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HALAKHAH AND ULTERIOR MOTIVES Rabbinic Discretion and the Law of Conversion*

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Conversion to Judaism, according to *halakhah*, is an act which must be undertaken out of sincere religious motivations. The *baraita* (*Yeb.* 47a-b) which defines the conversion process requires that the prospective proselyte declare his readiness to join his fate to that of the Jewish people, even though this entails suffering and persecution. He or she is to be informed of some of the commandments and accept upon himself the obligation to keep them.¹ Another *tanaitic* source emphasizes that this acceptance be total; a non-Jew who is ready to follow all the commandments except for one is not to be converted.² Conversion contemplated for ulterior motives, be they fear and intimidation, hope of monetary gain, or desire to marry a Jew, does not fall within the category of religious sincerity. The validity of such conversions was long a matter of dispute, and a number of sources, *tanaitic* and later, regard these proselytes as Gentiles.³ Even though the "final" *halakhah* recognizes their Jewishness,⁴ this is justified as an after-the-fact (*bedi'avad*) necessity: perhaps, despite appearances to the contrary, these persons did convert for the proper religious reasons.⁵ In principle (*lehatkhilah*), though, these conversions are not to be allowed, just as proselytes were not accepted in the days of David and Solomon and will not be accepted in the days of the Messiah, periods of history when Jewish power and prosperity, rather than devotion to Torah, are the putative reasons for a Gentile's wish to become a Jew.⁶ The codifiers explicitly assume this line. Although a person who undergoes the conversion ritual is, after the fact, a valid *ger*, he should first be examined to see whether his decision is motivated by improper desires. Only if no such ulterior motive (money, fear, marriage) is discovered may we assume that he wishes to convert "for the sake of Heaven" (*leshem shamayim*) and accept him.⁷

The *halakhic* "codes", it is true, do not possess intrinsic authority. Unlike the codes of other legal systems, which are promulgated by recognized legislative bodies and are regarded as binding statements of the law, those in Jewish law more closely resemble legal textbooks that in the opinion of their authors render accurate descriptions of the law as it is derived from its real source, in our case the *Babylonian Talmud*.⁸ Still, a clear and unequivocal description of the *halakhah* by the codifiers is a persuasive argument that the law is in fact according to their interpretation of it. It is significant, then, that the position sketched above is uncontested by the major codifiers. Nowhere do we find a declaration to the contrary, namely that the rabbinic court (*Bet Din*) may in principle accept for conversion those who come to us for the "wrong" reasons. To be sure, a certain amount of flexibility is built into the law. The *Tosafists*, for example, note that the *Talmud* records instances wherein Hillel and Rabbi Hiyya accepted converts who were driven by a desire for prestige or marriage. To resolve the apparent contradiction between the law and these two case rulings, the *Tosafists* suggest that the rabbis in question were certain that these proselytes would eventually adopt Judaism out of sincere religious motivations.⁹ Later *posqim* (decisors) adopted this explanation, declaring that "we learn from here that the entire matter is left to the judgement of the court" (*hakol lefi re'ut einai Bet Din*).¹⁰ Since this gloss has made its way into the annotated editions of the "codes", we must adjust our statement of the mainstream *halakhic* position as follows: those wishing to become Jews out of ulterior motives are ineligible for conversion, but the decision in each individual case is left to the discretion of the rabbinical authorities on the scene.

The word "discretion" raises an important theoretical issue concerning the nature of judicial decision-making. A large body of literature in the field of jurisprudence is devoted to the question of judicial discretion: to what extent is the judge empowered to choose an answer-in effect, to make new law-in a case which comes

before him for decision?¹¹ It is generally held that, in legal systems where the law is authoritatively formulated in literary sources, the judge's task is to apply to the case at hand the applicable written rule of law. That rule may be stated explicitly in the texts, or it may exist implicitly, "between the lines" of the written sources, to be derived through the use of logic, analogy, or other tools of legal reasoning accepted as valid by the system's practitioners.¹² Frequently, a judge will confront a question for which the texts provide no one obviously correct answer. How he renders a decision in the case is the subject of dispute between the various jurisprudential schools of thought. Legal positivists, for whom law is a system of rules enacted by authorized legislators and identified as law by certain master rules intrinsic to the system,¹³ believe that in such a case no valid law exists. In rendering a decision the judge in fact functions as a legislator, albeit an "interstitial" one,¹⁴ creating new law on the basis of utility, social policy, or other extralegal considerations. The judge is endowed by the legal system with the discretion to construct new legal norms which, filling the lacunae in the existing law, will serve as positive law to guide the decisions of future courts. This position has been attacked by Ronald Dworkin, who argues for a theory of "integrity in law".¹⁵ Rejecting positivism's sharp distinction between law and morals, Dworkin contends that law cannot be reduced to a system of politically-enacted rules. Law contains principles as well, notions of justice and right which determine the judge's decision in cases where no explicit or sufficient rule exists. There is almost always a "right answer" to a hard case, dictated by the judge's conception of the most persuasive justification of the political morality of the legal system. The judge, in other words, does not enjoy the discretion to make new law, nor may he operate, as the legislator does, by ruling in accordance with his view of the best social policy. He interprets the law, deriving an answer for his hard case by constructing a theory which, in his view, is the most coherent account of the legal "data" (constitution, statutes, judicial precedents) with which he works. Since judges will disagree over these theories, they will

disagree as to the "right answer"; that such an answer exists, however, is clear. It is an answer consistent with the fundamental principles of the law, not created by resort to considerations outside the law.¹⁶ A third approach, denoted variously as "legal realism" or "rule-skepticism", tends to minimize the binding character of legal rules altogether. The law "is" as it is applied in practice, by courts and other adjudicatory bodies; rules, by contrast, are purely theoretical until enforced by such agencies. In its extreme expressions, legal realism denies that rules limit the discretion of the judge in any significant way, even in so-called "easy" cases. Rules are fictions, serving as a smokescreen of legal argumentation disguising the true motivations--social, psychological, political--of the judge.¹⁷ Legal reasoning does not account for the decision. It reflects at best a "logic of exposition", an institutional requirement that judges explain their rulings to the community.¹⁸ That judges accompany their rulings with reasoned opinions should not, however, blind us to the fact that a judicial decision is an act of legislation, a choice prompted by "extra-legal" factors, rather than of interpretation.

These schools of thought in secular jurisprudence bear a more-than-passing connection to our topic. As in other fields of research, scholars of Jewish law may attain a better understanding of their subject matter through the use of methodological tools developed for the analysis of similar, non-Jewish literary genres. We should be wary, of course, of drawing improper analogies. The theories of jurisprudence to which I refer were formulated to describe the workings of secular (primarily Anglo-Saxon) legal systems; their basic presumptions, accordingly, may not fit the realities of the *halakhic* process. Religious law, for one thing, does not make a sharp distinction between legal and moral norms in judicial reasoning.¹⁹ In Jewish law, moreover, which lacks a recognized legislature, it may be as legitimate for the rabbinic decisor (*poseq*) to base his rulings upon policy considerations as upon strict rules of law.²⁰ Still, recent years have seen an

increasing number of studies which examine Jewish law from the vantage point of the positivist/Dworkinian/realist debate.²¹ For example, Haninah Ben-Menahem argues that during the *Talmudic* period the distinction between legal and extra-legal considerations was often ignored. *Talmudic* law was a system "governed by men, not by rules", tolerant of judicial deviation from the law in the interests of justice. Judges allowed themselves the authority to base their decisions upon extralegal factors and to set aside existing law without being authorized by the law itself to do so.²² This pragmatic jurisprudence, law consciously employed to serve recognized social ends, is an extreme version of the realist approach.²³ Indeed, if Ben-Menahem is correct, the rabbis at this early stage of *halakhic* history did not feel compelled to restrict their frankly legislative activity to filling gaps in the law or to hide it behind a "smokescreen" of legal reasoning. Such judicial openness and flexibility, it would seem, is no longer present in rabbinic decision-making, and has been absent for a very long time. What is true of a legal system at its formative stage does not necessarily describe the same system at its later, more sophisticated (*i.e.*, formal) state.²⁴ Although liberal *halakhic* theorists tend to portray Jewish law as a dynamic, constantly-changing system which places an emphasis upon rabbinic freedom of decision, fifteen centuries of commentary and codification have had their say. The *poseq*, the rabbinic decisor, is no longer empowered to enforce justice at the expense of law. He is expected to operate within the framework of the *halakhah*, which is largely determined by the evolving consensus view held by the community of *posqim* past and present.²⁵ The *halakhic* tradition, reflected in its voluminous literature has in effect settled many questions that were formerly open, and rabbinic discretion to deviate from these settled points has correspondingly declined.

On the other hand, there still exist hard cases in *halakhah*. Issues arise over which there is no general agreement among the *posqim* as to the correct legal answer. More than that rabbis at

times are in dispute over questions which at first glance do have such an answer, explicitly stated in the codes and ratified by generations of consensus.²⁶ Ours is such a hard case. Despite the unambiguous rulings of the *Mishneh Torah* and *Shulhan Arukh*, some rabbinic authorities permit the acceptance of converts who come to us out of clearly ulterior motives. Conversely, despite the authoritative gloss which leaves the final decision in the hands of the individual *Bet Din*, some authorities deny that rabbis are entitled ever to employ this grant of discretion. The question at hand is thus excellent material for a study of the nature of disagreement in the *halakhah*.

This essay is intended as a first step toward that study. I do not pretend to offer an exhaustive analysis of the legal issues involved, especially since others have worked this field.²⁷ I simply wish to examine the rabbinic disagreement over the issue from the perspective of theoretical jurisprudence. Does the dispute stem from the fact that, as the positivists would have it, there is no one "correct" answer and that the rabbis, like it or not, are constrained to create new law to fill the gap? Do we say, with Dworkin, that a correct answer exists and that the rabbis are arguing over interpretation rather than seeking to legislate according to extra-legal considerations? Or do we follow the realists and conclude that what appears to be *halakhic* argumentation simply masks the policy choices which are the ultimate cause of the rulings the *poskim* hand down? The Conclusion, in addition to a summary of the findings, will offer some comments as to the application of this kind of study in our efforts at delineating liberal *halakhah*.

I. Maimonides: Extreme Pragmatism and Its Discontents

A questioner poses the following case to the Rambam. A young man has scandalized his family by engaging in sexual relations with a Gentile maidservant he has purchased. Should the rabbinic court forcibly separate them, or does the principle of the

law of *yefat to'ar* (Deut. 21:10-17 and *Qiddushin* 21b), where a ritual prohibition is relaxed in a situation where it is likely to be violated, apply in this case? In his brief and to-the-point response,²⁸ Rambam agrees that the law of the Torah requires a separation. The permit of the *yefat to'ar* is understood as a concession to human weakness, a step the law takes unwillingly; on the contrary, the *bet din* must employ every means at its disposal to force the man to expel the maidservant "or to free her and marry her". Rabbinic law, moreover, adds another stringency: A man suspected of a sexual liaison with a maidservant or a Gentile woman is forbidden to marry her upon her conversion, although the marriage is valid should it take place. This is the existing law, the explicit rule of the *Mishnah* codified by Maimonides himself.²⁹ Yet in actual practice he sets aside the prohibition and allows the conversion and marriage.

