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Re-examining progressive halakhah

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Asu Seyag LaTorah. Make a Fence to Protect the Torah

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Chapter 3



ASU SEYAG LA TORAH

Make a Fence to Protect the Torah

Rabbi Richard S. Rheins

At the inaugural conference of the Institute of Liberal Halakhah, my teacher and friend Mark Washofsky addressed the question of whether "liberal *halakhah*" was a contradiction in terms. He asked "Can the system of rabbinic law accommodate contemporary values of justice, morality and progress?"¹ In developing his answer, Washofsky brilliantly laid the groundwork for a dialogue between liberal *halakhists* and those of the Orthodox community. As he stated, the "ultimate goal of liberal *halakhic* writing is to encourage among the observant community an openness to alternative interpretations of law."² While I share the hope of my mentor for a future era of respectful dialogue and intellectual exchange between Orthodox and Liberal *halakhists*, a more pressing and immediate problem is establishing the legitimacy of Liberal/Progressive *halakhah* among our own non-Orthodox laity and rabbinic colleagues.

Notes for this section begin on page 107.

Those of us who support the continuing development of Progressive *Halakhah* face major challenges.³ Too many Jews misunderstand the word "*halakhah*" as "Jewish Law," an imposing body of ancient and inflexible statutes and restrictions. But *halakhah* does not mean "law." Rather, it is derived from the Hebrew root *h-l-kh* "to go." *Halakhah* expresses less a concept of law and legalism than a "method," a "Jewish way of doing things."

Many Jews affiliated with Reform and Conservative congregations do not live lives informed by *halakhah*, yet it provides a documented record of the evolution and development of Judaism's cherished traditions. It also preserves evidence of the many variations of how those rituals were and are practiced from place to place and era to era. Judaism's growth and flexibility are clearly demonstrated in *halakhic* literature. Ultimately, *Halakhah* provides both the "how to" and the "why," and explanations that help Jews see how, through the fulfillment of *mitzvot*, they are linked to the continuum of Jewish expression through thousands of years.

Without adequate explanations, Jewish rituals and observances may appear to some as bewildering anachronisms. I am not suggesting, nor does Progressive *halakhah* advocate, uniformity of practice and blind obedience to specific rituals. Liberal and secularly educated Jews are quick to protest against mindless and rote "performance" of rituals. The very birth of the Reform movement was due to the agitation of emancipated Jews who longed for a meaningful and refined expression of Judaism. "Reformers" of the nineteenth century researched and reconsidered the origins of old traditions and they reserved the right to reject those rituals that seemed outdated, superstitious, wrong-headed, or simply lacking edifying values. They felt fully empowered to modify rituals in order to make them more relevant to the contemporary Jewish community. They accompanied those changes with carefully argued responsa that demonstrated how their modifications were in keeping with the essential principles of Judaism and *halakhah*.⁴ Significantly, many of those changes, which were considered "radical," eventually became widespread among Jews, regardless of denomination. Prayer in the vernacular, formal religious school education for females, and placing the *bimah* in front of the congregation were all Reform innovations. They became widespread both because

they addressed the will of the laity and because they were shown to be in keeping with the spirit of *halakhic* development.

Progressive *halakhah* has made remarkable advances during the last fifty years. Interest in Talmud and *halakhah* among Reform and Conservative laity continues to accelerate. Dozens of volumes of Reform responsa and other works on *halakhah* have been published.⁵ The Freehof Institute of Progressive Halakhah has taken root and flourishes. In 1988, the Conservative movement began to publish its collections of responsa in order to foster the study and observance of *halakhah* by its members.⁶

There are many areas of growing cooperation and partnership between Conservative rabbis and those Reform rabbis who are committed to *halakhic* standards. Reform and Conservative *halakhic* methodologies are remarkably similar, even if we reach different conclusions.⁷ I believe that the term "Progressive *halakhah*" properly refers to both efforts. Both are seeking to offer a logical and vital alternative to the unacceptable extremes that plague the Jewish people: on the one hand, unrestrained autonomy with no communal standards, and on the other hand, repressive fundamentalism that champions medieval sensibility.

Progressive *Halakhah* does not aim to promote "neo-Orthodoxy," as some of its more assimilated critics charge. Nor is Progressive *halakhah* seeking to water down or trivialize Jewish tradition, as some of the uncompromising purists charge. In a nutshell, Progressive *halakhah*, because it is a reflection of non-fundamentalist ideology, is far more willing to innovate and explore unique responses to the challenges that face modern Judaism. This paper seeks to provide a brief outline of the phenomenon of rabbinic legislation, the power to deviate from the literal word of the Torah, and the limits of that power.

Progressive Halakhahs vis-à-vis Orthodox Halakhah

Progressive *halakhah* openly embraces the scientific discoveries and inquiries that present such a grave intellectual indictment of Orthodoxy's fundamentalism. We may confidently claim that Progressive *Halakhah* is the truest vehicle for maintaining and continuing the spirit and genius of Jewish thought and practice. Progressive *halakhah* is, however, a work in progress (much like the Jewish people). Before it will win the attention and respect of

Reform and Conservative Jews, we must state more clearly its authenticity vis-à-vis the Orthodox model.

