also David and Brierley, 147-149.
35. Glendon *et al.*, 268.
36. Glendon *et al.*, 564-565. See Theodore F. T. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown, 1956), 342: since the common law developed out of the judicial custom of the king's courts, it was but natural that these courts developed regular routines of practice, which, becoming settled, could allow the people to forecast with certainty the future decisions of the judges.
37. Rupert Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1977), 4.
38. The most striking example of this is the rule that prevailed in England from 1898 to 1966 whereby the House of Lords, the highest appellate body, considered itself bound to its own precedents. See Cross, 4-8.
39. Or the *ratio decidendi*, that part of the judge's ruling that is considered essential to the decision; all else in the opinion is called *dicta* and does not bind the subsequent judge. See Cross, 38ff.

40. See P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987), 115, who cite the English judge Lord Patrick Devlin: "The principle of *stare decisis* does not apply only to good decisions; if it did, it would have neither value nor meaning. It is only if a (prior) decision is doubtful that the principle has to be invoked."
41. See the discussion in Cross, 12-17.
42. Atiyah and Summers, 118-127.
43. Compare Arthur L. Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge: Cambridge U. Press, 1931), 1-26, who constructs a ten-point checklist for determining the *ratio decidendi*, with the critique of Cross, 66-76. In turn, C. K. Allen, *Law in the Making* Seventh Edition (Oxford: Clarendon Press, 1964), 259, n. 3, opines that Cross's own description "is perhaps a little too complicated to be really illuminating." Allen, 260, rejects the effort to find a precise definition, proposing a pragmatic alternative: "it is for a court, of whatever degree, which is called upon to consider a precedent, to determine what the true *ratio* was."
44. Atiyah and Summers, 116ff. The difference between the English and American versions of *stare decisis*, they write, rests in the greater degree of formalism present in English law, as opposed to the more "substantive" approach of American courts. English judges are therefore much less likely to disregard otherwise binding precedents than are their American counterparts. American courts, too, will overrule precedents with much greater frequency than English courts. But even in America, "*stare decisis* is at least the everyday working rule of our law;" Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale, 1921), 19. In the words of the U.S. Supreme Court: "it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary decision'"; *Patterson v. McClean Credit Union*, 109 S.Ct. 2363, 2370 (1989).
45. P. J. Fitzgerald, *Salmond on Jurisprudence*, 12th ed. (London: Sweet and Maxwell, 1966), 145. See also Allen, 268-285, for examples of English judges deriving guidance from Roman or continental law. On the theory of non-authoritative precedent, see Richard Bronaugh, "Persuasive Precedent," in Laurence Goldstein, ed., *Precedent in Law* (Oxford: Clarendon Press, 1987), 217-247. Rabbinic law serves as "persuasive precedent" in the modern Israeli legal system, particularly when a court confronts a question that has no clear resolution in existing law. See Menachem Elon, *Jewish Law: History, Sources, and Principles*, translated by Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), 1729-1730. See also his discussion of the Foundations of Law Act (1980), which formally requires that when a court cannot resolve a question on the basis of legislation or judicial precedent it shall look to the principles of freedom, justice, equity, and peace as expressed in the "Jewish heritage" (*moresheet yisrael*); 1827ff.
46. Sir Matthew Hale, *The History of the Common Law of England*, 6th ed. (London: Butterworth, 1820), 90.
47. Sir William Blackstone, *Commentaries on the Laws of England*, 1:3, 68-70.
48. On this, see Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Boston: Beacon Press, 1958), and H. L. A. Hart,

- "The Demystification of the Law," in his *Essays on Bentham* (Oxford: Clarendon Press, 1982), 21-39.
49. A famous American expression of this idea is that of Supreme Court Justice Oliver Wendell Holmes, Jr., dissenting in case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."
 50. On the decline of the declaratory theory see Cross, 26-35. Gerald Postema, "Some Roots of Our Notion of Precedent," in Goldstein, 9-33, traces the influence of Hobbes and Bentham on the changing notions of precedent in England. See as well his *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), 192-196. The "school" of Anglo-American legal positivism was founded, according to all accounts, by Jeremy Bentham [see *The Limits of Jurisprudence Defined* (New York: Columbia U. Press, 1945) and *A Comment on the Commentaries*, ed. J. H. Burns and H. L. A. Hart (London: Athlone Press, 1977)] and developed by his student John Austin (d. 1859; see his *The Province of Jurisprudence Determined* (Indianapolis: Hackett, 1998)). Bentham and Austin hold that law must be defined as a command, an order of a sovereign; hence a judge who formulates a previously undeclared legal instruction can do so legitimately only if his ruling is understood to be a form of legislation authorized by the sovereign authority of his jurisdiction. The theory has been modified somewhat in the twentieth century by H. L. A. Hart, whose *The Concept of Law* (Oxford: Clarendon Press, 1961) presents law as a system of rules rather than individual commands.
 51. Atiyah and Summers, 120-124. They follow here their general assertion that the English legal practice is more formalistic and less flexible than the American.
 52. Cross, 176ff. On the analogical nature of legal reasoning, see Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: U. of Chicago Press, 1949), and Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford U. Press, 1996).