"When I have ruled in matters such as this that he expel her [i.e., liberate her] and marry her, I have done so as a means of encouraging sinners to repent [*mipnei taqanat hashavim*], saying 'it is better that they eat the sauce and not the forbidden fat', relying upon the rabbinic principle that 'when it is time to act for the Lord, we must annul the Torah if necessary' (*M. Berakhot* 9:5, after Psalms 119:126). He is therefore permitted to marry her. May God in His mercy grant atonement for our sins, as He promised us: 'I will purge all your impurities' [Isaiah 1:25].

Rambam, in other words, deviates from the established law in two respects: he allows a conversion which is clearly not undertaken *leshem shamayim*,³⁰ and he permits the newly-converted maidservant to marry a man to whom she is expressly, if only *lekhat-hilah*, forbidden. Recognizing this deviation, he seeks to justify it, but his arguments, from a legal standpoint, are curiously weak. It is true, for example, that by waiving the "lesser" rabbinic decree against the conversion and marriage of this woman

(=sauce) Rambam saves the man from violating the "weightier" Toraitic prohibition against cohabitation with Gentiles (=forbidden fat).³¹ It is also true that, in their well-known *taqanat hashavim*, the tannaitic sages pursued this "lesser of two evils" line by allowing a thief in certain cases to make monetary restitution rather than forcing him to meet the Toraitic requirement that he restore the actual stolen property.³² This serves him as an implied *kal vahomer*: if the law of the Torah may be set aside in order to encourage repentance, such is certainly the case with the rabbinic prohibition against this marriage. The problem, as Rambam himself remarks concerning the Torah's indulgence of the evil impulse on the issue of *yefat to'ar*, is that this reasoning has no objective weight in Jewish law. The approach embodied in the *taqanat hashavim* was indeed utilized occasionally in the past and Rambam may deem it appropriate here,³³ but it has never been condoned as routine procedure. If the rabbis overruled a legal standard in this specific instance, they did not do so in other instances where the law was just as likely to be violated.³⁴ Some authorities have even criticized the "sauce rather than fat" argument as a dangerous notion, since if followed to its logical extreme it would sanction the annulment of any and all *mitzvot* in situations where lawless individuals threaten to violate them.³⁵

The citation of "time to act for the Lord", while dramatic, raises similar difficulties. On its face, the principle allows the rabbinic authorities to ignore a specific *halakhic* standard in order to avert a calamity to the *halakhic* system as a whole. Yet how does one determine precisely that this is such a time to act? That determination, like the determination to employ *taqanat hashavim*, is inescapably subjective, so that two authorities confronting an identical situation might well draw diametrically opposite conclusions as to the proper course to take. Consider the decision of R. Shelomo b. Adret (Rashba, d. 1310) on virtually the same question as that which faces Rambam here.³⁶ A man buys a Gentile maidservant, cohabits with her, converts her to Judaism

before she gives birth and keeps her in his house. Rashba condemns what he sees as an act of unacceptable lewdness. Citing the *Mishnaic* prohibition against this marriage, he declares that in his own community "no one...even the most vile and base, would behave in such an arrogant fashion, to dally with a maidservant, convert her and marry her". It is inconceivable to him that the local authorities would permit the violation of the *Mishnaic* rule, especially since "it is probable that she did not convert *leshem shamayim* but only to marry him." Rashba seems not to have known of Rambam's ruling, and it is impossible to tell whether such knowledge would have influenced his decision. What is certain is that, where Maimonides is concerned that the sinner be aided in returning to the path of righteousness and so determines to deviate from the law, Rashba's goal is to strengthen the standards of community morality by insisting that the law be enforced to its fullest extent. None of this, of course, proves that either of these two sages was "right" or "wrong" in his ruling. It does indicate, however, that Rambam's deviation from the law was not required by the law itself. He could just as legitimately have concluded, as did Rashba, that the rabbinic prohibition against the conversion and marriage must be upheld. Rambam's decision, that is, is very much his *decision*. His ruling is a conscious choice, an act of rabbinic will.

Nothing in the *halakhah*, no preexisting legal norm forces the Rambam to arrive at his decision to deviate from the law. The ruling is valid because, in Rambam's view, he has the power to make it; the *poseq* may choose to overrule existing law when "it is time to act for the Lord". While Psalms 119:126 is applied in the *Mishnah* to the specific issue of rendering the Oral Torah in writing, the rabbis in general are said to have the power to set aside Biblical commandments on a temporary basis "in order to restore the multitude to religion...just as a physician may amputate a hand or a foot in order to save the patient's life".³⁷ *Posqim*, therefore, need not always follow the law. They may go beyond the law, even negate it, when in their very subjective judgement the situation

calls for that action.

This is the language of extreme pragmatism, of the variety which Ben-Menahem claims was exercised by the *Talmudic* rabbis. Law must be applied so as to achieve the recognized political, moral, and social goals of the community. When existing law clashes with those goals, the judge may adjust or set aside the law. As the dispute between Rambam and Rashba attests, reasonable judges may disagree as to whether this is truly a "time to act for the Lord", whether the law ought to be set aside in a particular case. In the pragmatic view, however, that determination lies entirely with the judge, in his own evaluation of the needs of the hour. He is not restricted to judicial-style interpretation of settled law; he is endowed with the power of choice, the discretion to create new law and annul the old. In exercising this broad grant of discretionary power, the pragmatic judge thus functions openly as a legislator, and not necessarily an "interstitial" one.

Rambam's pragmatism in dealing with this question constitutes a major exception to the rule described above, namely that rabbis no longer see themselves entitled, in this post-*Talmudic* age, to deviate from accepted and settled law as a means of securing the law's "higher" purposes. Were this exception to become the rule, it could serve as the foundation of a kind of pragmatic *halakhic* jurisprudence, in which rabbinic authorities would consciously and explicitly direct their decisions according to those purposes. The sources contain a good deal of material which supports this approach to halakhic decision. Dicta such as "you shall do what is just and good" (Deut. 6:18), "the court may coerce individuals not to act in the manner of Sodom", "its ways are ways of pleasantness" (Prov. 3:17), and "he is exempt from culpability under human law but liable under divine law" are occasionally cited in *Talmudic* literature to explain legal decisions which deviate from what is considered the fixed standard of the law.³⁸ One could make a case, based upon a strong interpretation of these principles,

that Jewish law recognizes an equity jurisdiction similar to that which existed at one time alongside the English common law and within, though not separate from, the Roman law.³⁹ The same rabbis who are empowered to apply the rules of the formal *halakhah* are likewise entitled to judge cases according to other, more fluid principles of general justice when in their view the established law would produce an unfair or socially undesirable result. This explanation would account for the decision of Maimonides in our case, and it would clearly fit the theory and practice of *halakhah* in liberal Jewish circles.⁴⁰ As suggested above, however, it does not correspond to the behavior of the vast majority of *halakhists* since the close of the *Talmudic* period, who do not, as a rule, feel authorized to deviate from the settled law on the basis of such principles as "time to act for the Lord".⁴¹ Historical, theological, and jurisprudential explanations for this trend vary and abound.⁴² For our purposes it is enough to stress that it is the centuries-old *tendency* in Jewish law, a rule proven by Rambam's striking and all too rare exception.

With respect to our subject, post-*Talmudic halakhists* might well agree that, for reasons of community policy, it is better in some cases to permit conversions that are undertaken for ulterior motives. And some leading rabbinic scholars of the past two centuries have made that ruling. Where they differ from Rambam is that, lacking Maimonidean levels of self-confidence, most (though not all) are loathe to deviate openly from the accepted legal norm. Their task is to demonstrate that, contrary to first impressions, no such deviation is involved, that the established law in fact allows these conversions.

II. Kluger, Hoffmann, Grodzinsky: Positivism in the Service of Leniency

The problem of conversion for ulterior motives has become a much more pressing issue for *halakhists* during the past two

centuries, as emancipation has brought Jews into the life of their surrounding communities and secularization has softened the taboos against social contact with Gentiles. The *posqim* have had to deal with an increasing number of Jews wishing to marry Gentiles, a phenomenon complicated by the fact that, should the rabbis refuse to allow the conversion of the non-Jewish marriage partner, the couple can turn to other sources of relief: liberal rabbis, civil marriage, and even non-Jewish religious marriage. For a number of these rabbis, the availability of non-*halakhic* marriage serves not only as a threat to communal discipline but also as an argument that the prohibition against conversion in these cases may no longer apply.

R. Shelomo Kluger (d. 1869), a leading Lithuanian respondent, is asked for his opinion on a case which has arisen in "the lands of Germany and France, where the new religion has taken hold".⁴³ A Jewish man has fallen in love with a Gentile woman "and cohabited with her several times". He has now returned to the Jewish community, and "it is her intention to convert to Judaism". Kluger permits the conversion. Relying upon the sources cited at the beginning of this essay, he notes that while those who convert for the purpose of marriage are not to be accepted, the *Bet Din* has the discretion to determine in any particular case whether the prospective convert has come to us *leshem shamayim*. In our case, that determination can be made for two reasons. First, since the Jew has cohabited with his lover "many"⁴⁴ times, we can presume that his desire to marry her is not founded upon lust (or, in the more elegant *Talmudic* phrase, *leshem ishah*, for the sake of marrying this woman). Second, it is clear that this man is of an impulsive disposition (*da'ato kalah*). He stands on the brink of apostasy (*qarov lehishtamed*); should we refuse our permission, he will convert to his lover's religion and marry her anyway. Since he has *not* done this, therefore, since the couple have "returned to his father's house", we have evidence that "her intention is to convert *leshem shamayim* and not for the purpose of

marriage." A major obstacle to this decision exists, however, in *M. Yevamot* 2:8, which declares that a man suspected of a sexual relationship with a Gentile woman is not permitted to marry her should she convert to Judaism. At first, Kluger suggests that this prohibition be read quite strictly, so that it apply only to cases in which the liason was "suspected" but not a known fact. Since the stated reason for the prohibition is to avoid public slander, one could argue that when slander cannot be avoided (*i.e.*, when the affair is common knowledge) the prohibition ought to be waived. He retreats from this argument, however. Other sources do apply the prohibition to cases where it is known with certainty that the couple have cohabited.⁴⁵ Moreover, he continues, to say that the marriage is permitted when we know for a certainty that the Jew has committed this transgression (and not if we are in doubt as to whether he did it) is the kind of reasoning that can make a mockery of the rabbinic law. Rather, Kluger points to the fact that if we refuse our permission the man will become an apostate. We can allow the conversion and marriage, he says, in order to prevent this terrible result, much as Isserles has ruled that a man suspected of a liason with an unmarried woman, though forbidden *lehat-hilah* to marry her, may do so in order to prevent her from falling into bad company (*tarbut ra'ah*).⁴⁶

Kluger's permissive conclusion parallels that of Rambam: both allow a conversion and marriage which apparently violate the established law. The emphasis, however, must be placed upon "apparently". While his illustrious predecessor admits that his decision deviates from the law and justifies that deviation by resort to overriding concerns of religious and community policy, Kluger recognizes no such transgression. The conversion and marriage are perfectly "legal", their validity "declared" by the established law itself through the process of interpretation and not "created" through an act of the *poseq's* will. Extralegal factors—for example, an analysis of whether a permissive ruling is good or bad for the community or whether the behavior of this couple undermine the

standards of Jewish religious life-are conspicuous by their absence. Kluger presents himself as the oracle of the *halakhah* and not its legislator; he arrives at his decision not by making new law but by applying the canons of textual logic so that the sources might yield up the correct answer already contained within.