Robert Gordis eloquently expressed the frustration many of us feel toward the extremist *halakhic* methodology of the Orthodox. In *The Dynamics of Judaism* he wrote

"It is ironic that in our day when the doctrine of papal infallibility is being challenged even in the Catholic Church, a novel doctrine of rabbinic infallibility is being advanced in fundamentalist Jewish circles. In order to suppress any movement for change in the *halakhah*, we are told that it is forbidden to question, let alone disagree with, the views of a given scholar or group of scholars, because they represent *da-at Torah*, "the true meaning of Torah." This gift has been vouchsafed to them because they are the mystical embodiment of divine truth. Such a doctrine, designed to stifle discussion and controversy, was never advanced in the past by any of the thousands of Talmudic Sages, by Saadia or his adversaries in the tenth century, by the advocates and opponents of Maimonides in the thirteenth, or even by the adherents of the *Shulhan Arukh* and its rabbinic opponents in the sixteenth and seventeenth centuries.⁸

Halakhic literature is replete with inspiring models of dynamic flexibility that demonstrate rabbinic creativity. The long and proud history of Judaism's spiritual and intellectual development was due in no small part to the courageous innovations and accommodations established and promoted by *halakhic* authorities (*poskim*) in every generation. Progressive *halakhah* strives to learn from these models and emulate them.⁹

While traditional *halakhic* methodology can be quite flexible, and in the hands of enlightened authorities throughout Jewish history has proven to be a most creative tool, most current Orthodox *poskim* are emphasizing the preservative and conservative properties of *halakhah*, not its progressive qualities.¹⁰ Moshe Sofer (*Hatam Sofer*) was a harsh critic of Reform—not only the Reform movement, but of the very idea that Judaism can change and evolve. He wrote: "*Hadash assur min ha-Torah*" (anything new is forbidden by the Torah!)¹¹ For him even local custom took on the urgency and importance of the Torah itself. As one Orthodox rabbi described him, the Hatam Sofer "would brook no deviation from the custom of his country that women cover their heads so that not even a single strand of hair be visible, a custom based upon a teaching of the Zohar."¹²

Notwithstanding the prevailing trend among Orthodox authorities toward ever-greater restrictions and conservative

readings of *halakhic* sources, it is a mistake to confuse their intransigence for religious piety. The late great historian Jacob Katz taught that the current Orthodox attitude of inflexibility is itself a reform (!)—a reaction to sociological and political influences and not a natural result of pure *halakhic* reasoning.¹³ In numerous case studies, Katz has demonstrated that *halakhah's* role has historically been one of reacting to the changing needs and realities of the Jewish people.¹⁴

It is essential to emphasize that radical innovations, unique interpretations, and bold contradictions to the literal instructions of the Torah text are not the inventions of Reform Judaism. They are the legacy of sages of the Mishnah and Gemara!

Rabbinic authorities have claimed the right, even the obligation, to make rulings that will help strengthen the Jewish people. When the sages of the *Kenesset HaGedolah*, (the Great Assembly), instructed us: *va'asu seyag laTorah*, (make a fence to protect the Torah), they did not mean to fossilize Jewish life and thought—just the opposite! Throughout rabbinic literature the principle of *seyag laTorah* is a shorthand way of guaranteeing the right of contemporary Jewish authorities to legislate even radical innovations to help the Jewish people survive and fulfill the Divine will as they could best determine. As Maimonides wrote in his commentary to the Mishnah:

The fourth [of the five divisions of Oral Law]: These are *gezerot*, laws the prophets and Sages decreed in every generation in order *la-asot seyag laTorah*—to erect a fence around the laws of the Torah. The-Holy-One-Blessed-Be-He commanded us in general terms to create such legislation when He said: "You shall protect my safeguards." (Leviticus 18:30) This is explained by tradition to mean: 'Make safeguards for my safeguards'" (*Yevomot* 21a).¹⁵

Rabbinic sages revered the Torah as divinely inspired and yet they realized the importance of developing legislation that was distinct from the letter of the law as it appeared in the Torah. Early Jewish philosophers apparently shared this conviction. So it has been argued that the first-century Jewish philosopher Philo promoted the importance of Oral law. In his *De Specialibus Legibus* (The Special Laws), he offers a fascinating commentary on Deuteronomy 19:14: "You shall not remove your neighbor's landmarks which were set up by earlier generations." Philo understood this verse as protecting the authority of ancestral customs.

For customs are unwritten laws, the decisions approved by men of old, not inscribed on monuments nor on leaves of paper which the moth destroys, but on the souls of those who are partners in the same citizenship.... Praise cannot be duly given to one who obeys the written law, since he acts under the admonition of restraint and fear of punishment. But he who faithfully observes the unwritten deserves commendation, since the virtue which he displays is freely willed.¹⁶

Philo's thought was echoed in *Pirkei Avot* (3:17): "*Masoret seyag laTorah ...*" (*Tradition is a protective fence for the Torah*). Scholars and sages two thousand years ago knew that if the Torah were to have a meaningful, ongoing and just impact on the lives of contemporary Jews, it had to be accompanied by commentary, interpretation and creative legislation. As Maimonides wrote in his introduction to the *Mishnah*:

Know that every *mitzvah* the Holy One Blessed Be He gave our teacher Moses, peace be upon him, was given to him with detailed explanations. First He gave him the *mitzvah*, then He told him the explanation and details and all wisdom contained in the Torah verses. ... When a situation arose on which no explanation had been heard from the prophet (Moses), they determined a response by means of deduction, logical argument guided by the thirteen methods of Torah interpretation¹⁷. ... Whenever a disagreement developed, they followed the majority opinion, as the Torah prescribes (Exodus 23:2): "to decide according to the majority."¹⁸

The Torah required commentary, interpretation and creative application that met popular approval among the sages and no doubt from the general population as well. Indeed, the ascendancy of the Pharisees and their heirs, the rabbis, was due in large part because of the popular support they earned by demonstrating a mastery and creative approach to Scripture. Our best first-century eyewitness Josephus maintained that the popular support and influence of the Pharisees was due to the reputation they had for excellence in their interpretation of the Torah (*A.J.* 17.41; *B.J.* 1.110; 2.162; *Vita* 191) as well as for *the customs they introduced* and transmitted (*A.J.* 13.296, 297, 408).¹⁹

For the early Sages, protecting the Torah meant safeguarding the Jewish people and promoting the continuance of the ancestral faith, not by slavish obedience to the literal words of the Torah, but through various forms of legislation that could enhance the essence of the Torah's message and intent. This legislative activity was the beginning of the classic rabbinic *halakhic* process.