 53. See the following works of Karl Llewellyn: *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960); *The Case Law System in America*, edited and with an introduction by Paul Gewirtz, translated by Michael Ansaldi (Chicago: U. of Chicago Press, 1989); and "Remarks on the Theory of Appellate Decision," *Vanderbilt Law Review* 3 (1950), 395-406. On his life and work, see William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973). It is my view that Llewellyn's work is a highly useful tool for the understanding of the process and realities of halakhic decision-making. I hope to expand upon this observation in a future work.
 54. See Llewellyn, *The Common Law Tradition*, 19-61, for the "Major Steadying Factors in Our Appellate Courts." These "social and professional factors" do not exclude intellectual influences; among Llewellyn's steadying factors are the existence of an accepted legal doctrine and the necessity for writing an opinion that explains the decision. These are "professional," however, to the extent that a judge must justify the decision in a form that the members of the craft will find acceptable.
 55. Fitzgerald, 178.

56. Llewellyn, "Remarks," 395.
57. Zerach Warhaftig, "Hatakdin bamishpat ha'ivri," *Shenaton Hamishpat Ha'ivri* 6-7 (1979-1980) 105, 119-120.
58. Eliav Shochetman, "Chovat hahanmakah bamishpat ha'ivri," *Shenaton Hamishpat Ha'ivri* 6-7 (1979-1980) 321, 395.
59. On this rule (*ein lo ladayan ela mah she'einav ro'ot*), see below.
60. Elon, *Jewish Law*, 983-985.
61. Ya'akov Canaani, *Otzar halashon ha'ivrit* (Givatayim: Massada, 1989), credits the invention to Itamar Ben-Avi (d. 1942).
62. Although there have been various bumps along this road. For the history of the doctrine of binding precedent in Israeli law, see Warhaftig, 109-113.
63. The emphasis here is on the word "generally"; the Talmud and the halakhic literature require the judge to respond positively to the litigant's request for a written record "of the legal basis upon which you rendered my judgment (*me'eizeh ta'am dantuni*)."¹ See *BT Sanhedrin* 31b and *Yad*, *Sanhedrin* 6:6.
64. See Shochetman, 326-332. See also Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law* (New York: Harwood, 1991), 19-40.
65. Decisions of Jewish courts are not to be reviewed by other courts, let alone "higher" tribunals exercising supervisory power; "no court may critique the ruling of another court" (*BT Bava Batra* 138b). The creation of a rabbinic appellate court (*beit din hagadol la'er'urim*) in 1921 is generally recognized as an innovation in Jewish law, brought on at the behest of the British mandatory authorities, whose own legal system, of course, is familiar with both the doctrine of binding precedent and the institution of appellate courts. See Elon, 824-825 and 1809-1818, as well as Shochetman, 355-356. On the other hand, two authors made notable attempts to demonstrate that an appellate jurisdiction is not inconsistent with Jewish law. Simcha Asaf, *Batey din vesidreyhen acharey chatimat hatalmud* (Jerusalem: Defus Hapo'alim, 1924) bases his argument upon historical examples, while R. Benzion Ouziel (*Resp. Mishpetey ouziel* 3, CM 1) utilizes traditional (though creative) halakhic reasoning.
66. Shochetman, 326.
67. Rashbam, *BT Bava Batra* 130b, *s.v. velo mipi ma'aseh*. See also *YT Chagigah* 1:8 (7b) and *Korban Ha'eidah*, *s.v. she'ein lemedin min hama'aseh*: "for example, when one sees his rabbi issuing a ruling, one should not declare the *halakhah* thusly, for perhaps one has erred concerning the reasoning behind the ruling in that particular case ...".
68. *BT Bava Batra* 131a.
69. And see Rambam's *Commentary to the Mishnah*, Introduction (Kafich ed.), 46: "the legal activity of all who arose after Ravina and Rav Ashi is confined to the understanding of the work they composed (*chiberu*), to which it is forbidden to add and from which it is forbidden to detract."
70. On the use of the title *gaon* to describe the *rosh yeshivah* (head of the Talmudic academy) in Babylonia from the sixth-century C.E. onward, see Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven: Yale U. Press, 1998), 49.
71. Isadore Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale U. Press, 1980), 55 and 160. See, in general, Meir Havatzelet, *Harambam vehage'onim* (Jerusalem: Sura, 1967). And see Rambam's own Introduction to

- his *Commentary to the Mishnah* (Kafich ed.), 47: "The *Halakhot* of our teacher R. Yitzchak (Alfasi) is the equivalent of all previous (post-Talmudic) works ... having corrected all their errors. I disagree with his rulings in no more than ten places."
72. Twersky, 160.
73. See *Resp. Harosh* 31:9 (those who cite a ruling in the *Mishneh Torah* without comparing it to its Talmudic source are likely to misunderstand or misapply that ruling) and 94:5 (Rambam "writes as does a prophet [*divrey nevu'ah*, and this is definitely *not* meant as a compliment], without accompanying argumentation").
