The fetus and fertility

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ABORTION AND THE HALAKHIC CONVERSATION
A Liberal Perspective

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Testifying before the United States Congress in 1976, Rabbi Balfour Brickner of the Union of American Hebrew Congregations argued in support of a woman's right to an abortion under the law. His statement made brief reference to the Jewish tradition on the subject of abortion. Citing several passages from the literature of *halakhah*, Jewish law, he argued that the tradition supports the "pro-choice" stance of the Reform movement and other liberal and secular Jewish organizations. Nonetheless, he noted, "despite this plethora of evidence from Judaism recognizing the legality of abortion, Orthodox Jewish authorities have taken and continue to hold a negative view toward abortion."[1]

Brickner's summary, a fair description of the political dispute on the subject within the American Jewish community, suggests that there is a legitimate difference of opinion over the teaching of Jewish tradition on abortion. Jewish law, that is to say, can plausibly be interpreted in either direction: liberals read it leniently while the orthodox emphasize its stringent side. Such characterizations, however, bring howls of protest from orthodox spokesmen, who argue that the difference is hardly "legitimate." There is, they say, no "plethora of evidence" in Jewish tradition in support of abortion rights. To the contrary: *halakhah* "flatly prohibits abortions in all but exceptional cases."[2] This position, as summarized by Rabbi Dr. Moshe Tendler, a scientist and eminent *halakhist*, holds as follows:

> Abortion defies the prohibition of killing....It is not permissible according to Jewish law to destroy a fetus, except in the classic rabbinic situation of the *rodef* (literally, "pursuer"), who is threatening the life of another. Such a person must be stopped even if it means killing him....A pregnant woman whose life is in danger, physiologically or psychologically, may have an abortion to eliminate the threat to her life.[3]

According to this description, the *halakhic* permit for abortion is far too limited to accommodate a woman's legal "right" to that procedure. Thus, orthodox organizations back the "pro-life" cause as the *only* legitimate Jewish point of view.[4]

Liberal *halakhic* scholars, to be sure, have criticized this description as excessively narrow. Abortion, they point out, is not defined as "murder" under Jewish law; if it is indeed a prohibited act, the prohibition does not fall under the rubric of "killing."[5] They have sought to demonstrate that a persuasive Jewish legal case can be made for a more lenient and nuanced stance on the abortion issue.[6] As usual, however, the writings of liberal *halakhists* have had no measurable effect upon the orthodox position, which remains firmly and severely restrictive.

Tendler's summary of the Jewish law on abortion is a good example of what we can call the "*halakhic* consensus." A "consensus" position exists in *halakhah* when, despite the availability of other plausible interpretations of the sources, it is the view of the law held by a preponderance of orthodox authorities. A consensus ruling will often appear in *halakhic* literature as "the" *halakhah* on a given issue. If dissenting views are mentioned, they are presented as divergent, less "correct", not to be relied upon as authoritative statements of the law. Thus, compendia on Jewish medical ethics tend to present the restrictive position described by Tendler as the one and only correct answer to the question: "when and under what circumstances does Jewish law permit abortion?" More lenient views are treated as deviations from the mainstream, the consensus.[7] The existence of this consensus view is of enormous significance, because it determines how the general public will ultimately perceive the stance of the *halakhah* on an issue of great moment. It nourishes the "pro-life" activism of orthodox organizations. It permits the Israeli Chief Rabbinate to declare the performance of an abortion to be an act of murder.[8] And it allows orthodox spokesmen to contend that, *contra* Brickner and the liberal *halakhists*, the opinion of the orthodox rabbinate is the sole authorized expression of the Jewish law on abortion.