What are the principles of flexibility and limitations inherent in the *halakhic* process? How did the sages of the Mishnah and Gemara establish their right to challenge the literal teachings of the Torah text? If radical innovation was and is possible, what principles constrain rabbis (both past and present)? What are the origins of rabbinic authority, our self-proclaimed mission to build a *seyag laTorah*, a protective fence around the Torah, by means of *takkanot* and *gezerot*? *Takkanot* and *gezerot* are forms of rabbinic legislation. Though the terms are frequently used interchangeably, some authorities use the term *takkanah* when the rabbis mandate a new action or observance and *gezerah* when the rabbis make a ruling that extends or limits an existing observance.²⁰ These principles enabled rabbis of every generation to legislate and even to contradict a law from the Torah. How could they claim such discretionary power?

From Torah to Legislation

New interpretations, applications and radical changes to law as it appears in the Torah can be traced to biblical times.²¹ The Torah itself provides clear examples of challenges to law and subsequent changes. The daughters of Zelophehad complained to Moses that just because their father had no son, the family inheritance should not be lost. Rather, it should be given to the daughters (Numbers 27:1-11): "Let not our father's name be lost to his clan just because he had no son! Give us a holding among our father's kinsmen." Moses sought divine help to adjudicate this case. And the Lord said to Moses, "The plea of Zelophehad's daughters is just. ..." After this challenge, daughters were included in the line of inheritance. A little later, a new challenge arose. What happens if the daughters of Zelophehad do not marry one who is of the tribe of Manasseh? Will not the land, promised by the Torah to the tribe Manasseh, be transferred by means of marriage to another tribe? Once again Moses turned to God and the law was further amended: "This is what the Lord has commanded concerning the daughters of Zelophehad: They may marry anyone they wish, provided they marry into a clan of their father's tribe. No inheritance of the Israelites may pass over from one tribe to another, but the Israelites must remain bound each to the ancestral portion of his tribe"

(Numbers 36:1-9). Thus we can see the evolution of *halakhah* occurred in the Torah itself!

Ezra the scribe was also a noted biblical legislator. He enacted new laws against intermarriage (Ezra 9:1-10:44). He was credited with a number of *takanot*, including: the public reading of the Torah at the *Minhah* service on Shabbat and on Mondays and Thursdays; and other matters (*Baba Kama* 82a).

Tellingly, Ezra was credited with revolutionary changes to the very fundamental elements of the Torah: its script. *Sanhedrin* 21b stated: "Originally, the Torah was presented to Israel in Hebrew script and in the Holy Tongue (*bikh-tav iv-ri uleshon ha-kodesh*). It (the Torah) was presented to them again in the days of Ezra in Assyrian script and the Aramaic tongue (*bikh-tav ashurit uleshon arami*)." A *Baraita* then continued: "Rabbi Yosi says, Ezra was worthy of having the Torah presented to Israel through him had Moses not preceded him (*Sanhedrin* 21b)."

What compelled Ezra to institute (legislate) such radical changes? The Book of Nehemiah explained that Ezra and Nehemiah were faced with Jews who were unfamiliar with the Torah. They apparently were unable to understand Hebrew. "They read from the scroll of the Teaching of God (*va-yikreu va-Sefer beTorah ha-Elohim*), translating it and giving the sense; so they understood the reading (Nehemiah 8:18). Ezra decided that if a language barrier prevented Jews from understanding the Torah, then then tradition and form should not stand in the way of essential principles and integrity.

Another ancient example of legislation that altered the literal reading of a Torah law can be found in I Maccabees. Early in the war against the Seleucids, many Jews were unwilling to violate the laws of Shabbat even to defend themselves. The Seleucids therefore attacked on the Sabbath and the defenseless Jews were slaughtered.²² Shortly thereafter, Mattathias, the leader of the Jewish revolt, proposed a *takkanah*:

When Mattathias and his friends heard this, they mourned greatly over them, each one saying to the other, "If all of us do as our brothers have done, and do not fight against the heathen for our lives and our laws, they will soon destroy us from off the earth." They then made the following decision, "If any man attack us in battle on the Sabbath day, let us oppose him, that we may not all die as our brothers did in the hiding places" (2:39-41).

Again, the preservation of the Jewish people and their faith took precedence over scrupulous observance to the laws of the Torah, even those as significant as Sabbath prohibitions. Jews in later days could cite these important precedents for legislative activity. In fact, on first glance it appears that the Talmudic sages simply assumed that they were empowered to legislate for *Pirkei Avot* taught:

Moses received the Torah at Sinai and transmitted it to Joshua, Joshua to the elders, and the elders to the prophets, and the prophets to the men of the great synagogue. The latter used to say three things: be patient in [the administration of] justice, rear many disciples and *make a fence around the Torah* (*va-asu seyag laTorah*).