74. See Mark Washofsky, "R. Asher b. Yehiel and the *Mishneh Torah* of Maimonides: A New Look at Some Old Evidence," in David R. Blumenthal, ed., *Approaches to Judaism in Medieval Times, Volume III* (Atlanta: Scholars Press, 1988), 147-158.
75. Hil. *Harosh*, Sanhedrin 4:6.
76. *BT* Sanhedrin 33a.
77. *Sefer Hameorot* to Alfasi Sanhedrin, fol. 12a.
78. In *Katuv Sham*, Rabad's *hasagot* on Razah's *Sefer Hame'orot*, ed. Jerusalem (1990), 198 (to Razah, fol. 12a).
79. It is uncharacteristic because of Rabad's reputation for creativity in halakhic thought. I say "creativity" and not "independence." The latter refers to the willingness to disagree with one's predecessors while remaining within the broad outlines of their own understanding of the *sugya*, while the former signifies new interpretations that blaze new paths in Talmudic understanding. On this view of Rabad, see Haym Soloveitchik, "Rabad of Posquières: A Programmatic Essay," in E. Etkes and Y. Salmon, eds., *Studies in the History of Jewish Society ... Presented to Professor Jacob Katz* (Jerusalem: Magnes, 1980), 7-40. The difficulty, obviously, is that Rabad made a literary career out of departing from the geonic view of the Talmud and the *halakhah*, just the sort of thing that he apparently condemns in this *hasagah*. Soloveitchik's attempt to reconcile the career with the *hasagah* (namely, that what Rabad "actually says" is that discarding geonic doctrine is virtually unheard of in halakhic circles; see at 12-13, n. 10) has much affinity with some ideas about precedent that I want to talk about in the next section of this article. It does not, however, close the gap between Rabad the creative halakhist and Rabad the conservative critic of Razah. Perhaps the best we can do is to say that the purpose Rabad set for himself in *Katuv Sham* is precisely that: to criticize Razah wherever the latter is vulnerable, even if Rabad himself would not proceed in the spirit of that critical note. On the icy personal and literary relations between the two Provençal scholars, see Y. Ya-Shema, *Rabbi zerachyah halevy ba'al hama'or uveney chugo* (Jerusalem: Mosad Harav Kook, 1992), 126-149.
80. *BT* Rosh Hashanah 25b. On the rule *yiftach bedoro keshmuel bedoro*, see Yisrael Ta-Shema, *Halakhah, minhag umetzi'ut be'ashkenaz, 1100-1350* (Jerusalem: Magnes, 1996), 67-70.
81. On the other hand, the *Sefer Hama'or* itself is characterized by its support of judicial independence and by Razah's opposition to the tendency to make the rulings of any one halakhic work (in this case, the Alfasi) the automatic standard of legal correctness within the community. See Ta-Shema, *Rabbi zerachyah halevy*, 58ff.

82. He is joined in this view by R. Menachem Hameiri, *Beit Habechirah*, Sanhedrin 33a, who rejects the notion that a matter decided by the *geonim* enjoys the status of *davar mishnah*. This is significant in that Meiri is, in general, heavily influenced by the halakhic thought of Rabad, his Provençal forebear.
83. *Ein lo ladayan ela mah she`eynav ro'ot*; BT Bava Batra 131a.
84. Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary of America, 1986), 81-113. The quotations are found at 83 and 113.
85. BT Sanhedrin 32a (= M. Sanhedrin 4:1) and 33a. The categories are introduced as part of a series of efforts to resolve a contradiction between the *mishnah* in Sanhedrin and M. Bekhorot 4:4. According to the former, an erroneous decision at monetary law is reversed and the case retried; the latter declares that such a decision stands, but the judge is liable for compensation to the losing party.
86. So Rambam, *Yad*, Sanhedrin 6:1, following the *sugya* on BT Sanhedrin 33a, which extends the circumference of *davar mishnah* beyond the Mishnah to cover legal matters determined by the sages of all Talmudic generations. See also Meiri, *Beit Habechirah*, BT Sanhedrin 33a.
87. Rashi, BT Sanhedrin 33a, *s.v. to`eh bedavar mishnah*. See *Hil. Harosh*, Sanhedrin 4:5: "this decision does not deserve to survive," and *Tur* CM 25: "there is no 'ruling' when the error concerns a matter so obvious."
88. If, however, the *dayan* is a *mumcheh*, an "expert" judge, or if he has been appointed by a recognized Jewish political authority such as the Exilarch, or if the litigants agreed to abide by his ruling in all events, he is empowered to retry the case.
89. The text here follows the preferred reading in geonic, rishonic, and manuscript traditions; see *Mesoret Hashas* and *Dikdukey Soferim* (n. 6) to Sanhedrin 33a.
90. *Yad*, Sanhedrin 6:2-3.
91. *Arukh Hashulchan*, CM 25, par. 2.
92. *Hil. Harosh*, Sanhedrin 4:6.