A closer look, though, reveals that Kluger's ruling depends upon a daring exercise of rabbinic discretion which, though concealed beneath the surface, compares well to that which the Rambam employs openly. Consider the manner in which he determines that this conversion is undertaken "for the sake of Heaven". Even if we do not define the concept, as some do, as an exalted, virtually unattainable level of religious purity,⁴⁷ the requirement that a convert come to Judaism *leshem shamayim* would surely seem to require positive evidence of his or her religious sincerity. Kluger stands this presumption on its head. A decision to convert can be judged as *leshem shamayim* in the absence of positive evidence to the contrary, that is, that the individual desires conversion in order to obtain some temporal object or goal. In our case, the woman need not convert in order to cohabit with her Jewish lover, since they will remain together in any event. In this strictly formal sense, the conversion is not contemplated for the ulterior motivation of marriage (*leshem ishut*); by process of elimination, therefore, we may conclude that the motivation for the conversion is religiously sincere.

The problem with this designation is two-fold. On the level of fact, the fit is unpersuasive. We have here a clearly non-observant Jew who is quite prepared to embrace another religion if necessary in order to marry a Gentile woman, whose attachment to Judaism can hardly be any deeper than that of her prospective husband.⁴⁸ It is one thing to say that, technically, this couple do not need the cooperation of the *Bet Din* in order to marry. To conclude that their motivation is *leshem shamayim*-and Kluger explicitly applies that label to them - is precisely the kind of

sophistry which Kluger himself condemns in his discussion of *M. Yevamot* 2:8. On the level of law, even if "sincerity" is equated with the absence of a formal ulterior motive, Kluger relies upon an unnecessarily strict-constructionist definition of that term. This point is brought out by R. Meir Arik who, facing a similar case, makes a forceful critique of Kluger's reasoning.⁴⁹ The meaning of "ulterior motive" (*ilah*, in the language of the codes)⁵⁰ is not exhausted by the stated examples, such as "for the sake of marriage". The category, says Arik, includes "any kind of pretext", and in our case, "perhaps the man now wants to live with her in honor and not in a licentious manner (*behefquerut*)". The couple do not require a conversion in order to live together, but they do need it in order to live together legitimately within the Jewish community. That desire, while it may be laudable, does not prove that the woman wants to become a Jew for the purpose of serving God as a member of the covenant people of Israel.

Kluger, by contrast, defines "ulterior motive" more narrowly and, as the obverse side of the coin, "for the sake of Heaven" more broadly than does Arik. The issue here is not whether he, as opposed to Arik, has the better argument. As I have indicated, Kluger's definitions of "ulterior motive" and "sincerity" do seem to run afoul of the canons of plausibility and common sense, but the lay understanding of terminology is not always decisive in the technical world of law and *halakhah*. It is rather that his making of that argument is an act of choice, of rabbinic discretion. Nothing in the *halakhic* texts forces him to define these crucial terms as he does. Were he to choose the opposite set of definitions, those favored by Arik, he would have no choice but to conclude that the conversion is forbidden by *halakhah*. To permit it, he would have to emulate Rambam and set aside the established law in favor of some overriding principle. His own set of definitions allows him to champion the conversion as perfectly "legal"; no deviation is necessary. My point is simply that this conclusion, presented as a logical inference demanded by the words of the texts, is not that at

all. It is a *choice* which Kluger makes between two legitimate alternatives.

The difficulties with that choice can be seen in the ruling of R. David Zvi Hoffmann (Germany, d. 1921), who cites Kluger's *hidush* (though not the responsum itself) as the basis for his permissive decisions in two cases where Jews are either married to Gentiles according to civil law or contemplating such marriage.⁵¹ Since the conversions sought in these instances are not technically for the sake of marriage, we may allow them. Yet at the same time, Hoffmann cannot regard the prospective conversions as evidence of religious sincerity; "how can the *Bet Din* accept a proselyte who does not convert *leshem shamayim*?" Unlike Kluger, therefore, Hoffmann turns outside the established law, supporting his decision with arguments of principle and policy. For his principle, he relies upon II Samuel 24:17 ("and these sheep, how have they sinned?"), stressing that the future children of these couples ought not to suffer for the misdeeds of their parents. As his policy consideration, he notes that should we refuse the conversion, the non-Jewish partner will be converted by a liberal rabbi. This will produce unfortunate consequences, since the public will then consider that partner a Jew even though liberal conversions are invalid under *halakhah*. Thus, "it is better to seize the lesser of two evils" and permit the conversion.⁵²

Hoffmann's approach nicely illustrates the difference between "legal" and "extralegal" arguments in a responsum. Legal arguments are based upon rules whose applicability to the case at hand is unquestioned and which are subject to demonstration by means of textual analysis, even if that analysis does not persuade other scholars. Extralegal arguments are by their nature controversial; they cannot be "proven", merely advocated. Their applicability to the case at hand is likewise controversial.⁵³ For example, in a similar case R. Chaim Ozer Grodzinsky (Lithuania, d. 1940)⁵⁴ rejects out of hand his correspondent's concern that

should the *Bet Din* turn him away the prospective convert will go to a Reform rabbi. "We cannot worry about this...a proper *Bet Din* must act strictly according to *halakhic* procedures" and not violate them in order to save an individual (the Jewish spouse) from committing a sin. Citing Rambam's decision, he notes that the issue there concerns the owner of the Gentile maidservant, who can convert her upon his own authority, and not the religious court. If an individual may transgress the law in order to save himself from a greater sin, this does not mean that the *Bet Din*, which represents the rule of law in the community, is so entitled. Besides, the "lesser of two evils" argument, which plays such an important role for Rambam, Kluger, and Hoffmann, does not really fit our case. Grodzinsky points out that if we allow the conversion of a Gentile wife, her husband will thereupon become a transgressor of the commandment against sexual intercourse with a *niddah*, a rule which does not apply to Gentile women. That transgression, punishable by *karet*,⁵⁵ is a more serious one than that of cohabiting with a Gentile, which does not carry that harsh punishment; we are not, therefore, "saving" a Jew from sin by permitting the conversion. In other words, Grodzinsky concludes, none of these extralegal considerations justifies the conversion. It *can* be permitted because, since it is not undertaken "for the sake of marriage", there is no *halakhic* barrier to it, even if it is not good policy for the Jews in general or for this Jew in particular.

Ultimately, for these lenient authorities, conversion for the sake of marriage can be allowed only on the basis of the legal argument formulated by R. Shelomo Kluger. In this they differ from Rambam, whose similar ruling is presented as a conscious deviation from settled *halakhah*. By reasoning that such conversions do not technically fall under the rubric of *leshem ishut*, they expand the boundaries of the permissible in Jewish law, allowing it to include a phenomenon which clearly would not fit within previous conceptions of those boundaries. That "reasoning", however, that close adherence to purely legal argumentation, should not blind us

to the fact that these authorities have *chosen* to read the law as they have. The motivation for their choice might lie, as it clearly does for Hoffmann, in an estimate of policy, of what is best for the Jewish community in this particular situation. Kluger and Grodzinsky make no such claim; they do, nonetheless, make a choice. In this, they confirm the positivist model: judges facing "hard cases" answer them through the exercise of discretionary, virtually legislative power, even when their choices are expressed through the medium of conventional legal argumentation.

III. Kook and Herzog: Principles and Interpretation

Those willing to permit conversion for the sake of marriage rely upon the premise that the conversion, even if prohibited by rabbinic enactment, is Toraitically valid (*bedi'avad*) should it take place. This premise is challenged in decisions issued by two chief rabbis of Palestine/Israel, R. Avraham Yitzhaq Hakohen Kook⁵⁶ and R. Yitzhaq Halevy Herzog.⁵⁷ A good argument can be made for the invalidity of these conversions, even though the notion is a minority opinion.⁵⁸ The argument is Dworkinian in nature: it answers a "hard case" according to that theory which in the judge's view is the most coherent account of the legal "data" on the subject, regardless of the consequentialist (=policy) implications of that answer.

Kook addresses a responsum to R. Shaul Setton, one of the authors of a 1927 rabbinic decree banning conversion in Argentina.⁵⁹ Kook thinks the ban is a good idea and supports it by showing that the "data" of Jewish law overwhelmingly oppose the acceptance of religiously insincere converts.⁶⁰ Indeed, as we learn in *Bekhorot* 30b, "one who accepts the entire Torah with the exception of the tiniest detail is not allowed to convert". This position is held universally in the *halakhic* world, says Kook, who is therefore puzzled that the great codes omit this statement entirely. This is reminiscent of Dworkin's "theory of mistakes": when

a judge finds that his best available interpretation of the law cannot account for certain "data" of legal history, he has no choice but to declare those data to be mistaken, contradicted by the preponderance of the precedents upon which he relies.⁶¹ The failure of Maimonides and Karo to codify the rule of *Bekhorot* 30b, a silence that deviates from the tradition's consistent emphasis that the proselyte accept the Torah in its entirety, is such a mistake, and it therefore does not constitute evidence that the rule itself is not authoritative. And since, as far as Kook is concerned, the vast majority of converts today do not accept the Torah unconditionally and in its entirety, a ban on conversions has powerful *halakhic* justification.

This interpretation of the law similarly allows Kook to address another "hard case": when an insincere proselyte undergoes the conversion ritual, is his conversion a valid one? Again, the "data" are conflicting. On the one hand, the codes rule that once a person undergoes the ritual, even if he does so for ulterior motives, "he is a convert". That is to say, the ritual brings about an automatic change in the person's legal status, regardless of the intentions he brought with him to that moment. On the other hand, those same rulings add a proviso concerning this person: "we watch him carefully until his sincerity is proven", suggesting that insincere intent might render the rituals ineffective.⁶² Kook resolves this contradiction of rules as follows: the conversion of an insincere proselyte is valid ("he is a convert") only when subsequent investigation ("we watch him carefully") reveals that his conversion was "complete", that is, accompanied by observance of the *mitzvot*. When both factors, religious sincerity and religious observance, are absent (as they are clearly absent in the vast majority of cases of conversion for the sake of marriage), we conclude that regardless of the ritual no real conversion ever took place.⁶³ For this reason such persons should never be permitted to convert and, should they convert, should never be permitted to marry Jews.

In his resolution of this legal ambiguity, Kook aims at *coherence*, or what Dworkin refers to as "integrity in law". To account for the full range of rulings and statements on conversion in the *halakhic* literature, he develops a general interpretive theory of the *halakhah* on the subject, which in turn allows him to distinguish between possible answers to his "hard case", the ambiguous wording of the codes. One possible answer, that insincere conversions are nonetheless valid, contradicts his interpretation of the *halakhah*, which makes a consistent demand that the convert display religious sincerity. The other possible answer, which limits this validity to cases where the conversion is ratified by subsequent religious observance, is more coherent, a better fit with his interpretive theory, minimizing contradictions and maximizing legal consistency. In approaching the case in this way, Kook marches in lock step with Dworkin's conception of a good judge.