What *hutzpah* for the earliest sages to claim the right to legislate! Did not the Torah explicitly warn against altering the laws of Moses? "*Lo tosifu al hadevar asher Anokhi metzaveh etkhem ve-lo tigre-u mimenu*" (Do not add anything to that which I have commanded you and do not subtract from it" (Deuteronomy 4:2).²³

To overcome this imposing obstacle, the sages understood *lo toseif* and *lo tigre-u* narrowly. Rashi interpreted *lo tosifu* (do not add) as a prohibition against adding to the prescribed elements of a commandment. For instance, we are prohibited from adding a fifth species to the four species of the *lulav* and *etrog*. Likewise, we are forbidden to add a fourth blessing to the threefold priestly blessing (*birkat Kohanim*) found in the Torah.²⁴ Nachmanides noted that the addition of the reading of the Scroll of Esther on Purim was an early challenge to the above prohibition.²⁵ By what right did our ancestors add the festival of Purim to the Jewish calendar of observances when it celebrates an event that happened centuries after the canonization of the Torah? In the words of Nachmanides, Purim and other rabbinically legislated observances are permitted as long as: "one realizes that these *takanot* (ordinances of the sages) were enacted as a fence [to protect the Torah] and are not the actual words of the Holy One Blessed by He of the Torah."²⁶

A thirteenth century contemporary of Nachmanides, Rabbi Hizkiyah Hizkuni (Hazekuni) of Provence, had another ingenious way of limiting the effect of Deuteronomy 4:2. Quite logically, he understands that the injunction not to add or subtract is in specific reference to the Torah's prohibition against the worship of other gods and idol worship.²⁷ Thus, the Torah's intent

was simply to preserve the absolute ban on idolatry, not to limit the later generations from adding legislation.

Tradition has established that the Torah text contains 613 commandments (*mitzvot*) that are explicitly divine in origin. Though there is some variation about which are the specific 613 commandments from the Torah, they are generally divided into two categories: 248 affirmative commandments (*mitzvot aseh*) and 365 negative commandments (*mitzvot lo ta-aseh*).²⁸ The rabbis understood Deuteronomy 4:2 as prohibiting them from adding to the 613 Torah laws (*de-oraita*), but that verse did not restrict them from legislating rabbinic laws (*de-rabbanan*).

Having overcome the restrictions of Deuteronomy 4:2, the rabbis still had to find the textual support in the Torah for the authority to add laws that would help shape and define Jewish practice. They grounded the right to legislate on Deuteronomy 17:11: "According to the sentence of the Torah which they shall teach you, and according to the judgment which they shall tell you, you shall do; *you shall not deviate ('lo tasur')* from that which they instruct you either to the right or to the left."

The operative verse is Deuteronomy 17:11, *Al pi hatorah asher yorukha ve-al hamishpat asher yomru lekha ta-aseh lo tasur min hade-var asher yageedu lekha yamin usmol*. The Torah specifically referred to the Levitical priests (*Kohanim*) and the local judge (*Shofet*) as the authorities which must be obeyed. Naturally, the rabbis saw themselves as the rightful heirs to judge, guide and instruct the Jewish people in the post-Temple era. This crucial verse helped to establish rabbinic authority and the right to legislate. But it also taught that their words must be obeyed. As the Talmud taught: "All the ordinances of the Rabbis were based by them on the prohibition *lo tasur* (you shall not deviate)."²⁹

Interestingly, the above proof-text was an important argument in the arsenal the medieval Rabbis marshaled during the infamous Disputations organized by the Catholic Church.³⁰ The church's persecutors charged that Jews had abandoned the Bible in favor of the Talmud. They cited as evidence the rabbinic teaching that the Talmud (*Torah she-b'al peh*) was divine. Christian doctrine, according to Augustine, based its "tolerance" of Jews on the predication of Jewish adherence to the divinity of the Bible. If it could be proven that Jews had abandoned the Bible (in favor of the Talmud), Christians no longer needed to tolerate Jews in Europe.³¹ The rabbinic defenders in the *Disputations* had to

demonstrate the indispensability of the talmudic interpretation and application of the Bible. They also had to demonstrate the rabbinic right to legislate. Rabbi Moses of Coucy provided such a defense in his *Sefer Mitzvot Gadol*. He described how rabbinic sages, disciples of the prophets, were the rightful heirs to carry out the Biblical injunction: "You must not deviate from that which they instruct you either to the right or to the left" (Deut. 17:11). He then wrote: "And whosoever should examine this book [i.e., the Talmud] will see how they made a fence for the Torah (*asu seyag latorah*) and on their authority enacted [ordinances] to create a buffer that will prevent Jews from violating a Biblical prohibition."³²

The rabbinic legislative powers were developed throughout the Talmudic era. A comprehensive review of the major principles and guidelines for legislative activity by the *halakhic* authorities can be found in Menachem Elon's monumental four-volume work: *Jewish Law: History Sources, Principles*. In it, Elon identified several major methodological principles of rabbinic legislation,³³ including³³ *Shev ve-al ta-aseh*³⁴ "Sit and do not perform," a positive *mitzvah* from the Torah. A rabbinic court may legislate that a precept of the Torah should not be carried out. For instance, the Rabbis prohibited the sounding of a *shofar* when Rosh HaShanah fell on Shabbat even though the Torah commanded that the *shofar* to be sounded,³⁵ and they extended the Biblical law against boiling meat in its mother's milk to include poultry.³⁶

The converse of the first principle listed above (sit and do not do) is *kum va-aseh*³⁷ (get up and do). Specifically, this concept established the Rabbinic right to issue decrees that compel us *to do that which the Torah has commanded us not to do*. This is the most controversial of the principles of rabbinic legislation. It is hardly surprising that not all rabbis agreed that they had this authority. The Talmud recorded a debate between the third-century *amoraim* Hisdah and Rabbah on this issue.³⁸ Rabbah did not believe that rabbis possessed the authority to permit an act prohibited by the Torah. Hisdah thought they did.

This debate in *Yevamot 90b* involved an exegesis of Deuteronomy 18:15 ("The Lord your God will raise up for you a prophet from among your own people, like myself; unto him you shall hearken."):

Come and hear: "Unto him you shall hearken (Deut. 18:15)," even if he tells you to transgress any of the commandments of the Torah. For instance, Elijah on Mount Carmel—obey him in every respect

in accordance with the needs of the hour! There it is different, for it is written, Unto him shall you hearken—Then let [rabbinic law] be deduced from it! The safeguarding of a cause is different ...