93. Introduction to *Shulhan Arukh*. Did Karo see the *Beit Yosef* as the indispensable commentary to the *Shulhan Arukh*, in the sense that one must study the former in order to understand the latter and use it as a reliable code? He does not state this explicitly in his introduction, where he describes the *Shulchan Arukh* primarily as an aid to the study of the *halakhah*. On the other hand, the pattern of Karo's work—the creation of a large compendium containing all the necessary material for the understanding of the *halakhah*, followed by the creation of a shorter, simpler work encompassing easy-to-memorize legal dicta suggests to some that he might see the *Shulhan Arukh* as a sort of "horn-book" to be read at the conclusion of the thorough study of the *Beit Yosef*. Some authors, at any rate, insist on the prior study of the *Beit Yosef* before one declares the *halakhah* in accordance with the *Shulhan Arukh*. Among these is R. Yom Tov Lipmann Heller in the wonderful introduction to his *Tosafot Yom Tov* commentary to the Mishnah. See as well *Yad Malakhi*, Kelalei HaShulhan Arukh, no. 1, and *Sedei Chemed*, Kelalei Haposkim, 13:2.i
94. It is for this reason, Karo tells us, that he chose to make his *Beit Yosef* a commentary upon an existing compendium rather than a self-standing work. To collect all the materials by himself would have been a task without end. It is

- also the reason he chose the *Tur* as the basis for the commentary rather than the *Mishneh Torah*, "the most widely-known work of *halakhah*." Since the latter presents only one opinion—that of Rambam—on each halakhic question, it would not serve to lighten Karo's workload. The *Tur*, on the other hand, already includes many of the opinions which Karo will need to cite.
95. This is meant literally. The texts Karo uses will be *sedurim*, laid out verbatim for the reader, rather than summarized.
96. See Menachem Elon, *Hamishpat ha'ivri* (Jerusalem: Magnes, 1973), 1139ff.
97. See R. Chaim Yosef David Azulai, *Birkey Yosef*, CM 25, no. 29, for sources on the antiquity of Karo's procedure. For a comprehensive description of this tendency, as well as lists of the various "bancs" of *poskim* that served as the ultimate halakhic authorities in these communities, see Y. Z. Kahana, *Mechkarim besifrut hateshuvot* (Jerusalem: Mosad Harav Kook, 1973), 8-88, and Ovadyah Yosef, *Sefer hayovel larav yosef dov halevy soloveitchik* (Jerusalem: Mosad Harav Kook, 1984), 267-280.
98. See *Bedeq habayit*, CM 25, near the end of the chapter: "I say that in our time, the accepted *minhag* in our entire region to follow Rambam on all halakhic matters save those over which his words are difficult to understand and to reconcile." It is significant that this remark follows Karo's discussion of R. Asher's endorsement of judicial discretion (*Hil. Harosh*, Sanhedrin 4:6). That is to say, while Asher declares that a judge may interpret the law as he sees fit, even against the views of the great *poskim* of the past, Karo notes that "in our region" such is not the practice if the great *posek* in question is Maimonides.
99. See Kahana, 69-71: according to many observers, Karo's decisions in the *Shulchan Arukh* tend to follow Rambam even in cases where the other two "pillars" of the law, Alfasi and R. Asher, disagree with him.
100. Kahana, 25-28. R. Asher's opposition, as discussed above, is conveyed in *Hil. Harosh*, Sanhedrin 4:6. It is expressed as well by Asher's son Yehudah, who criticizes the city of Toledo for adopting a *takanah* after his father's death to decide the *halakhah* in accordance with Rambam except in those cases where R. Asher disagrees; *Resp. Zikhron yehudah*, no. 54.
101. See *Resp. Rashba* 2:322. I find myself in some disagreement with Joel Roth, *The Halakhic Process*, 93, on the thrust of this *teshuvah*, though this disagreement may be more a matter of emphasis than of essence. As I read him, Rashba places a much greater presumptive weight upon precedent than Roth seems willing to concede. Note that the *sho'el* who submits the question cites the Talmudic principle "a judge must rule on the basis of what he sees" (*BT Bava Batra* 131a) as an argument in favor of judicial discretion. Rashba, however, is not impressed by this, preferring to see the sages of our time—that is, the *rishonim*—as the (metaphorical, at any rate) equivalent of the ancient Sanhedrin.
102. *Seder Tanna'im Ve'amora'im*, ch. 24. See also Azulai, *Shem Hagedolim*, *Sefarim*, *samekh*.
103. For the two positions, respectively, see Y. Yuval, "Rishonim ve'acharonim, Antiqui et Moderni," *Zion* 57 (1992), 369-394, and Y. Ta-Shema, *Halakhah, minhag umetzi'ut beashkenaz, 1100-1350* (Jerusalem: Magnes, 1996), 58-78. Menachem Elon, *Hamishpat Ha'ivri*, 233, shares Ta-Shema's view, although he makes no mention of the stages by which the rule developed during the medieval period.

104. For example, both Ya'akov and Yehudah, the sons of R. Asher b. Yechiel, understand their father's comment in *Hil. Harosh*, Sanhedrin 4:6, as applying the rule *hilkheta kevatra'ey* to "the sages of one's own generation"; see *Resp. Zikhron yehudah*, no. 23. It should be noted however, that it is Asher's sons who use the word *batra* to refer to their father; R. Asher does not use the word *batra* to refer to himself.