Herzog fully endorses Kook's position. Throughout his *responsa* on our issue, he argues that the majority *halakhic* position, which declares that insincere conversions are valid *bedi'avad*, is no longer applicable. His particular contribution on this point is his citation of those *rishonim* who justify the validity of insincere conversions only when subsequently ratified by observance of the *mitzvot*.⁶⁴ In this, he provides concrete theoretical backing to Kook's logical inference to the same effect. This ruling, in turn, provokes another "hard case": if we say that insincere conversions are invalid, must we not therefore declare that the marriages which followed them are likewise invalid? This conclusion follows logically from its premise, yet other "data" in the law contradict it. Most notable among these is the very rule against which Herzog and Kook argue, namely that insincere conversions are accepted as valid once they take place. Although Herzog, as we have seen, does not believe that this rule applies today, he admits that his and Kook's position may not be the correct one; others, that is, would dispute it. Since there is doubt as to the correct *halakhah* (i.e., since there

is no dominant consensus view among *halakhists*) we must resort to the principle *sofeiqa de'oraita lehumra*, doubt in matters of Toraitic law requires us to rule stringently. In this case, the stringent ruling would hold the marriages valid (i.e., a *get* would be necessary to dissolve them). In this way Herzog avoids the potentially devastating consequences which Kook's opinion, if accepted, would exert upon Jewish communal stability, Jewish identity and the like. Yet it should be noted that he does not mention these consequences as the justification for his ruling. Like Kook, Herzog approaches his "hard cases" as a Dworkinian. His argumentation rests upon principle, not policy. His conclusion is supported by means of legal reasoning, by tools internal to Jewish law which come into play to resolve issues of doubt, rather than by the extralegal concern over what effect a different decision would have upon the community.⁶⁵

For all their devotion to matters internal to law, Kook and Herzog nonetheless exercise wide discretion in rendering their decisions. The key to this discretion can be found in Herzog's acknowledgement that, while conversion for the sake of marriage is certainly prohibited and very possibly invalid should it take place, some *halakhic* precedents allow them (he cites Rambam and Kluger) and some communities accept proselytes in these cases. Kook, who is obviously aware of these facts of precedent and practice, ignores them completely, a studied ignorance which enables him to issue his unequivocal condemnation. Herzog, on the other hand, takes judicial notice of these facts, which serve as the basis for an alternative interpretation of the *halakhah*. If he is not persuaded by that interpretation, he at least recognizes its existence as a legitimate (if inferior) understanding of the law. He therefore has grounds to accept, if grudgingly, the custom of some rabbinic courts to permit conversions in situations where he personally would not. In the end, he leaves it to the discretion (*shiqul da'at*) of the local rabbi to determine whether in each individual case the proselyte meets the *halakhic* requirement of religious sincerity and

whether he or she will likely observe the commandments. Thus Herzog, while agreeing with Kook in theory, is much more flexible on the issue of these conversions in practice. The difference is the result of discretion: Herzog is no more forced to cite the alternative precedents and practices than is Kook forced to omit any mention of them. Both of them *choose* to cite or to ignore the data, and their choices determine their final rulings.

IV. Moshe Feinstein: The *Poseq* as Realist

Herzog gives us an example of what we might call the "alternative theory" in *halakhic* decision-making. A *poseq* declares the *halakhah* according to his best understanding of it and at the same time seeks to explain the reasoning behind the contrary or opposite ruling, even though he himself rejects that reasoning. As his example shows, this is no mere act of intellectual courtesy. Practical legal consequences stem from the existence of an alternative theory, in much the same way as a minority opinion, though rejected, carries concrete *halakhic* implications.⁶⁶ A similar illustration emerges from two of the rulings of R. Moshe Feinstein on our subject.⁶⁷

The first of these deals with a Jewish man who married his Gentile spouse in a civil ceremony; the couple have lived together for a number of years, and they have a son. Feinstein declares that there is no rabbinic impediment to a Jewish marriage in this instance. Contrary to R. Shelomo Kluger, he limits the prohibition in *M. Yevamot* 2:8 to a man suspected of a liason with a Gentile woman and excludes the man who has lived openly in a marital relationship with her. There is, however, a Toraitic impediment: the woman needs to become a Jew, and conversion in such a case is forbidden. On this issue, too, Feinstein parts company with Kluger. He suggests, as does R. Meir Arik, that while this couple do not require a conversion in order to live together as husband and wife, "there may be some other ulterior motive [*sibah*] that impels her to

convert. And since she is converting only on account of that motive, it is probable that she does not intend to accept the commandments of the Torah." Feinstein, in other words, does not accept Kluger's strict construction of "ulterior motive" which allows the latter to define a conversion of this sort as *leshem shamayim*. He strengthens the point by noting that we can hardly expect this woman upon her conversion to be more observant than her husband, a violator of (among others) the laws of *Shabbat* and *nidah*. Since most contemporary conversions fall into this category, "most rabbis who are true scholars and fearers of Heaven" refuse to handle conversions at all. Still, community political pressure may make it impossible for the rabbi (Feinstein's correspondent) to refuse to convert this woman. If so, then he should do his best. He should explain very carefully to her the requirements of Judaism and obtain her promise to uphold them, regardless of her husband's irreligious behavior. "Perhaps (this promise) can be considered acceptance of the *mitzvot*, so that, although this conversion should not be allowed *lehat-hilah*...it is still a valid conversion." This "perhaps" serves as a *halakhic* justification, albeit a weak one, for a decision which the local rabbi most likely cannot avoid.

In the second case, Feinstein's correspondent asks whether a woman converted by a Conservative rabbi may be buried in the communal cemetery. Not surprisingly, Feinstein rejects any hint of validity in the non-Orthodox conversion ceremony, since there can be no legitimate *qabalat hamitzvot* (acceptance of the commandments) before a *Bet Din* whose members by his definition "deny many central tenets of Judaism and violate a number of ritual prohibitions".⁶⁸ Even worse from his perspective is the fact that some Orthodox rabbis accept proselytes who want to marry Jews and who clearly do not intend to observe the commandments. As in the previous case, however, Feinstein seeks to defend these rabbis by providing a *halakhic* explanation for their practice. He suggests, first of all, that the *Bet Din* may be entitled to accept the convert's declaration that he or she will uphold the Torah. Even

though most converts in our day have no such intention, some actually mean it, and because of these few we might give the others the benefit of the doubt. Additionally, it is possible that their intentions, while misguided, are sincere. That is, the convert probably thinks that "to accept the commandments" really means "to behave as a Jew ought to behave", and this he is prepared to do. Of course, the Jews in the community, and certainly those in the convert's immediate environment, violate the commandments, and he will think that their actions constitute a truly Jewish religious lifestyle. This is an error, of course, but one due to his innocent ignorance, and ignorance of the commandments is not a fatal flaw in the conversion process.⁶⁹ It is only when the proselyte is aware of the commandments and positively intends *not* to observe them that the conversion may be rendered invalid. Since this convert has no such positive intention, he has in principle accepted the obligation to observe the *mitzvot*, even if in fact he will violate them afterwards. "This," Feinstein concludes, "is a limited justification (*limud zekhut ketzat*) for those rabbis who accept such converts, so that they (the rabbis) will not be thought of as worse than ignorant."

Limited indeed. Feinstein clearly does not swallow the explanations he has created to justify rabbinic acceptance of conversion for the sake of marriage. He personally sides with those "scholars and fearers of Heaven" who refuse to involve themselves with conversions, since it is evident to all (*anan sahadei*) that the vast majority of proselytes in our day do not accept upon themselves the obligation to observe the *mitzvot*. Nonetheless, his alternative theories play a crucial role in his understanding of the halakhic system and its practice, a role that thinkers of the legal realist camp can readily appreciate. A cornerstone in realist doctrine is the assertion that the legal argumentation presented in judicial opinions often masks the policy considerations which actually account for the judge's ruling. It is not difficult to gauge the policy goals that drive Feinstein in these cases, particularly since his

reasoning is meant to justify not his own decisions but those of other rabbis.⁷⁰ Consider that these responsa were directed to rabbis in small communities (the "outskirts of Pittsburgh" and Canton, Ohio, respectively) at a time (1952 and 1950) when American Orthodoxy, not having entered its current self-confident triumphalist phase, was struggling for survival. For their own professional survival, Orthodox rabbis frequently found it necessary to compromise their standards of observance in the face of community pressure. An outright condemnation of conversion for the sake of marriage, in the style of Rav Kook, would correspond to the "true", ideal *halakhah*, but it would place these rabbis and others like them in the unenviable position of having to deviate from normative Judaism in order to officiate, as they must, at such conversions. Feinstein elects a middle path. He recognizes on the one hand the correct theory of the law which forbids these conversions and regards them as invalid should they take place.⁷¹ On the other hand, by straining to create his alternative theories, he allows these rabbis to maintain at least the appearance of *halakhic* integrity while taking actions which are forced upon them.

Like Herzog, Feinstein's alternative theory approach permits him a degree of legal flexibility that serves an important, practical purpose. We should, however, take note of the difference between these two authorities. Herzog's alternative theory is based upon an existing line of rabbinic precedents, decisions of respectable *posqim* whose prestige is unquestioned even though one may disagree with them. Feinstein, by contrast, seems not to accept these precedents at all and so must create his alternative theories out of thin air. The theories are thus excessively weak, and Feinstein himself shows them little respect. For him, this is not a case of legitimate *halakhic mahloqet*, an issue over which reasonable rabbinic scholars can disagree. The permissive position is in fact *wrong, unreasonable*, and exists only to provide halakhic cover for rabbis who in their hearts know better. It functions as Feinstein's version of the "lesser-of-two-evils" policy argument: it is better for rabbis to justify their

decisions by means of patently weak *halakhic* argumentation than to deviate openly from the law. Like all policy arguments, this one can be challenged on the basis of the facts. Perhaps the opposite is true: resort to such *halakhic* sleight-of-hand may be the surest way to destroy the respect of the laity for the Jewish legal system. The point, however, is not whether or not Feinstein's policy judgement is correct but rather that he makes it. It is an act of his discretion, a *choice* which he makes to serve a purpose other than the determination of what, strictly speaking, is the authoritative *halakhah* in this case.

V. Benzion Uziel: A Return to Pragmatism

Feinstein's approach can be termed "pragmatic", although in a backhanded sort of way: his judgement of practical necessity leads him to devise a legal theory not to account for his own, presumably correct ruling but rather the incorrect rulings of other rabbis. A clearer example of *halakhic* pragmatism can be found in the opinions of R. Benzion Meir Hai Uziel, who served as the first Sephardic Chief Rabbi of Israel until his death in 1953. One decision, dating from his years as rabbi in Salonica, is especially interesting. Uziel permits the non-Jewish wife of a Jewish man (and, importantly, the mother of his children) to convert and marry him according to *halakhah*. In his responsum,⁷² he cites the sources which prohibit conversion when undertaken for an ulterior motive, along with the gloss declaring that "the entire matter is left to the judgement of the court".⁷³ He suggests that in this case, discretion argues for permitting the conversion and marriage, on the grounds that

"(the wife) will be drawn ever closer to her husband's family and religion. Moreover, her present and future children will be fully Jewish (*yehudim gemurim*). This is analogous to the cases of Hillel and R. Hiyya, who were certain that their converts would eventually become true proselytes. It is

therefore permitted, even commanded, to bring these people into the covenant of Israel and thereby expunge the blight of intermarriage that is now a raging pestilence..."