The very fact of an *halakhic* consensus is of sufficient importance as to warrant its own study.[9] In this essay, I want to explore the making of *this halakhic* consensus. I do not seek to evaluate its "correctness" as a statement of Jewish law; my goal is rather a study in approaches to *halakhic* reasoning. By what means has the restrictive position on abortion achieved the status of consensus? If, as liberal *halakhists* contend, there is more than one plausible *halakhic* response to the abortion question, how do orthodox *halakhists* justify theirs as *the* correct answer? I will argue that this "correctness" has been established by means that are excessively mechanical and formalistic, by scholarly procedures imposed upon the law from without, by a pure conceptualism that is at once intellectually interesting and *halakhically* unpersuasive. This has occurred, I believe, because *halakhic* authorities view their enterprise as a kind of scientific inquiry, a search for "the" objective truth. *Halakhah* in this conception can permit of only one correct answer to any legal question. When confronting a serious issue for which the sources provide a plurality of approaches, therefore, these authorities require a method that will allow them to banish uncertainty, to locate the single right answer from among the available alternatives.

Against this tendency, I will argue that *halakhah* is neither mathematics nor an exact science which operates according to rules that produce sure and certain knowledge. Any attempt to fashion such rules will betray its own intellectual inadequacy. Indeed, our issue provides a case study in the artificiality of *halakhic* "method." Like law, I will suggest, *halakhah* is better understood as a rhetorical practice than as a science. It is a field where, in the absence of objective certainty, the participants search for meaning through a process of ongoing argument. Its proper language is that of practical reason rather than scientific method. *Halakhic* "truth" is not the product of some systemic criterion of validity; rather, it is the always-tentative result of a never-ending discussion aimed at eliciting the assent of the community of *halakhic* practitioners. The model of *halakhic* reasoning is not that of scientific method; it is what I would call the *halakhic* conversation, a reasoned if impassioned dialogue among all the potentially correct interpretations of the

law, an argument in which liberals as well as the orthodox can and ought to take part.

I. *ABORTION IN THE HALAKHIC SOURCES.*

This is not the setting for a comprehensive survey of the *halakhic* literature on abortion.[10] Yet in order to trace the formation of the orthodox *halakhic* consensus, and as a necessary basis for the analysis which follows in Section II, I do need to sketch in broadest outline the *halakhic* discussion of abortion, which customarily begins with a consideration of *M. Ohalot* 7:6, the only mention of therapeutic abortion in the entire *Mishnah*:

> When a woman has travail during childbirth, the fetus is dismembered in her womb and is extracted limb by limb, because her life precedes its life [*mipnei shehayeha qodmin lehayav*].
>
> Once the major part of it[11] has emerged it may not be touched, because the life of one person does not override the life of another person [*ein dohin nefesh mipnei nefesh*].

This *mishnah* is discussed by the Talmud in *Sanhedrin* 72b:

> Rav Huna said: when a minor pursues another with intent to kill, he may be stopped even at the cost of his life. Rav Huna reasons: a pursuer need not be forewarned,[12] whether he is an adult or a minor.
>
> Rav Hisda objects: "once the major part of it has emerged it may not be touched, because the life of one person does not override the life of another person." Why is this the case? Surely (the infant) is a pursuer! That case is different: she is being pursued from Heaven.

Unlike a person on trial for a capital offense, a *rodef* may be killed without prior adjuration if such is necessary to save his intended victim. Rav Huna applies this rule to a minor as well as to an adult. Yet, as Rav Hisda notes, this last provision is apparently contradicted by *M. Ohalot* 7:6, which declares that the fetus whose birth threatens its mother's life may not be harmed once it has emerged from the womb. The Talmud resolves this contradiction by distinguishing the case: difficult childbirth is not an instance of "pursuit" as normally understood. The mother's life is threatened by "an act of God", an unfortunate occurrence of nature. The law of the *rodef* does not apply to this child upon its emergence from the womb.

Yet why, if the child may not be harmed upon emergence, does the *mishnah* permit an abortion while the fetus is *in utero*? The commentators offer two lines of response. According to Rashi:[13]

> The first part of the *mishnah* states that the fetus may be dismembered, for as long as it has not emerged it is not a *nefesh* and it is permitted to kill it to save its mother. But once its head has emerged we may not destroy it; at this point it is considered as already born, and one *nefesh* does not override another *nefesh*.