105. "Little doubt?" I shudder here to disagree with the conclusions of Professor Ta-Shema (*Halakhah, minhag umetzi'ut*, 76), whose writings have earned the status of *batra* on virtually every question of scholarship concerning medieval halakhic literature; see my "Medieval Halakhic Literature and the Reform Rabbi: A Neglected Relationship," *CCAR Journal*, Fall 1993, 66-68. Yet I cannot follow him when he says that Isserles applies the rule *hilkheta kevatra'ey* to the scholars of his own generation. Isserles' formulation of this rule in *SA CM 25:2* is nothing more than a quotation from a responsum of the fifteenth-century scholar R. Yosef Kolon (*Resp. Maharik*, no. 94). And as Yuval ("Rishonim ve'acharonim," at note 47) demonstrates by way of abundant citations from Kolon's responsa, the latter includes as *batra'ey* only those scholars who flourished during the first half of the fourteenth century in Ashkenaz, a period stretching from the redaction of the *Tosafot* to the calamities of 1348-1349. Ta-Shema (p. 60) recognizes this as well. And the quotation gives us no hint that Isserles reads Kolon's words any differently than did Kolon himself. Similarly, Isserles' reference to the rule *hilkheta kevatra'ey* in the Introduction to his *Darkhey Moshe*—where he criticizes Karo for not adopting that rule—also restricts its coverage to such thirteenth and fourteenth-century works as *Sefer Hamordekhai*, *Hilkhot Harosh*, and the *Tur*. As Isserles himself puts it, Karo decides the law "according to the great *geonim* Alfasi, Rambam, R. Asher, but he pays no attention to the other great scholars of Torah, even though (the ones he favors) are earlier scholars (*kama'ey*) rather than later ones (*batra'ey*)." It is scarcely imaginable that Isserles would rank his own contemporaries among the "great scholars of Torah" (*revevata adirey torah*), a designation customarily reserved for the long departed. R. Shelomo Luria, Isserles' great Polish contemporary, likewise used the term *batra'ey* to refer to scholars of the past, although he included more Sefardim within this category than did Isserles; see Yuval at note 68. The one difficulty with the position I have outlined here is the famous refusal by Isserles' teacher, R. Shalom Shakhna, to write a halakhic compendium because others would rule in accordance with that book on the grounds that *hilkheta kevatra* (*Resp. Rema*, no. 25; ed. Siev, p. 156b). This might be taken to mean that a contemporary *posek* is himself a "latest authority" under this rule. Yet I think it is more plausible that Shakhna had in mind the potential influence his book would exert upon future generations. Isserles, at any rate, gives no indication that his *own* work enjoys such status; rather, when he decides in accordance with the "latest authorities," he is referring to authorities *other* than those of his own generation.
106. Thus, in the responsum cited previously (*Resp. Rema*, no. 25; ed. Siev, p. 156b), R. Shalom Shakhna refuses to write a halakhic compendium because he does not wish to have the law decided in accordance with his views; rather, quoting *BT Bava Batra 131a*, he holds that "a judge must rule on the basis of what he sees"; *i.e.*, his own reading of the law.

107. See the sources in note 97.
108. For a list of some of the works that contain these rules, see Elon, *Jewish Law*, 1540-1555. No value judgment is implied here. The establishment of some sort of regimen for determining the "correct" decision on a disputed matter may very well be a social or political necessity in a legal community; see Y. Kahana, *Mechkarim besifrut hateshuvot*, 1-8. My point is simply that this is one of the ways that a consensus view emerges out of a previously open debate over the "right" answer.
109. On the formation of this consensus see Mark Washofsky, "Abortion and the Halakhic Conversation," in Walter Jacob and Moshe Zemer, eds., *The Fetus and Fertility in Jewish Law* (Pittsburgh and Tel Aviv: The Freehof Institute of Progressive Halakhah, 1995), 39-89, especially at notes 1-9. See also the forthcoming doctoral dissertation of Daniel Schiff for a comprehensive analysis of the history of the abortion controversy in Jewish law.
110. For background see Avraham Freimann, *Seder kiddushin venisu'in* (Jerusalem: Mosad Harav Kook, 1964); Y. Z. Kahana, *Sefer ha'agunot* (Jerusalem: Mosad Harav Kook, 1954); and Mark Washofsky, "The Recalcitrant Husband," *Jewish Law Annual* 4 (1981), 144-166.
111. Eliezer Berkovits, *tenai benisu'in uveget* (Jerusalem: Mosad Harav Kook, 1966).
112. Menachem M. Kasher, "Be'inyan tenai benisu'in," *No'am* 12 (1969), 338-353.
113. The rabbinical reactions to that ill-fated proposal are collected in *Ein tenai benisu'in* (Vilna, 1930).
114. Shlomo Riskin, *Women and Jewish Divorce* (Hoboken: Ktav, 1989).
115. *BT Ketubot* 63a-b; Rashi, *Ketubot* 63b, s.v. *la kayafinan lah*; *Yad*, *Ishut* 14:8.