The cases, of course, are *not* so similar. Hillel and R. Hiyya were persuaded that their converts would eventually "do so *leshem shamayim*",⁷⁴ a term generally understood to imply the observance of the *mitzvot*. Here, Uziel provides absolutely no evidence that such an outcome is predictable. How "Jewish" will this woman ever be? How observant is her husband, whose religion she will eventually - after her conversion-come to accept? Uziel offers no discussion of this issue, nor does he claim, following Kluger *et al.*, that a conversion in a situation such as this is in fact *leshem shamayim*. Indeed, the religious sincerity of the prospective proselyte is virtually irrelevant to his decision. He permits the conversion, not because he can predict that the woman will eventually accept all the commandments, but because of the potentially negative consequences which would result from denying it. As he makes clear in a related responsum, Uziel radically expands the discretionary power granted by the phrase "the entire matter is left to the judgement of the court", holding that the rabbis may permit a conversion even if clearly undertaken for ulterior motives, since that course of action is necessary to combat the plague of intermarriage "that threatens to wreak destruction upon our people."⁷⁵ This is a dramatic departure from the codified *halakhah*, which is decidedly non-consequentialist: a conversion is permissible, not because to permit it is good for the Jews, but because the convert wishes to become a Jew "for the sake of Heaven". Uziel, alone among the *posqim* we have surveyed, makes the general welfare of the Jewish community the pivotal factor in deciding the *halakhah* on this issue.

His pragmatism shows itself as well in his treatment of the second issue in this case: if we allow this woman to convert, may she marry her current husband according to Jewish law? The

rabbinic prohibition of such marriages (*M. Yevamot* 2:8) is an apparently insurmountable obstacle. Uziel surveys various legal devices that have over the years been suggested as ways to circumvent the prohibition, but he concludes that all of them are *halakhically* defective. Ultimately, we are left with one sure remedy: the responsum of Maimonides discussed above. Indeed, as his other responsa on this issue suggest, Rambam's ruling is the linchpin of Uziel's position on both issues, the conversion as well as the marriage.⁷⁶ It shows us that we may deviate from the settled law in the name of higher religious purpose. Uziel declares that Rambam's lesser-of-two-evils argument "serves as a guide on all matters which do not involve an absolute prohibition (*isur gamur*; i.e., rabbinic as opposed to Toraitic prohibitions)":⁷⁷ to avoid potentially tragic consequences to the Jewish people, the prohibition may be waived.

Uziel, in other words, uses Rambam as his precedent, which allows him to contend that he does not actually deviate from the law at all. If Maimonides, a post-*Talmudic* authority, can suspend *Talmudic* law on the basis of a "lesser-of-two-evils" argument, Uziel can do so as well. True, he does not *have* to do so, since Jewish law does not recognize a doctrine of binding precedent. The fact that a great authority ruled in a particular way on a question of *halakhah* does not obligate a subsequent scholar to rule likewise. The ultimate authority, after all, is the Babylonian *Talmud*, and the *halakhist's* responsibility is to decide questions according to his best understanding of the *Talmudic* sources regardless of the opinions of other *posqim*.⁷⁸ Still, a past decision may count as a "precedent" to the extent that it influences the thinking of a contemporary scholar. In theory, rabbis are free to arrive at their own independent decisions; in practice, they customarily cite the decisions of post-*Talmudic* predecessors in support of their own rulings. Even the eminent codifiers attribute decisive weight to precedent in their determination of the *halakhah*.⁷⁹ The opinions of past scholars do not automatically establish the *halakhah*, but they do serve a

persuasive function, as evidence that the law, *in all probability*, is in accordance with their view. In our case, Uziel is on solid ground in basing his ruling upon that of the Rambam. Indeed, by hitching his wagon to a *halakhist* of towering prestige, he can claim that his lenient and seemingly radical decision is justified by the existing law. Its legitimacy, that is, does not depend solely upon his arbitrary act of discretion.

This point, however, does not save his decision from criticism. The problem here is not that Uziel relies on precedent but that he relies on *this* precedent instead of the available alternative, that of Rashba, who as we have seen took a stringent attitude on an almost identical set of facts. Uziel is aware of Rashba's ruling, and he cites it in his responsum. If, therefore, he wishes to argue from the law rather than from his own subjective judgement, how does he know that the law follows one version rather than another? What legal rule, that is, allows him to favor Rambam over Rashba? A Dworkinian approach would be to apply the test of coherence, giving the nod to that ruling which better conforms to the legal "data" and is endorsed by the preponderance of scholarly opinion. Uziel takes the opposite tack. He does not attempt to prove that Rambam is "right"; it is enough that Rashba is also not necessarily "right". The law, that is to say, *might* be according to either position, giving Uziel an opening to adopt Rambam's view as the best means to preserve Jewish identity and to save the Jewish spouse from the prohibition of intermarriage. Ultimately, then, Uziel's justification is consequentialist and not strictly legal: when the law is in dispute, we are entitled to choose that position which promises the better consequences for the community.⁸⁰

Such, in brief, is the doctrine of legal pragmatism. Judges should opt for that legal alternative which best supports the ends which the law itself is intended to achieve. In our case, to hold to

the accepted rule and deny conversion on the grounds that the Gentile wife does not have the proper religious motivations is to allow an intermarriage to continue to exist. To enforce the law is to weaken Jewish life, to lower its powers of resistance against the rising tide of assimilation. To relax the *halakhic* standards on conversion, on the other hand, would help save this couple and their children for Judaism. The reasoning is certainly compelling, but it may be wrong. For one thing, Rambam's lenient ruling may not be a legitimate potential interpretation of the *halakhah* in our case;⁸¹ in situations such as this, the surest course of action is the more conservative approach (*i.e.*, following Rashba, to refrain from abetting an improper conversion and marriage). Moreover, assuming that all agree on the "end" to be achieved--here, to combat intermarriage--the stringent approach of Rashba is perhaps the best means of achieving it. A plausible argument can be made that in the face of widespread disregard of Jewish law the worst thing we can do is to relax the observance of halakhic standards. Such a tactic, which promises sinners a reward for their transgression, can hardly engender respect for the Torah and its commandments. To compromise on our devotion to the *mitzvot* may therefore weaken the intensity and quality of Jewish religious life--the very goals that Uziel seeks to attain. In other words, while Uziel follows the precedent of Rambam, the better policy may be that advocated by Rashba, who refused to allow conversion and marriage in a similar case. The determination of the "better policy" would seem to demand an empirical study based upon sociological and demographic data, yet Uziel cites no such data to support his preference for Rambam over Rashba. We return, therefore, to our question: on what *halakhic* basis are we entitled to follow Rambam as opposed to the other authorities?

Clearly, the only reason is that Uziel says so. The identification of Rambam as "the" authoritative precedent is an act of choice, a stated preference for one opinion over another, supported not by *halakhic* argumentation but by the *poseq's*

intuitive, fervently-held belief that this is the best thing for rabbis in this situation to do. In this he demonstrates a fundamental truth about the use of precedent in legal reasoning: judges may rely upon past decisions as authorities, but the determination of *which* decisions (and which aspects of those decisions) will serve as their precedents is a matter of discretion, "a choice as to what the precedent *shall* be."⁸² The "law" does not compel Uziel to recognize Rambam's ruling as his precedent. In the final analysis, his *choice* to so recognize it is justified by his unprovable conviction that this is the best choice he can make and by the undeniable fact that, as a leading *poseq*, he has the power to make it. In Ouziel, therefore, we find one of those rare exceptions to the *halakhic* rule, a rabbi willing to countenance deviation from the established *halakhah* in order to realize the goals and purposes of Torah as a whole.

VI. Conclusion

To repeat, the intent of this essay was not to provide a comprehensive survey of the *halakhah* on conversion for the sake of marriage but rather to study some representative responsa on the subject using analytical tools developed by students of modern jurisprudence. The results, if tentative and sketchy, suggest the following conclusions (themselves tentative and sketchy; obviously, the topic deserves a much more extensive treatment than is possible here).

1. The application of these methodologies to the responsa literature is a promising field for future research. That vast literature has by no means been ignored by academic scholars, who have mined it for data on Jewish economic and social history, biographical material on the great respondents, details concerning religious currents and the like.⁸³ In doing so, however, they have necessarily ignored the *responsum* itself, as a genre of rabbinic writing, in favor of the information it happens to contain. They

have thus missed the purpose and point of responsa writing, which is to answer queries concerning theoretical and practical *halakhah*. Other academic scholars, studying the history of the development of Jewish law, have paid closer attention to the more purely *halakhic* aspects of the *sheelot uteshuvot*.⁸⁴ Yet they, too, in focusing their energies upon the responsum's *halakhic* "bottom line", have perforce had to overlook the document's essential nature as a *decision*, a literary reconstruction of the process by which a rabbinic scholar has drawn upon various sources in an attempt to reason from the known to the unknown. It just may be that the most interesting feature of a responsum is not the *poseq's* final conclusion (the "holding", in judicial terminology) but the intellectual map which charts how he arrived at that destination. His reasoning and justification may well be that aspect of his responsum which exerts the most long-lasting influence upon future scholars. To analyze the responsa from this standpoint can yield us a better understanding of how the established *halakhah*, the law as expressed in the "codes" and through the consensus of rabbinic practitioners, came to be.

2. The decisions examined in this essay use a variety of methods of arriving at answers to the "hard case" of conversion for the sake of marriage. These correspond to the theoretical models of judicial decision put forward by the leading thinkers in the academy of modern jurisprudence. Some of our *posqim* display an openly pragmatic bent, justifying their answers on the grounds that a better (or less evil) conclusion follows from a decision which frankly departs from the standards of settled law (Rambam, Uziel), though we have also seen that the weakness of this justification is that it rests not upon legal reasoning but upon the *poseq's* subjective, unprovable value judgement (Rashba). Others, who reach the same permissive conclusion as the pragmatists, are unwilling to take the step of deviation from the settled *halakhah*, and they therefore must support their answer by means of a narrow reading of the positive law (Kluger). Some find it necessary to

buttress this approach by pointing to policy considerations that demand this ruling (Hoffmann); in this, we see an example of the positivist view of the judge's decision in a hard case as an act of legislation. These arguments are rejected as out of place by other "positivists", who emphasize that the answer must come from the legal texts alone (Grodzinsky). Some of our scholars derive their answers to hard cases by the method, described by Dworkin, of resorting to general legal principles and interpretive theories of the law as a whole (Kook, Herzog). We have also seen how *posqim* will attribute legal argumentation to support the rulings of those with whom they disagree (Feinstein, Herzog). In so doing, they provide evidence for the realist conception of judicial reasoning as the formal justification for a decision that is "really" warranted by goals that lie outside the judge's reasons.