“Unto him you shall hearken” refers to the power of the prophets to legislate. Rabbi Chisda maintained that, like the prophets, rabbinic courts could legislate even to the extent of permitting an act that the Torah prohibits. Rabbah disputes Hisda on this point. *Yevamot* 90b explored the difference between the extraordinary acts of Elijah and the acts of rabbis to amend or even abrogate laws of Torah in order to establish a *seyag letorah*.

Elijah violated the Torah’s ban against sacrificing in a place other than Jerusalem when he made his great sacrificial confrontation with the priests of Baal on Mount Carmel (I Kings 18:31ff). Rabbah maintained that there was a substantial difference between Elijah’s heroic act and the rabbinic right to legislate. Elijah’s was a desperate act to save the day and not an attempt to establish a precedent.

The Tosafists asked, “How can a prophet, like Elijah, who delivers a divine message, be analogous to a *halakhic* authority whose enactment is not of divine origin?” Nachmanides and others understood that when a prophet abrogated Torah, he did so not by divine command but on his own authority. Likewise, the rabbis legislate on their own authority and not with the pretension of divine command.³⁹

Though the dispute of *Yevamot* 90b was decided in favor of Rabbah, the Talmud established three important exceptions, which, in effect, granted the rabbis sweeping power in accordance with Chisda’s position. The three exceptions are:

*Hefker bet din hefker*⁴⁰ (what the rabbinic court nullifies is nullified). In a property dispute, the rabbis have the right to declare an individual’s property forfeited. This principle became a doctrine that permitted legislation to both nullify existing legal rights (granted by the Torah) and to create new rights (not conferred by the Torah). This was the principle upon which Hillel based his famous *takkanah* known as the *prosbul* that gave creditors the right to collect debts even after the end of a sabbatical year.⁴¹

Le-migdar milta (to safeguard the matter). The Rabbis have the authority to issue *takkanot*, protective measures even in criminal and capital cases, during times of dire necessity.

*Hora'at sha'ah*⁴² (a decision for the hour, that is an emergency enactment) and *ha-sha-ah tzerikhah le-khakh* (the extraordinary needs of the hour). The Rabbis established the right to enact temporary legislation to protect the health and faith of the Jewish people even if it meant contradicting a commandment from the Torah. In these emergency situations the Rabbis frequently evoked the phrase from Psalm 119:126: *et la-asot* (it is time for the Lord to word, they have made void Your law).⁴³

The exceptions to Rabbah's rejection of the Rabbinic authority to declare *kum va-aseh*, seem to be reserved for emergency situations. The exceptions were, in theory, only (*lefi sha'ah*) temporary measures that did not establish precedent, but practically many "emergency" decrees established by the rabbis during times of crisis became permanent. For example, the prohibition against memorizing the "written Torah" or writing the "oral Torah." The Talmudic sages understood this law to be *de-oraita*, based on a law from the Torah. The scriptural citation was Exodus 34:27:⁴⁴ "And the Lord said to Moses: 'Write (*ketav-lekha et-hadevarim ha-eileh*) down these commandments, for in accordance with these commandments (*ki al pi hadevarim*) I make a covenant with you and Israel.'"

This verse was interpreted to mean that teachings that were handed down to Moses in writing (i.e., the Torah) must not be transmitted orally.⁴⁵ Likewise, teachings that were given orally (i.e., Mishnayot and Beraitot) must not be written down.⁴⁶ But the Mishnah was written down! In writing it down, did not the Rabbis violate a prohibition from the Torah? However, as Rashi and the Rambam explained, the Mishnah was written down in violation of the Torah only because of the terrible crisis the Jewish people faced after the destruction of the Second Temple.⁴⁷ The sages cited the emergency authority inferred from Psalm 119:126: "*Et la-asot*" (When it is time to act for the Lord, you may even nullify your Torah!). This "emergency decree" has now been in effect one thousand nine hundred years.

Ultimately, Joseph Karo, the great codifier of Jewish law, understood that the Talmudic debate between Rabbah and Hisdah was won by Hisdah (Yevamot 90b). The Rabbis had the authority to permit that which the Torah prohibits.

... for we say *kum aseh*, (rise up and do that which the Torah prohibited)...because we conclude that in order to "safeguard the mat-

ter" (*le-migdar milta*), the Sages are empowered to abrogate a law of the Torah even by directing the performance of an act the Torah prohibits. The reinforcement of Rabbinic enactments even in those cases that do not, strictly speaking, involve *safeguarding* will lead to the better observance of those measures designed to create such a safeguard, because if people fail to respect one Rabbinic enactment, they will ultimately lose respect for all of them. Therefore, anything that reinforces a Rabbinic enactment comes within the application of the principle *safeguarding the matter*.⁴⁸

Rabbinic legislation which contradicted the Torah may be enacted in order to protect the spiritual and physical well being of the Jewish people and Judaism. Still, no one should infer from this that the rabbis assumed the power to speak with the same eternal authority as the Torah. The rabbis have been obligated to make it clear that their enactments are not additions to the Torah. Rabbis are not empowered to add or subtract from the Torah, they are empowered to declare *takkanot* and *gezerot* that strengthen Judaism and the Jewish people. As Maimonides wrote in *Mishneh Torah, Hilkhot Mamrim 2.4*:

If in order to bring back the multitudes to religion and save them from general religious laxity, the court deems it necessary to set aside temporarily a positive or a negative command, it may do so, taking into account the need of the hour. Even as a physician will amputate the hand or the foot of a patient in order to save his life, so the court may advocate, when an emergency arises, the temporary disregard of some of the commandment, so that the whole of the commandments may be preserved. This is in keeping with what the early Sages said: "Desecrate on His account one Sabbath that many Sabbaths will be observed" (*Yoma 85b*).⁴⁹