116. See *Tosafot*, *BT Ketubot* 63b, s.v. *aval*.
117. See *Beit Yosef*, *EHE* 77, fol. 115b-116a, and *SA EHE* 77:2.
118. See the review of Riskin's book by Gedalia Dov Schwartz in *Tradition* 25:2 (1990), 94-96.
119. On the other hand, some authorities are willing to consider the argument of *ma'is alay* as one of several factors—though not the exclusive factor—in persuading a rabbinical court to accept a divorce document of questionable validity. See R. Ezra Basri, "Get Me'useh," *Shenaton hamishpat ha'ivri* 16-17 (1990-1991), 535-553.
120. The word reflects Ronald Dworkin's discussion of the "gravitational force" of precedent; *Taking Rights Seriously* (Cambridge, MA: Harvard U. Press, 1977), 111ff.
121. Emanuel Feldman, "Trends in the American Yeshivot: A Rejoinder," in Reuven P. Bulka, *Dimensions of Orthodox Judaism* (New York: Ktav, 1983), at 334-336.
122. Yosef Dov Soloveitchik, *Shi'urim lezekher abba mari z"l* (Jerusalem: Akiva Yosef, 1983), at 428.
123. See Walter S. Wurzburger, "The Conservative View of *Halakhah* is Non-Traditional," *Judaism* 38 (1989), 377-379.
124. We should not claim too much for the responsum in this regard. The *teshuvah* does not necessarily render a chronological account of its author's thought processes. For example, although the responsum usually presents the question, followed by the halakhic argumentation that leads to its answer, it may well be that the *meshiv* arrived at his answer prior to his considering those

- arguments, whether by way of a "hunch" or of a general impression that "this is how the question ought to be decided." Louis Jacobs suggests that this indeed is the way rabbis answer halakhic questions: they begin with a general impression drawn from their personal Judaic values and then search for legal arguments to support this preconceived conclusion. See his *A Tree of Life* (Oxford: Oxford U. Press, 1984), 11-12. Still, the reasoning as conveyed in the *teshuvah* is a vital component of the answer, for without that reasoning the *meshiv* cannot justify his decision to his readers; he cannot advocate that they adopt his view of the *halakhah* unless he shows them in some reasoned form—that is, through some pattern of argument that they might conceivably accept as "halakhic"—why they ought to adopt it.
125. Peter Haas's *Responsa: Literary History of a Rabbinic Genre* (Atlanta: Scholars Press, 1996) is an effort in this direction. What I mean by a "literary study" of the responsa is indicated in my "Responsa and Rhetoric: On Law, Literature and the Rabbinic Decision," in John C. Reeves and John Kampen, eds., *Pursuing the Text: Studies in Honor of Ben Zion Wacholder* (Sheffield: Sheffield Academic Press, 1994), 360-409. Menachem Elon, *Jewish Law, 1453-1528*, offers what is currently the best discussion of the responsa as "literary sources" of law in the Judaic tradition. And for detail and characterization of the *she'elot uteshuvot*, Solomon B. Freehof's *The Responsa Literature* (Philadelphia: Jewish Publication Society of America, 1955) is still unsurpassed.
126. *Resp. Rivash*, no. 15. See Abraham M. Hershman, *Rabbi Isaac Ben Sheshet Perpet and His Times* (New York: Jewish Theological Seminary of America, 1943), 39, who posits that this responsum was written soon after Rivash arrived in North Africa in the wake of the persecutions of 1391 in Spain.
127. The halakhic tradition derives this requirement from Gen. 1:28; see *Sefer Hachinukh, mitzvah* no. 1. The relevant halakhic sources are *M. Yevamot* 6:6, *BT Yevamot* 61b-62a and 65b, *Yad*, *Ishut* 15:2ff., and *SA EHE* 1.
128. On this, see *BT Pesachim* 49a and *SA EHE* 2:8.
129. See, e.g., Alfasi, *Ketubot*, fol. 36a, and *Hil. Harosh, M. Ketubot* 7:20 and *M. Yevamot* 6:16.
130. The classic method is to demonstrate that the apparently deviant *minhag* in fact constitutes a correct interpretation of the Talmudic sources. A good example is the defense by medieval Ashkenazic halakhists of the practice of conducting commerce with non-Jews on a Gentile religious festival, an apparently clear transgression of the prohibition laid down in *M. Avodah Zarah* 1:1. Compare the straightforward presentation of the law in Alfasi, *Avodah Zarah*, fol. 1a-b, with the treatment it receives in *Hilkhot Harosh, Avodah Zarah* 1:1. On the relationship between *halakhah* and *minhag* in medieval halakhic literature, see Yisrael Ta-Shema, *Minhag ashkenaz hakadmon* (Jerusalem: Magnes, 1992); Jacob Katz, *Halakhah vekabalah* (Jerusalem: Magnes, 1984); Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *AJS Review* 12 (1987), 205-222; and Mark Washofsky, "Minhag and Halakhah: Toward a Model of Shared Authority on Matters of Ritual," in Walter Jacob and Moshe Zemer, eds., *Rabbinic Lay Relations in Jewish Law* (Pittsburgh and Tel Aviv: The Freehof Institute of Progressive Halakhah, 1993), 99-126.