As noted above, theories developed for the analysis of secular law are not a perfect fit with a religious system, and within their own jurisprudential sphere these theories are controversial. With these caveats in mind, however, they offer a helpful perspective for grasping the essentially *indeterminate* nature of the *halakhah* on controversial questions such as ours. Our results indicate that *halakhah*, like other legal systems, offers no one "correct" answer to questions disputed by its authorities (or, as a Dworkinian might say, no one "correct" answer on which all those authorities can agree). In itself, of course, this observation is hardly news. *Mahloqet*, *halakhic* dispute, has been regarded as an inevitable feature of rabbinic law at least since tanaitic times, yet it is a feature that has caused considerable discomfort to many. If some authorities look upon it with equanimity, others are distressed at its implicit threat to the unity of the Torah and the effectiveness of Jewish law.⁸⁵ Accordingly, we witness attempts throughout halakhic history to reduce the scope of this legal uncertainty. Criteria for decision-making, *kelalei hapesaq* of divine as well as human origin, appear to help the rabbis blaze the trail of halakhic truth through the wilderness of *mahloqet*. "Codes" are compiled to

serve as digests of those interpretations of the law that the codifiers view as correct. Precedent, in the form of the emerging *halakhic* consensus, works to distinguish the correct view of the law from other possible and even plausible interpretations. Eventually, the "right" answer will be identified with the opinion which commands the assent of a preponderance of *halakhists* over a significant period of time, and the minority opinions, though studied avidly in the *yeshivah*, will lose whatever authoritative power they once possessed. The achievement of consensus, it can be argued, is an indispensable aspect of rabbinic legal practice; how else, in the absence of a Sanhedrin that could declare the law by fiat, is one to know what "the" *halakhah* demands on any given issue?⁸⁶ And it is perhaps just as indispensable that the system itself view the emergence of consensus opinion as the reflection of the ongoing Divine will. The *gedolei hador*, the recognized *halakhic* decisors, derive the proper judgement through the dispassionate, value-free exercise of logic and analysis upon the relevant sacred texts. In this sense, they can be said to function as "oracles" of the law, its interpreters and not its legislators.⁸⁷

The method employed in this study suggests that these attempts to force an objective correctness upon *halakhic* decision are doomed to failure. If our findings with respect to the responsa on conversion hold true for other areas of Jewish law (and there is no *prima facie* reason to suppose they do not), then rabbinic discretion is endemic to the *halakhic* process as a whole. In addressing hard cases, that is, rabbis cannot avoid the necessity of making choices. They choose whether to subject their texts to narrow or broad construction; they choose whether to resort to policy considerations (and which considerations those shall be) as a means of resolving legal ambiguity; they choose whether to take judicial notice of opposing viewpoints; they choose which rulings of their predecessors shall serve as precedents; they choose whether to adhere to the established legal standard or to deviate from it. All of these *choices*, which as we have seen lead directly to the *poseq's*

final ruling and which taken together constitute the general perception of the objective *halakhah*, are acts of rabbinic discretion. No preexisting legal norm, no canon of legal logic forces the *poseq* to make one choice over its alternative. It is his will rather than his reason, a will presumably informed by his faith, his adherence to standards of reasonability in interpretation, his sense of the purposes of the law, and his assessment of the needs of the community against the backdrop of Jewish history, that determines his choice. All of which suggests that the process of *halakhic* decision is much more art than it is science.

3. From this point, we may draw a conclusion with special application to liberal *halakhah*. One of the major objections raised against our enterprise, by critics of the left as well as the right, is that liberal *halakhah* is unprincipled. That is, liberal (especially Reform) rabbis who write on *halakhic* subjects lack carefully delineated principles to determine how their decisions ought to be made, to decide which traditional laws to retain and which to abandon. Ultimately, say these critics, Reform responsa writers make their decisions on an *ad hoc* basis, relying exclusively upon considerations of expediency and personal prejudice. Put differently, they reach the same decisions at which they would have arrived in the absence of their *halakhic* argumentation and its marshalling of traditional sources. Reform responsa thus lose any claim to the objective validity and the logical consistency which mark the traditional *halakhic* process.⁸⁸ There is much of value in this criticism, even if those who raise it are probably averse to the idea of any Reform "*halakhic* process", principled or otherwise. Liberal *halakhah*, if it is to be more than an exercise in dredging up sources merely to endorse the preconceived religious sensibilities and biases of liberal Jews, must be prepared to justify its conclusions by means of principles more permanent and general than the need to arrive at an "expedient" decision in the case at hand.⁸⁹ Consistency and objectivity are surely worthy goals for any humanistic endeavor; they are building blocks of intellectual

integrity. This criticism is nonetheless flawed, quite apart from the problem of imputing objective standards of knowledge to the humanities and to law in general, because it exaggerates the objectivity of traditional rabbinic responsa. As our analysis demonstrates, the *halakhah* in this hard case is indeterminate precisely because the rabbinic respondents do not (and presumably cannot) derive their conclusion without making choices between available alternatives. No calculus exists to fix with any precision how these choices are to be made, to identify which methods of reasoning are to be employed, which precedents are to be held authoritative, which policy considerations are to be brought into play and how much weight is to be attributed to them. And the responsa in which these choices occur are all perfectly "Orthodox"; no one questions their legitimacy as documents of *halakhah*. Our own responsa, afflicted as they are with the same essential indeterminacy, are thus not that different in style from their Orthodox counterparts.

Our own efforts, therefore, cannot be disqualified as non-*halakhic*. Our conclusions, to be sure, will differ from those drawn by Orthodox *halakhists*. For us, there are many more "hard questions" than there are for them, much more indeterminacy, many more choices to make. And Orthodox *posqim* will make different choices than do we, given that their notion of a fit or proper response to a hard question will often diverge radically from ours. None of this, however, should obscure from our view that the fact of choice, of discretion, is a necessary and inevitable element of Jewish normative thinking.⁹⁰ As we have seen, the *posqim* utilize a variety of methods to justify their choices. Of particular interest to us might be the argument of the "pragmatists" who argue that the correct answer may well be the one which affords the best consequences, the one which stands as the most effective means to secure an agreed-upon end, even when it deviates from the commonly-held legal rule. One would be hard put to find a better description of the central tendency of liberal *halakhah*. Differences

in result, it would seem, do not necessarily mean a difference in nature or essence. This last point, which grows out of a study of *halakhic* responsa through the prism of the literature of contemporary jurisprudence, suggests that the field of legal theory has much to offer us toward the understanding of *halakhah* in general and of liberal *halakhah* in particular.

Notes

* I am indebted to two of my students at HUC-JIR-Cincinnati, whose rabbinical theses helped in no small measure to direct my thinking on the issues covered in this essay. They are Rabbi Ilene Lerner Bogosian ("*Discourage with the Left Hand and Draw Near with the Right*": An Exploration of Ambivalence Toward *Gerim* in Jewish Law and Practice, 1992) and Rabbi Mark Bryan Goldfarb (*An Analysis of Modern Responsa on the Question of Proper Motivations for Conversion*, 1991). *Harbeh lamadeti mirabbotai...*(Ta'anit 7a).

1. This acceptance, known as *qabalat ha-mitzvot*, is taken quite seriously. While all the steps of the conversion ritual are in theory to take place before a *Bet Din*, if circumcision and/or immersion are performed outside that context they are valid *bedi'avad*. Not so *qabalat hamitzvot*: should that statement be made in the presence of two rather than three judges, or at night, etc., it and the conversion are not considered valid at all. *Shulhan Arukh Yoreh Deah* 268:3 and *Taz*, n. 9, in the name of R. Asher (b. *Yeb.* 4:31).
2. b. *Bekhorot* 30b.
3. See the position of R. Nechemyah and R. Yehudah, Tractate *Gerim* 1:7 (1:3, ed. Higger), cited as well in *Yeb.* 24b. The clear distinction between *gerei 'arayot* (i.e., the Samaritans, who converted out of fear of wild beasts; cf. II Kings 17:24-41) and "true proselytes" is maintained by the *setam Talmud* in b. *Baba Kama* 38b, b. *Sanhedrin* 85b, b. *Hullin* 3b, and b. *Niddah* 56b. And see below for the discussion of the opinions of Rabbis Kook and Herzog on this question.
4. *M. Ye.* 2:8: one who is suspected of a sexual liaison with a Gentile woman who has since converted may not marry her; if, however, he does marry her, she remains his legitimate wife. The *Talmud* (24b) draws the conclusion that her conversion is valid (*hagiyoret miha havya*) and cites the statement of Rav that those who convert out of ulterior motives are valid proselytes. This, I should stress, is the predominant view of the "final" *halakhah*; as we shall see, some contemporary *posqim* question whether modern-day insincere conversions qualify as valid.

5. See the version of Rav's ruling preserved in *Y. Kid.* 4:1. The *rishonim* suggest another justification. Even though the original conversion may have been prompted out of ulterior motivations, once the proselyte has begun to observe the commandments we can presume that he or she has subsequently accepted the obligation to do so (*agav onsaiho gamru veqiblu*), in much the same way as a person who is coerced into selling his property can be said to have consented to the sale, after the fact, as a result of the pressure brought to bear upon him (*b. Baba Batra* 47b-48a). See Ritva and *Nimukei Yosef* to *Yeb.* 24b. Here we find the roots of a distinction, of great importance to *poskim* such as Kook and Herzog, between "insincere" converts who observe the *mitzvot* and "insincere" converts who do not.
6. *b. Yeb.* 24b, *Tosafot*, s.v. *lo*, *Yad*, *Hil. Issurei Bi'ah* 13:15.
7. *Yad, Is. Bi'ah* 13:14-18 and 14:1 (but see below, in the discussion of Rav Kook's decision, for another interpretation of Rambam's ruling); *Shulhan Arukh Yoreh Deah* 268:12 and *Bi'ur Hagra ad loc.*
8. Legal textbooks are indeed likely to be cited as "authorities" in judicial decisions, as all who are familiar with names such as Blackstone, Wigmore, and Prosser can testify. The point is that these authorities are not legislators. Like Rambam and the *Shulhan Arukh*, they describe the law, but they do not make it. For a full treatment of the distinction between codification in Jewish law and in other systems see Menachem Elon, *Hamishpat Ha'ivri* (Jerusalem, 1988), pp. 938-948.
9. *b. Shabbat* 31a, *b. Menachot* 44a; *Tosafot*, *b. Yeb.* 24b, s.v. *lo*.
10. *Beit Yosef, Yoreh Deah* 268, fol. 215b; *Siftei Kohen, Shulhan Arukh Yoreh Deah* 268, no. 23.
11. The "classic" treatment of this theme (*i.e.*, one which delineates the issues which subsequent scholars return to and address) is Benjamin Cardozo, *The Nature of the Judicial Process*, New Haven, 1921.
12. Cardozo's "method of philosophy"; *ibid.*, ch. 1.
13. Such as the "rule of recognition" proposed by H.L.A. Hart, *The Concept of Law* Oxford, 1961, the most influential of the contemporary legal positivists. Hart's work is a sympathetic critique of John Austin, *The Province of Jurisprudence Determined* (London, 1832), whose theory of "law as the command of the sovereign" developed a line of thought laid down by Hobbes and Bentham which was critical of natural law philosophy. Law, for positivists, is a strictly human enactment, whose source is to be found not in reason or nature but in social and political choices made within the context of a particular legal system. A similar "master rule" is Hans Kelsen's *grundnorm*; see *The Pure Theory of Law*, tr. Max Knight, Berkeley and Los Angeles, 1967.