Limits To Rabbinic Legislation

Despite the authority to legislate, there have always been stringent limits; their dominance has always been obvious. Were innovation and radical reform easy, Judaism today would be very different. Judaism has evolved. Most observances and beliefs that dominate modern Judaism (monotheism, Shabbat, festivals, daily prayer, *tzedakah*, dietary restrictions, Torah study, the Hebrew language, *Brit Milah*, etc.) can all be traced to the Biblical period.⁵⁰ The "conservative" nature of Judaism has preserved a link to our ancestors and fostered bonds among Jews of

every denomination. It may be inaccurate to speak of *Am Echad*, nevertheless, a large degree of homogeneity remains among our major denominations. This is the direct result of the strict limits the rabbis placed upon their legislative authority. Radical innovations, eclectic expressions and individual autonomy lead to more sectarian divisions.⁵¹

Some liberal Rabbis seem far too eager to experiment and create without reflection on the long-term effect on Jewish continuity. While my colleagues and I are quick to criticize our Orthodox brethren for not taking advantage of the flexibility inherent in *halakhah*, we Progressive Jews must answer to the charge that we play too fast and loose with tradition and *halakhic* process. Therefore, let me review the major principles that limit *halakhic* legislation: rabbis were criticized for issuing excessively restrictive decrees. rabbis were not permitted to impose a *takkanah* or *gezerah* that the majority of Jews would not heed. Rabbis were forbidden to issue a decree against the will of the majority of Jews. Criticism was especially unleashed against those who promulgated excessive restriction (*gezerot*) that burdened the people. In *Avot d'R. Natan* the author warned that such burdens are more likely to lead the people to abandon the law than to achieve levels of super-piety.⁵² A sage of the *Yerushalmi* stated: "Is it not enough for you what the Torah has forbidden, that you go and prohibit additional things!"⁵³

The prohibition against a *gezerah* or *takkanah* that the majority of the people will not obey was clearly stated in *Avodah Zarah* 36a:

Our sages relied upon the dictum of Rabban Simeon b. Gamaliel and R. Eliezer b. Zadok who declared: "We make no decree upon the community unless the majority are able to abide by it." R. Adda b. Ahaba said: "What Scriptural verse supports this rule? You are cursed with the curse; for you rob Me, even this whole nation (Malachi 3:9). When the whole nation has [accepted an ordinance, then the curse which is the penalty of its infraction] does apply, otherwise it does not."

Maimonides codified this limitation in his *Mishneh Torah*: "Before instituting a *gezerah* or enacting a *takkanah* or introducing a *minhag* which it deems necessary, the rabbinic court (*Beit Din*) should calmly deliberate and make sure that the majority of the community can live up to it. At no time is a decree to be imposed upon the public which the majority cannot endure (*Hilkhot Mamrim*, 2.5)."

Religious authorities always encouraged greater observance and piety. To combat assimilation, laxity, superstition and ignorance, Rabbis have issued countless *gezerot* and *takkanot*. In addition, *minhagim* (customs) have been promoted, but rabbis may not issue mandates that are contrary to the popular will. Sometimes Rabbis have tried to eliminate a popular custom that they find inconsistent with the Jewish ideal.

The refusal of the majority of Jews to accept an ordinance not only prevents the new decree from taking effect, it also nullifies a longstanding rabbinic prohibition. As Rambam wrote:

If the court has issued a *gezerah* in the belief that the majority of the community could endure it, and after the enactment thereof the people made light of it and it was not accepted by the majority, the decree is void and the court is denied the right to coerce the people to abide by it. If after a decree had been promulgated, the court was of the opinion that it was universally accepted by Israel and nothing was done about it for years, and after the lapse of a long period a later court investigates the doings of Israel and finds that the decree is not generally accepted, the latter court, even if it is inferior to the former in wisdom and number, is authorized to abrogate it (*Mamrim 2.6-7*).

Just as the Rabbis were restricted by popular will from issuing overly burdensome *gezerot*, so, too, they were cautioned against being overly permissive: "Any court that permits two things that have been declared forbidden should hesitate about permitting a third thing (*Mamrim 2.8*)."

Practical Applications of Progressive *Halakhah*

From this brief review of *halakhic* legislation, it is clear that Progressive *halakhah* has an important and valid mission in the struggle against assimilation and secularism. Liberal Judaism can serve the masses of Israeli Jews caught between an oppressive medieval ultra-Orthodoxy and the crass emptiness of secularism. Progressive *halakhah* must follow the lead of our ancestral sages and find innovations, interpretations and applications that preserve essential Jewish principles while renewing Judaism's vitality and relevancy. *Asu seyag laTorah* is a mandate to change when necessary. The changes must be in consonance with the majority.

The awesome authority of *halakhic* legislation must be utilized judiciously. Legislative powers are best saved for true emergencies and untenable situations. Progressive *halakhah* must continue to develop methodologies that incorporate critical scholarship and modern ethical values in the decision-making process. Those methodologies must acknowledge the dramatic differences between liberal Jews and fundamentalist Jews.⁵⁴

The role of Progressive Halakhah is not to impose its authority on Jews. It is a much needed tool that enables liberal Jews to teach the why and how to of modern Jewish practice and ethics. It establishes parameters that are most important.