131. An unstated motivation—but one I think cannot be far from Rivash's mind—is the desire to keep the Gentile authorities from intervening into the affairs

- of the Jewish community. The local ruler in this case summons the community leaders to respond to Shmuel Aramah's indictment of them, and it would seem that he is well-disposed to Aramah's claim.
132. It would be absurd to describe R. Yitzchak b. Sheshet Perfet as a philosophical pragmatist, a forerunner of Pierce, James, Dewey, and Rorty. Pragmatism as a general approach to knowledge and action involves intellectual attitudes (most notably a thoroughgoing skepticism concerning metaphysical truth claims) that would have been foreign to the mind of a fourteenth-century rabbi. My reference indicates rather that in his handling of this question, Rivash displays some of the tendencies associated with legal pragmatism, which urges that jurists apply rules of law not as formal propositions to be developed by abstract logical reasoning but as instruments serving practical purposes that lie beyond the rules themselves. The good of the legal system as a whole is just such a purpose, and Rivash cites it here as the reason for rejecting the controlling legal precedents. On legal pragmatism, see John Dewey, "Logical Method and Law," *Cornell Law Quarterly* 17 (December, 1929), 17-27; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale, 1921), 66 ("The final cause of law is the welfare of society"); Richard Posner, *Problems of Jurisprudence* (Cambridge: Harvard, 1990), especially 454-469 ("A Pragmatist Manifesto"); and the essays in M. Brint and W. Weaver, eds., *Pragmatism in Law and Society* (Boulder, CO: Westview, 1991).
133. That Rivash himself recognizes this is underlined by R. Yosef Karo, *Beit Yosef* EHE 154 (fol. 74b), who cites the beginning of this responsum as proof that a divorce is coerced when the wife is beyond childbearing years. See SA EHE 154:10 and *Beit Shmu'el*, no. 24. Significantly, Karo never mentions the second part of the responsum, in which Rivash notes that the practice of the courts is to refrain from coercion in these cases. R. Moshe Isserles, on the other hand, relies heavily upon this second part of the responsum for his ruling that "nowadays the custom is not to coerce on these matters" (SA EHE 1:3 and 154:10; and see *Darkei Moshe* EHE 1, no. 3). This method of selective citation, in which the later authority refers only to that part of the precedential source that supports his own opinion, surely belongs in the category of "leeways" that jurists enjoy with respect to precedent.
134. The language and ideas here—notably that the responsum expresses a sense of the ideal and while conceding the necessity of the failure to realize that ideal—are inspired by the observations of James Boyd White, "The Rhythms of Hope and Disappointment in the Language of Judging," *St. John's Law Review* 70 (1996), 45-50.
135. A wooden translation of Rivash's phrase *nicha lah delipuk `alah shema de'ishut*. She wishes, literally, to bear the title of "wife." This may be a delicate way to avoid stating the obvious: that no actual *ishut*—marital relations—are likely to occur in this union.
136. See the *mishnah* on the page (*M. Yevamot* 6:6); *Yad*, *Ishut* 15:2; SA EHE 1:1 and 13.
137. Thus, lacking a valid claim for divorce, if you wish to leave the marriage you will not receive your *ketubah*; Rashi, *Yevamot* 65b, *s.v. la mipakadat*.
138. Rashi, *Yevamot* 65b, *s.v. chutra leyadah*.
139. Llewellyn, *The Common Law Tradition*, 90.

140. I have argued this point elsewhere. See Mark Washofsky, "Responsa and the Art of Writing: Three Examples from the *Teshuvot* of Rabbi Moshe Feinstein," in *A Festschrift for Walter Jacob* (forthcoming), and "Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision," *Pursuing the Text: Studies in Honor of Ben Zion Wacholder*, London, Sheffield Press, 1994, pp. 360-409.
141. Anthony T. Kronman, "Rhetoric," *University of Cincinnati Law Review* 67 (1999), 677-709. The quotation is at 687.
142. On the "ethical" appeal see Aristotle, *On Rhetoric*, translated by George A. Kennedy (New York: Oxford U. Press, 1991), 1.2 (37). The reference is to *ethos*, one of the three classic *pisteis* (means of persuasion in public address, the others being *pathos* and *logos*). *Ethos* is the moral character of the speaker as presented in the speech. The point here is that Rivash, in his ample description of the established law, portrays himself as one who displays the virtues requisite of the good scholar. His readers can therefore trust him to arrive at an answer that is carefully considered and well-warranted according to the procedures of halakhic thought.
143. I have in mind here the observation of Richard Weisberg that "great [judicial] opinions, like great novels, strive to put a narrative structure around a specific and observable reality, and thus to create a more lasting universe"; "Law, Literature, and Cardozo's Judicial Poetics," *Cardozo Law Review* 1 (1979), 288. To put it somewhat more bluntly, in a judicial opinion, reality is what the judge says it is. The "great" opinion will do this with evident literary success.