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14. After the famous aphorism of Justice Holmes in his dissent in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917). Cardozo, p. 113, concurs that unlike a proper legislature the judge "legislates only between the gaps", within the "open spaces" of the law.
15. Ronald Dworkin, *Taking Rights Seriously*, Cambridge, MA, 1977, and *Law's Empire* Cambridge, MA, 1986.
16. This determination of the law by non-enacted principles resembles natural law theory, but as Bernard Jackson notes, it differs in one important respect. Dworkin's "right answer" is derived from the morality and political values of a particular community and not from universal reason or morality. See Jackson, *Semiotics and Legal Theory*, London, 1985, p. 7.
17. See especially Jerome N. Frank, *Law and the Modern Mind*, New York, 1930. The central themes of legal realism have been taken up and developed by the Critical Legal Studies movement, which sees the development of law as determined by the political worldview of societies and legal elites. See Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge, MA, 1987. Some of the strongest criticism of legal realism as an explanation of how judges make decisions comes from judges themselves. See Aharon Barak, *Judicial Discretion*, New Haven, 1989, pp. 37-38, who questions whether even the extremists among these groups truly believe that judicial discretion exists in every case.
18. See John Dewey, "Logical Method and Law", 10 *Cornell Law Quarterly* (1924), 17ff. Such institutional requirements, rather than any inherent logic in the law and its rules, account for the tremendous consistency and stability in judicial decision within a particular system; Karl Llewellyn, *The Common Law Tradition* (Chicago, 1960).
19. The point is stressed by Shalom Albeck, *Mishpat Umusar Bemesoret Yisrael, Mehkarei Mishpat*, v 1, 1980, pp 40-57.
20. See Avraham Z. Rabinovits, *He'arot Lanoseh Mediniut Hilkhaitit Vehandasah Genetit, Techumin*, v. 2, 1981, pp. 504-512.
21. Thus, for example, Menachem Elon adopts the *Grundnorm* of Kelsen and the legal sources described in Salmond's *Jurisprudence* as descriptive of the Jewish legal system. In this, he is followed closely by Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York, 1986, and see the review essay by Gordon Tucker in *Judaism*, v. 38, Summer, 1989, pp. 365-376). See also Norman Lamm and Aaron Kirschenbaum, "Freedom and Constraint in the Jewish Juridical Process", 1 *Cardozo Law Review* (1979), 99-133; Elliot N. Dorff, "A Methodology for Jewish Medical Ethics", B.S. Jackson and S.M. Passamaneck, eds., *Jewish Law Association Studies VI*, especially at pp. 46 ff.; and Bernard S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law", *Jewish Law Annual*, Boston, 1987, v. 6, pp. 3-44, as well as the other articles in that volume.

22. H. Ben-Menahem, *Judicial Deviation in Talmudic Law*, Chur, Switzerland, 1991.
23. On legal pragmatism and its relationship to the realist school, see Richard Posner's introduction to his *The Problems of Jurisprudence*, Cambridge, MA, 1990.
24. Take our case as an illustration. Hillel and R. Hiyya (note 9, above) accepted proselytes who came to us for motives other than *leshem shamayim*. The stories in which those cases are reported do not offer any legal justification for their decisions, which allows us to speculate that these authorities may hold that no justification is necessary, i.e., the rabbi enjoys unfettered discretion in the law of conversion. The *Tosafists* and the later commentators, however, explain these actions on the ground that the rabbis were certain that the converts would eventually practice Judaism out of sincere religious motivations. In thus justifying the cases, later *halakhah* suggests a limit upon rabbinic discretion which is not enunciated explicitly in the original sources.
25. Mark Washofsky, "The Search for Liberal *Halakhah*", in Walter Jacob and Moshe Zemer, eds., *Dynamic Jewish Law*, Tel Aviv and Pittsburgh, 1991, pp. 25-51, and Walter S. Wurzbarger, "The Conservative View of *Halakhah* is Non-Traditional", *Judaism*, v. 58, Summer, 1989, p. 378.
26. See, for example, Shlomo Riskin, *Women and Jewish Divorce*, Hoboken, 1989. Riskin contends that a husband may be coerced into divorcing his wife if she refuses to live with him on the grounds that "he is repulsive to me". He thus exhumes a legal argument that the *halakhic* authorities have overwhelmingly rejected for the last eight hundred years.
27. See David Ellenson, *Tradition in Transition*, Lanham, MD, 1989, pp. 61-100; the articles by J. David Bleich, Marc D. Angel and Shlomo Riskin in Emanuel Feldman and Joel B. Wolowelsky, *The Conversion Crisis*, New York, 1990; S.T. Rubenstein, *Giyur leshem ishut-bahalakhah, Torah shebe'al peh*, v. 13, 1971, pp. 74-81.
28. *Resp. Pe'er Hador*, n. 132. On the authoritative brevity with which Maimonides answers *halakhic* queries see *Elon*, p. 1233 and n. 78.
29. *M. Yebamot* 2:8 (24b); *Yad, Gerushin* 10:14.
30. The *Talmudic* discussion at *Yebamot* 24b presumes that the maidservant or Gentile woman referred to in the *Mishnah* had no motive other than marriage in converting (or being converted) to Judaism.
31. *Avodah Zarah* 36b; *Yad, Isurei Bi'ah* 12:1-2.

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32. *M. Gitin* 5:5; *b. Gitin* 55a. See Rashi on *Gitin* 55a (s.v. *mipney*): if we enforce the Toraitic standard and require the thief to tear down the house in order to retrieve the stolen beam and return it to its rightful owner, he will likely refuse to do so. In other words, we effectively prevent him from doing *teshuvah*. It is better to leave the building standing and allow him to compensate the beam's owner.
33. Rambam's analogy to the *taqanat hasahvim* is, at best, problematic. There, the thief must at least restore the value of the stolen object, if not the object itself; here, the marriage and conversion allow the sinner to keep the fruits of his transgression. This would violate the *Talmudic* principle that the sinner not be permitted to benefit from his action (*b. Yeb.* 92b and parallels cited in *Masoret Hashas*).
34. Compare the *taqanah* of R. Yehudah Hanasi that, in order to encourage thieves to repent, we do not accept payments of compensation from them (*b. Baba Kama* 94b). *Tosafot* (s.v. *bimey*) notes that this contradicts common *Talmudic* practice, where thieves were in fact expected to restore the value of stolen goods. Moreover, were this rule to be taken literally, any thief could pretend to do repentance and thereby exempt himself from the compensation requirement. See *Yad, Gezeilah* 1:13, and *Shulhan Arukh, HM* 366:1.
35. See R. Barukh Halevy Epstein, *Torah Temimah* to Deut. 21:11, n. 72, and below for R. Haim Ozer Grodzinsky's critique of the notion that the *bet din* may violate a "little" commandment to save another from transgressing a "big" one.
36. *Resp. Rashba*, I, no. 1205. I say "virtually" because this case is complicated by the fact that the man who cohabits with the Gentile maidservant is already married. Rashba is incensed at the man's abandonment of wife and child, and this might account in part for his stringent ruling. Nonetheless, Rashba makes clear that the conversion and marriage of the maidservant is a separate wrong, quite apart from the man's betrayal of his first wife.
37. *Yad, Mamrim* 2:4 and commentaries; *Elon*, pp. 425-426.
38. The best comprehensive treatment of these principles is Eliezer Berkovits, *Hahalakhah: Kocha Vetafkidah* (Jerusalem, 1981). See also Shalom Albeck (note 19, above); Louis Jacobs, *A Tree of Life*, London, 1984, pp. 182-192; Shimeon Federbusch, *Hamusar vehamishpat beyisrael*, Jerusalem, 1947; Boaz Cohen, *Law and Tradition in Judaism*, New York, 1969, pp. 182-238; David Novak, *Halakhah in a Theological Dimension*, Chico, CA, 1985, pp. 11-28; Moshe Silberg, *Kach Darko Shel Talmud* (Jerusalem, 1964), pp. 66-138.
39. P. V. Baker and P. St. J. Langan, *Snell's Principles of Equity*, 28th ed. (London, 1982), pp. 5-22; W. W. Buckland, *Equity in Roman Law* (London, 1911).

40. See Moshe Zemer, "Authority and Criteria in Liberal *Halakhah*," in Walter Jacob and Moshe Zemer, eds., *Dynamic Jewish Law: Progressive Halakhah, Essence and Application* (Tel Aviv and Pittsburgh, 1991), pp. 9-24.
41. It is instructive that Berkovits, in his discussion of the principles discussed above, relies almost exclusively upon *Talmudic* sources. The absence of material from codes or responsa leads one to the conclusion that, following the end of its formative period, *halakhah* became much more rule-oriented and less likely to deviate from accepted precedent and *pesaq*. There are, however, some notable exceptions. R. Moshe Isserles violated a rabbinic prohibition and conducted a wedding on the night of *Shabbat* in order to preserve the match and safeguard family reputations (*Resp. Harema*, no. 125). R. Asher b. Yechiel declares that a divorce coerced from a husband when a wife claims that he is repulsive to her is invalid and her offspring by a subsequent husband are *mamzerim*. Yet he departs from his own logic and limits this ruling to future cases only (*Resp. Harosh* 43:6).
42. The formalization of law as a stabilizing and stultifying factor in legal change and judicial flexibility is a theme treated by Sir Henry Maine, *Ancient Law*, London, 1861, pp. 1-59. See also Alan Watson, *The Evolution of Law*, Baltimore, 1985, especially pp. 115-119. Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakhah*, New York, 1983, pp. 85-112, argues that the codification of Jewish law has robbed the Oral Torah of its original creative energy. S. Z. Havlin suggests that the tendency for later generations to submit to the *halakhic* authority of their predecessors is a literary phenomenon, brought about by the redaction or composition of comprehensive legal works which demand the attention and assent of the community; "Al 'hachatimah hasifrutit'," in *Mechkarim Basifrut Hatalmudit*, Lieberman Tribute Volume; Jerusalem, 1983, pp. 148-192.
43. *Resp. Tuv ta'am veda'at*, no. 230. It is unclear whether by "new religion" is meant religious reform or cultural enlightenment and emancipation. To Kluger, at any rate, these phenomena were probably the same thing.
44. Note that Kluger deftly changes the terminology from that submitted to him by his correspondent (assuming that Kluger accurately reproduces the latter's communication). Where in the description of the case we are told that the couple have cohabited several times (*kamah pa'amim*), here we discover that they have been together many times (*harbeh pa'amim*). The strengthened terminology also strengthens Kluger's argument that the man's lust has been quenched so that the request for conversion is not based upon his desire to marry her. On the tendency of judges to restate the facts of a case in order to stack the deck in favor of their decision, see Richard Posner, *Cardozo: A Study in Reputation*, Chicago, 1990, pp. 33-57.
45. On all of this, see *b. Yeb.* 24b and Rashi, *s.v. de'amar rav asi*; *Tosefta Yeb.* 4:5; *Nimukei Yosef* to Alfasi, *Yevamot*, fol. 5b.