Notes

1. Mark Washofsky, "The Search for Liberal Halakhah," *Dynamic Jewish Law*, (Freehof Institute of Progressive Halakhah, Rodef Shalom Press), Pittsburgh, 1991, pp. 25ff.
2. *Ibid.*, p. 45.
3. This article is based on a lecture I delivered at a regional rabbinic conference in 1999. It seeks to provide a short aid to Jews interested in the development of *halakhic* principles (both traditional and progressive). My teachers and colleagues, Mark Washofsky and Moshe Zemer, have recently published books that offer more comprehensive and authoritative explanations of the same. Moshe Zemer's *Halakha Shefuyah*, has been revised and translated: *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law*, (Jewish Lights), Vermont, 1999. Mark Washofsky has just published *Jewish Living: A Guide To Contemporary Reform Practice*, (UAHC Press), New York, 2001.
4. See *The Struggle over Reform in Rabbinic Literature*, Alexander Guttman, (WUPJ), New York, 1977.
5. In addition to the above-mentioned books (*Evolving Halakhah* by Moshe Zemer, and *Jewish Living* by Mark Washofsky), for an excellent review of Progressive Halakhah's ideals and methodology see *Dynamic Jewish Law, Progressive Halakhah*, edited by Walter Jacob and Moshe Zemer; and Mark Washofsky's introduction *Responsa and the "Reform Rabbinate"* published in *Teshuvot for the Nineties*, CCAR, 1997, pp. xiii-xxix.
6. *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement*, 4 Vols: 1927-1970 and 1980-1985, Jerusalem, 1997.
7. See *Emet Ve-Emunah, Statement of Principles of Conservative Judaism*, (Jewish Theological Seminary of America, 1988), pp. 21-24. For an example of progressive halakhah as practiced by the Conservative movement, see *The Ordi-*

- nation of Women as Rabbis, edited by Simon Greenberg, Jewish Theological Seminary of America, 1988. See note 1 for references about the Reform movement's version of Progressive Halakhah.
8. Robert Gordis, *The Dynamics of Judaism*, (Indiana University Press), Bloomington, 1990. P. 82.
 9. Zemer's *Evolving Halakhah* is especially valuable for this purpose.
 10. Fortunately, there are exceptions. For a good example of a modern Orthodox Rabbi striving to incorporate modern ideals (such as egalitarianism) into Orthodoxy, see the recent article by Rabbi Adam Mintz, "Secularism, Spirituality, and the Future of American Jewry," edited by Elliot Abrams and David G. Dalin, Ethics and Public Policy Center, 1999. Rabbi Mintz, spiritual leader of the Lincoln Square Synagogue in New York City, concludes: "Education is really the great equalizer. Men and women, young and old—everybody is able to study Torah and reach the highest level he or she can achieve. In this respect there is no difference between men and women. If we are somehow able to incorporate the notion of equality of education into the Shabbat morning service without disturbing the traditions of that service, we will be continuing the process that was begun a century ago of allowing the Orthodox synagogue to meet the needs of a changing Orthodox community, while at the same time remaining faithful to our tradition" (p. 59).
 11. Chatam Sofer, *Responsa Orach Chayyim*, number 28.
 12. Mendell Lewittes, *Principles and Development of Jewish Law*, Bloch Publishing, 1987, p. 186. See Chatam Sofer's *Responsa, Orach Chayyim*, number 36.
 13. Jacob Katz, *The Shabbes Goy, A Study in Halakhic Flexibility*, (JPS), Philadelphia, 1989, especially pp. 144-156 and 235-241.
 14. In addition to the above-mentioned *Shabbes Goy*, see Katz's *Divine Law in Human Hands, Case Studies in Halakhic Flexibility*, The Magnes Press, The Hebrew University, Jerusalem, 1998.
 15. Maimonides' *Introduction to the Mishnah*, chapter four.
 16. *De Specialibus Legibus*, 4.149-150 in the Loeb series and following the translation of F.H. Colson. According to Martin Goodman in *JJS* Vol. 1, Spring 1999, p. 18, Naomi G. Cohen maintains that Philo was referring specifically to Oral Law in her *Philo Judaeus: His Universe of Discourse* (1993).
 17. The thirteen methods of Torah interpretation are found in the introduction to *Sifra* and are reprinted in some traditional prayer books, including Birnbaum's, pp. 42-43.
 18. Rambam's Introduction to the Mishnah is found in traditional editions of tractate *Berakhot* and is titled *Rambam's Introduction to (the Mishnaic) Order of Zeraim* (seeds).
 19. Cf. Goodman, *JJS*, Spring 1999, pp.17-20.
 20. For example: Rabbenu Gershom's ban against polygamy (which is permitted by the Torah) is a *gezerah* because it limits an existing observance. When Rabban Gemaliel mandated a new arrangement of the *shemoneh esreh* for the post-Temple era, his declaration was a *takkanah*. See Mendell Lewittes, *Principles and Development of Jewish Law*, pp. 93ff.; Menachem Elon, *Jewish Law*, pp. 490ff.
 21. See Ephraim E. Urbach, *The Halakhah, Its Sources and Development*, (Massada Ltd.), Jerusalem, 1986, pp. 3-6.
 22. I Maccabees 2: 29-38.