144. On this notion of "translation," the creation of new meaning from old texts by placing those texts in new relationships with others, see James Boyd White, *Justice as Translation* (Chicago: U. of Chicago Press, 1990).
145. See especially Suzanne Last Stone, "In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1993), 813-894.
146. On the development of this consensus, its breakdown, and the various attempts by legal theorists to find alternative bases on which to reconstruct it, see Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale U. Press, 1996).
147. The leading voice in this "turn" is that of the late Robert Cover, whose much-discussed "Forward: *Nomos* and *Narrative*," *Harvard Law Review* 97 (1984) 4ff., suggests that the plurality of "metanarratives" in American culture renders problematic any attempt by the courts to speak with a unitary voice in the name of the law. Cover regards this plurality, which challenges the traditional liberal conception of a "correct" meaning of the law accessible through reason, as a positive thing, and he looks to Jewish law as the paradigm of a legal system that can tolerate a multiplicity of judicial views; see his "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5 (1987), 65-90. See also, among others, Samuel J. Levine, "Halacha and Aggada: Translating Robert Cover's '*Nomos* and *Narrative*,'" *Utah Law Review* 1998 (1998), 465-504; Perry Dane, "The Maps of Sovereignty: A Meditation," *Cardozo Law Review* 12 (1991), 959-1006; Norman Lamm and Aaron Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process," *Cardozo Law Review* 1 (1979), 99-133; and Sanford Levinson, *Constitutional Faith* (Princeton: Princeton U. Press, 1988). And see David R. Dow,

- "Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem," *Houston Law Review* 29 (1992), 581: "Jewish law teaches that it is possible for competing foundational norms to reside peacefully and beneficially in a single legal system as long as the interpreters of these norms possess certain characteristics—as long as they are wise."
148. On the tendency of Jewish lawyers to exaggerate the supposed similarities between American and Jewish law—two vastly different systems, see Jerold S. Auerbach, *Rabbis and Lawyers: The Journey from Torah to Constitution* (Bloomington: Indiana U. Press, 1996), xviii.
149. See Stone, note 145.
150. These include such famous examples as the "eilu ve'eilu" resolution of the halakhic controversy between the schools of Hillel and Shammai in *BT Yevamot* 13b and the "oven of Akhnai" story in *BT Bava Metzi'a* 59b.
151. This scholarly controversy provokes the same observation that I apply to the arguments over the role of precedent in Jewish law: a theory is only as valid as the data it purports to explain. Or, as Justice Holmes might have put it: "General propositions do not decide concrete cases"; *Lochner v. New York*, 198 U.S. 45 (1905), Holmes, J. dissenting.
152. Here I wander dangerously close to the precipice of modern (and postmodern) literary theory, in which the question of what, if any, meaning texts and language may have is deeply and irremediably controversial. I do not wish to fall off, at least not here. A thorough analysis of this subject would demand at least a brief reference to such approaches as deconstruction, hermeneutics, reader-response theories, and the objectivity-in-interpretation school of E.D. Hirsch, Jr. Let me instead make this observation: the activity of law is a conversation in which the parties involved commit themselves to the proposition that the texts do *mean* something and that this meaning is sufficiently discernible by the parties. I cannot imagine a coherent legal conversation that does not proceed from this assumption. If texts can mean *anything*, they therefore mean *nothing*, and if they mean nothing, no point can be served by citing them as part of the conversation. Meaning can be arrived at and agreed upon even when the discussants acknowledge the semantic reality that "objective" meaning does not inhere in words. Rather, meaning is an activity of speech or writing; it can be inferred by more-or-less reliable evidence as to what the speaker or writer had in mind when saying or writing the words. See Gerald Graff, "'Keep Off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson," *Texas Law Review* 60 (1982), 405-413.
153. For example, the bare facts of an auto accident—"he ran right into me while I was making a left turn"—are devoid of any meaning until translated into the language of tort law, which speaks of causation and negligence.
154. See, in general, Walter Jacob, *American Reform Responsa* (New York: Central Conference of American Rabbis, 1983), xv-xviii, and Alexander Guttmann, *The Struggle Over Reform in Rabbinic Literature* (New York: UAHC, 1976).
155. See Solomon B. Freehof's essay "Jacob Z. Lauterbach and the Halakah," *Judaism* 1 (1952), 270-273. The hundreds of *teshuvot* penned by Freehof himself, of course, are clear testimony to the halakhic language of Reform responsa.

156. Alisdair MacIntyre, *After Virtue* (Notre Dame: U. of Notre Dame Press, 1981), 207 (p. 222 in the second edition, published in 1984). In his *Whose Justice? Whose Rationality?* (Notre Dame: U. of Notre Dame Press, 1988, 12), MacIntyre expands his definition as follows: "A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition ... and those internal, interpretive debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted."
157. Put differently, a tradition is "the necessary framework to rational argument"; H. Jefferson Powell, *The Moral Tradition of American Constitutionalism* (Durham, NC: Duke U. Press, 1993), 14-15. See Powell at 12-47 for a consideration of MacIntyre's theory of tradition and its relationship to law.