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46. Isserles, *EHE* 177:5. This raises the issue of precedent in *halakhah*: on what basis does Kluger determine that Isserles' decision concerning an unmarried woman applies to the case of a Gentile spouse? This issue will be discussed below, as part of my analysis of Ouziel's decision.
47. This is Rambam's understanding of R. Yose's statement (*M. Avot* 2:12), "let all your actions be for the sake of Heaven". According to Rambam, this constitutes a demand that the individual harness his entire being and all his actions toward the apprehension of God (Commentary to *Avot*, ch. 5).
48. A rather obvious point: how can we expect of the Gentile spouse-to-be a higher degree of religiosity than that of her intended? Yet the obvious needs at times to be stated. See the discussion of R. Moshe Feinstein, below.
49. *Resp. Imrei Yosher*, v. 1, no. 176. Arik (d. 1925) was one of the leading Galician *halakhic* authorities.
50. *Yad, Isurei Bi'ah* 14:1; *Shulhan Arukh, Yoreh Deah* 268:12.
51. *Resp. Melamed Leho'il*, v. 2, nos. 83 and 85.
52. Consequentialist arguments such as these, strewn throughout Hoffmann's response, support the widely-held perception of him as an Orthodox "reformer" of the *halakhah* who issued lenient rulings in a conscious effort to adapt Jewish observance to the challenges of a modern, liberal-secular environment. See Jonathan Brown, *Modern Challenges to Halakhah* (Chicago, 1969).
53. I refer to the statement "the innocent should not suffer for the sins of the guilty" as "extralegal" since it is hardly a universal principle of Jewish law; witness the *agunah* and the *mamzer*. And one searches almost in vain for the contemporary Orthodox halakhist who would agree with Hoffmann's policy judgement that it is better to convert these people ourselves rather than let them go to Reform rabbis.
54. *Resp. Achiezer*, v. 3, no. 26.
55. *Lev.* 18:19, 29; *Yad, Issurei Bi'ah* 1:1. Grodzinsky assumes, plausibly, that *niddah* is one of the commandments which the currently intermarried couple will violate upon the woman's conversion.
56. *Resp. Da'at Kohen*, nos. 154-155.
57. *Resp. Heikhal Yitzhaq, Even Ha'ezer* 1:1, nos. 19, 20, and 21; *Pesakim Ukhetavim*, Jerusalem, 1990, v. 4, nos. 87, 89, 90, and 91.

58. See above at notes 3, 4, and 5.
59. See Moshe Zemer, "The Rabbinic Ban on Conversion in Argentina", *Judaism*, v. 37, Winter, 1988, pp. 84-96.
60. Kook does provide for the rare "sincere" proselyte: he or she can travel to Jerusalem, to be examined there by Kook's own *bet din*.
61. Dworkin, *Taking Rights Seriously*, pp. 118-123.
62. *Yad, Hil. Issurei Bi'ah* 13:17; *Shulhan Arukh Yoreh Deah* 268:12.
63. Kook relies here upon a distinction used by *Tosafot, Hulin* 3b, s.v. *kasavar*, to explain the *Talmudic* dispute over whether the Samaritans were valid proselytes. Those who say they are not valid proselytes hold that the Samaritans, who converted originally out of the ulterior motive of fear, never observed Judaism properly. Thus, in Kook's equation, insincerity plus subsequent nonobservance equals an invalid conversion.
64. See note 5, above.
65. This is not to say that such policy considerations cannot lie below the surface of Herzog's rulings. My concern here is with the jurisprudential question of the process by which a rabbinic decision is argued and justified, rather than with the psychological or sociological inquiry as to how a rabbi actually "thinks up" his answers. The former, as the realists would assert, may well be a smokescreen concealing his "real" motivations, but it is through his written argument that a rabbi or a judge influences the future development of the law. On the distinction between these two levels of judicial thinking, see Richard Wasserstrom, *The Judicial Decision*, Stanford, 1961.
66. See *M. Eduyot* 1:5, Rambam *ad loc.* in the Kafich edition of his *Commentary to the Mishnah* and Kafich's note 31.
67. *Resp. Igerot Moshe, Even Ha'ezer*, v. 2, no. 27, and *Yore Deah*, v. 1, no. 160.
68. Although Orthodox halakhists accept Feinstein's judgement concerning Conservative rabbis (J. David Bleich, *Contemporary Halakhic Problems, Volume III* New York, 1989, p. 91 at n. 6), it is subject to the logical -- and jurisprudential -- criticism that the *poseq* assumes facts not in evidence. See Roth, pp. 71-74.
69. See *b. Yevamot* 47a-b (the proselyte is informed of "some [i.e., and not all] of the lighter and weightier commandments") and *b. Shabbat* 68a-b (one who converts among the Gentiles is a valid convert, even though out of his ignorance he violates the most important commandments).

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70. Compare Feinstein to Kluger, who arrives at his permissive ruling through a similarly forced argument. Unlike Feinstein, Kluger seems to accept that argument as persuasive, so that it is not so obvious that in his case the legal justification is but a "mask" or a "smokescreen" concealing the true motivations of his decision.
71. Feinstein uses the term *me'akev* (an absolute, *sine qua non* requirement) to describe acceptance of the *mitzvot*: without that acceptance, there is no conversion, even *bedi'avad*.
72. *Resp. Mishpetei Uziel*, v. 1, *Yore Deah*, no. 14.
73. See notes 9 and 10, above.
74. The language of *Tosafot*, *Yeb.* 24b, s.v. *lo*.
75. *Mishpetei Uziel*, *Even Ha'ezer*, no. 18. He adds that "we are allowed to make ourselves *hedyotot* and facilitate the conversion" in order to combat intermarriage. *Hedyotot* refers to the ignorant judges who improperly converted insincere proselytes during the days of David and Solomon; *Yad*, *Isurei Bi'ah* 13:15. It is, to say the least, unusual for a *poseq* to look upon these judges as models worthy of our imitation.
76. See *Mishpetei Uziel*, *EHE*, no. 18: in our day, to combat the threat of intermarriage, it is necessary to convert the Gentile spouse, "relying in this matter upon our teacher, the Rambam".
77. Uziel's language here is not as precise as it might be. The prohibition against this man marrying this woman is certainly *derabanan* (*M. Yeb.* 2:8); the suggestion that to accept an insincere proselyte violates only a rabbinic provision assumes that, *bedi'avad*, the conversion is valid. Elsewhere (*EHE*, no. 18), Uziel states that this is his view. Were he to hold with the authorities who invalidate such conversions, the prohibition would be absolute indeed.
78. On the limits of precedent in Jewish law see Elon, pp. 768-804, and Zorach Warhaftig, "*Hatakdim Bamishpat Ha'ivri*", *Shenaton Hamishpat Ha'ivri*, vols. 6-7 (1979-1980), pp. 105-132.
79. The authors of the *Shulhan Arukh*, for example: R. Yosef Karo declares that the law shall follow the majority view among a panel of leading *rishonim*, while R. Moshe Isserles holds to the rule that "the law is according to the latest authorities". See their introductions to, respectively, the *Bet Yosef* and the *Darkhei Moshe* commentaries to the *Tur*.

80. On the other hand, in *Mishpetei Uziel*, YD, no. 25, he offers an argument of principle. The case of the *yefat to'ar* proves that "whenever the Torah estimates that a man cannot release himself from the grip of the evil impulse, it gives him an opening for repentance so that he might not sin." As we have seen, however, the notion that we are permitted to deviate from *halakhic* standards in the name of some "higher purpose" is not a consistent *halakhic* principle. Rambam's reasoning-"better that they eat the sauce than the fat" - and his analogies to *yefat to'ar* and *taqanat hashavim* are contestable, and Rashba is but one example of the countless *posqim* who reject those analogies, explicitly or implicitly. See above at notes 33-35.
81. See note 80 and the discussion of Grodzinsky's responsum, above.
82. Posner, *Problems of Jurisprudence*, p. 95.
83. For an overview see Peter Haas, "The Modern Study of the Responsa," in D. Blumenthal, ed., *Approaches to Judaism in Medieval Times*, v. 2, Chico, CA, 1985, pp. 35-71. The basic monograph is still Solomon B. Freehof, *The Responsa Literature*, Philadelphia, 1955.
84. This is especially true of the *Mishpat Ivri* school, whose leading current representative is Menachem Elon. See his *Hamishpat Ha'ivri*, pp. 1213-1281, and his introductions to the volumes of the *Mafte'ach Hasheelot Vehateshuvot* Jerusalem, 1981--, an index of the responsa literature of Spain and North Africa during the period of the *rishonim* (ca. 1000- ca. 1500).
85. For example, R. Ya'akov b. Asher in his introduction to *Tur Hoshen Mishpat* complains that every litigant can rely upon that *poseq* who agrees with his position, a practice which runs counter to the search for legal truth. R. Yosef Karo, in his introduction to the *Bet Yosef*, recites a familiar refrain that "the Torah has not become two Torahs; it has become innumerable Torahs, owing to the many books written ostensibly to clarify its laws." On this topic generally, see Menachem Elon, *Meni'im Ve'ekronot Bekodifikatsiah Shel Hahalakhah*, in Y. Eisner, ed., *Hagut vehalakhah*, Jerusalem, 1973, pp. 75-119.
86. See Washofsky, "The Search for a Liberal *Halakhah*". That consensus is a necessary factor in attaining even a modicum of objectivity in law is a point stressed heavily by Posner, *Problems of Jurisprudence*, pp. 125-129.
87. For a succinct statement of this theory, see J. David Bleich, *Contemporary Halakhic Problems I*, New York, 1977, pp. xii-xviii.
88. See Dan Cohn-Sherbok, "Law and Freedom in Reform Judaism", *Journal of Reform Judaism*, v. 30, Winter, 1983, pp. 88-97, and "Law in Reform Judaism: A Study of Solomon Freehof," *Jewish Law Annual*, v. 7, 1988, pp. 198-209. For a response see Walter Jacob and Mark Staitman in the afore-cited *Journal of Reform Judaism*, pp. 98-104. For detailed treatments of Freehof's *halakhic* method, which tend to contradict

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Cohn-Sherbok's arguments, see Kenneth Jay Weiss, *Solomon B. Freehof: Reforging the Links*, DHL Dissertation, HUC-JIR (Cincinnati, 1980) and Scott Gurdin, *The Halakhic Methodology of Solomon Freehof*, Rabbinical Thesis, HUC-JIR, Cincinnati, 1991.

89. This criticism bears a striking parallel to that made by Herbert Wechsler of the *ad hoc* fashion in which some American courts during the 1950's decided constitutional questions; "Toward Neutral Principles of Constitutional Law", *73 Harvard Law Review* 1 (1959).
90. It is sometimes argued that "Jewish normative thinking" includes the discipline of ethics as well as *halakhah* and that *our* normative thinking corresponds more closely with the former than with the latter. This argument rests upon the controversial presumption that there is such a thing as a normative "Jewish" ethics, as opposed to ethics in general. If that presumption is wrong, as I suspect, then those who make this argument have the burden of proving just what precisely is "Jewish" about their approach to normative thinking. See, in general, Menachem Kellner, "Reflections on the Impossibility of Jewish Ethics," *Sefer Bar-Ilan*, vol. 22-23 (1988), pp. 45-52.

...the fact that the law is not a mere technical instrument... it is a social product... it reflects the values and interests of the community...

...it is essential to recognize that the law is not a static entity... it evolves over time... it is shaped by the social and economic conditions of the society...

...the law is a dynamic system... it is constantly being reinterpreted and reformed... it is a living organism...

...the law is a reflection of the society... it is a mirror of the social order... it is a tool for social control...

...the law is a product of human activity... it is a result of human choices... it is a social construct...

...the law is a system of norms... it is a set of rules that govern behavior... it is a framework for social interaction...

...the law is a means of social organization... it is a way of ordering society... it is a mechanism for resolving conflicts...