23. This prohibition is repeated in Deuteronomy 13:1 "...lo toseif alav velo tigra mimenu."
24. See Rashi to Deut. 4:2, s.v. *Lo tosifu*; also, Rashi to Deut 13:1, s.v. *Lo toseif alav*.
25. *Megillah* 14a-b; *Yerushalmi Megillah* 1, #7.
26. See Nachmanides to Deut 4:2, s.v. *Lo tosifu*.
27. See Tigay's commentary to Deut. 4:2 in the *JPS Torah Commentary*, (JPS), Philadelphia, 1987, pp. 43-44.
28. Two popular lists of the *mitzvot* are those of Moses Maimonides (Rambam) and the Chafetz Chayim (Rabbi Yisrael Meir haKohen). Rambam's list is found in the first volume of his *Mishneh Torah* and Chafetz Chayim wrote *Sefer ha-Mitzvot ha-qatzar* (*The Concise Book of Mitzvot*) translated and published by Feldheim, 1990. Of course, one would be remiss not to mention *Sefer haHinnukh*, the thirteenth century classic that lists each of the 613 *mitzvot* in the order and context in which they appear in the Torah. The five volume Hebrew-English edition by Feldheim is highly recommended.
29. *Berakhot* 19b.
30. *Polemics in Sefer Misvot Gadol of Rabbi Moses of Coucy*, Jeffrey R. Woolf, *Jewish Quarterly Review*, LXXXIX, Nos. 1-2 (July-October 1998), pp. 85-94.
31. *Ibid.*, pp. 85-86.
32. *Ha-Smag ha-Shalem*, pp. 5-6.
33. Menachem Elon, *Jewish Law*, Vol. II, pp. 495 ff. The following list can be found in its full treatment on pp. 505-533.
34. Elon, *Jewish Law*, pp. 505-506.
35. *Rosh HaShanah* 29b. This *gezerah* is a perfect example of the dynamism of *halakhah*. The original decree forbade the sounding of the *shofar* when *Rosh HaShanah* fell on Shabbat in any place except the Temple. The reason for this *gezerah* was to build a fence around the Torah that would prevent Jews from mistakenly violating Shabbat on *Rosh HaShanah*. The concern was that some Jews might be tempted to carry their *shofar* in public or have it repaired and thereby violate Shabbat. After the destruction of the Temple, Rabban Yohanan ben Zakhai favored annulling this *gezerah*. He permitted the sounding of the *shofar* when *Rosh HaShanah* fell on Shabbat in every town where there was a *beit din*. Despite Yohanan's opinion, traditional *Halakhah* prohibits the *shofar* when *Rosh HaShanah* falls on Shabbat (see Rambam's *Hilkhot Shofar* 2.6).
36. See Rambam's *Hilkhot Mamrim* 2.9 on the issue of including fowl in the prohibition of mixing meat and milk. Our late, beloved teacher Jakob Petuchowski wrote a marvelous essay on the same subject that is now reprinted in a new collection: *Studies in Modern Theology and Prayer*, JPS, 1998, pp. 61-73. What mostly fascinated Petuchowski was the evidence of pluralism as demonstrated by the fact that not every community accepted the expansion of the prohibition against mixing milk and meat to include poultry.
37. Elon, *Jewish Law*, pp. 521-533. Also see Joel Roth, *The Halakhic Process*, pp. 190-204.
38. *Yevamot* 89b-90b. Elon, *Jewish Law*, p. 506; Roth, *The Halakhic Process*, pp. 190ff.
39. *Tosafot*: to *Yevamot* 90b s.v. *Ve-ligmar mineih* and *Sanhedrin* 89b (*Eliyahu be-har haCarmel*). Cf. Nachmanides in his novella to *Yevamot*; Menachem Elon, *Jewish Law*, pp. 519-20 and note 117.
40. Elon, *Jewish Law*, pp. 507-514.

41. *Mishnah Shevi'it* 10:3-4.
42. Elon, *Jewish Law*, pp. 533-536.
43. For instance, *Terumah* 14b; *Berakhot* 63a.
44. *Gittin* 60b.
45. According to tradition, the written Torah conveys hidden meanings through the use of spellings and symbols that would be missed if one only heard the Torah.
46. It was believed that certain profound thoughts should be conveyed orally so they could be fully explained. If the profound thought is written down and is read without instruction or commentary, the true meaning may be missed.
47. Rashi to *Gittin* 60a, *s.v. Et la-asot*; Rambam in his introduction to *Mishneh Torah*.
48. *Kesef Mishneh* to Rambam's *Mishneh Torah*, *Nedarim* 3.9, *s.v. U-le-inyan*.
49. See also, *Mishneh Torah*, *Shabbat* 2.3.
50. Many Reform congregations during the "classical period" (approximately 1880-1960) de-emphasized *kashrut* and promoted the vernacular. Nevertheless, Hebrew and to a far lesser extent Jewish dietary laws (especially during Passover) were still very much in evidence in Reform congregations. Today, most Reform congregations use a much greater percentage of Hebrew in their services and "Biblical Kashrut" (i.e., no pork or shell fish may be served) has become the norm.
51. Protestant Christianity is an instructive paradigm for what happens when localized groups of religious leaders are free to legislate and innovate without limits. Today there are thousands of Protestant denominations. Most of those communities have splintered off from other denominations in a dispute over liturgy or doctrine. Most of these denominations were established within the last 150 years in the United States. In contrast, over the past two thousand years, notwithstanding the distance between Jewish communities (both culturally and geographically) in the Diaspora, and the horrible ordeals that these far-flung communities have endured, there is remarkable unity of spirit and practice and there have been but a handful of different Jewish denominations.
52. *Avot d'R. Natan* 1:5.
53. *JTNedarim* 9:1. A case in point is the promulgation of restrictions added by Eastern European Ashkenazim on what is permitted during Passover. One finds Rabbis of every generation and of every denomination who have voiced concern that excluding *kitniyot* (e.g., rice, legumes, corn), as if they were *hametz*, imposes such a hardship on the diet of Jews that many would despair of trying to keep any form of *pesadik*. For a wonderful review of the *halakhic* opinions on both sides of the *kitniyot* issue, see S.Y. Zevin, *The Festivals in Halachah*, vol. III, pp. 111-127.
54. In general, Reform Jews insist on a clear demarcation between issues of Communal Religious/Ritual concern and their personal lifestyle decisions. For example, a Rabbi and/or synagogue's authority to set the time, date, and standards of services is generally accepted. But the decision concerning a family's degree of *kashrut* is zealously guarded by the individuals.