Rashi and those who follow his approach[14] explain *M. Ohalot* 7:6 on its own terms, quite distinct from the discussion in *Sanhedrin* 72b. The *mishnah* confers the term *nefesh*, which denotes the legal status of personhood, only upon a child who has been born. Only at that point does one become a full member of the human community and enjoy all the protections that pertain to the "person." All "persons" are equal under the law. Thus, one person may not be killed in order to save the life of another.[15] The fetus, however, is not a *nefesh* and does not benefit from the full status of personhood.[16] In a conflict between fetus and mother, we can and do judge between them, sacrificing the former to save the latter. An abortion is permissible, in other words, due to the inferior status of the fetus and not because it is defined as a "pursuer."

Maimonides, on the other hand, writes as follows:[17]

> This, too, is a negative Toraitic commandment: you shall not spare the life (*nefesh*) of the pursuer. For this reason the sages ruled that when a woman has travail in childbirth it is permitted to dismember the fetus in her womb, either medically or surgically, because it is like a pursuer (*kerodef*) who seeks to kill her. Once its head has emerged it may not be harmed, because one life does not override another life. And this is the way of nature.

Unlike Rashi, Rambam defines the distinction in *M. Ohalot* 7:6 entirely within the context of the Talmudic discussion of the *rodef*. Where Rashi reads the conclusion of the discussion - "she is being pursued from Heaven" - as an indication that the fetus is not a *rodef*, Rambam apparently applies this phrase only to the child upon emergence; prior to that point, it *is* to be categorized as a pursuer. Like any other pursuer, the fetus may be destroyed because it endangers the life of another. "For this reason" it may be stopped if necessary at the cost of its life.

This ruling has caused much puzzlement to subsequent *halakhic* commentators. Surely, they write, Rambam must agree with the plain sense of the Talmudic passage that rejects the designation of the fetus as a pursuer.[18] Moreover, how does one explain the distinction between the fetus before and after emergence? If it is considered a *rodef* and may be killed because it threatens the mother's life, why may it not be harmed following its emergence from her womb? Does it not still "pursue" her?[19] And how can a fetus be called a pursuer when it cannot form intent to kill and when its "pursuit" is the result of a natural process?[20] Nonetheless, it is possible to defend Rambam's interpretation and to declare the fetus a *rodef*.[21] And the fact that an *halakhic* authority of towering prestige explains the warrant for abortion in terms of pursuit and aggression introduces an important factor into the process of legal decision-making. If we adopt his view, we might conclude that the fetus may never be aborted unless it poses a clear and present danger to the mother. In

the absence of any threat to her life, there is no acceptable warrant for abortion. Were we to reject Rambam, however, in favor of Rashi's approach, we might suggest that the warrant for abortion lies not in a situation of mortal danger but in the the inferior legal status of the fetus. If that view is adopted, it is possible to imagine circumstances other than threat to maternal life where abortion might be permitted.

An example of "other" circumstances is provided by R. Yosef Trani (Maharit; d. 1639), whose responsum is the earliest *halakhic* discussion of a case of elective abortion.[22] The questioner asks whether a Jew, presumably a physician or midwife, may abort the fetus of a Gentile woman. Is such a thing prohibited as murder or homicide (*ibud nefashot*)? Trani permits the abortion, for a Jewish woman no less than for a Gentile. This is not, he stresses, a case of homicide, since the fetus is not a *nefesh*. He cites among other proofs[23] the *mishnah* in *Arakhin* 7a, which declares that a pregnant woman who is condemned to death is executed immediately upon the conclusion of the legal process surrounding her trial. The court does not wait for her to give birth; her fetus is executed with her. The Talmud, notes Trani, considers this point to be obvious and wonders why it needed to be stated. After all, the fetus is "a limb of her body" (*gufah hi*). The answer is that, since Exodus 21:22 specifies that one who causes a woman to miscarry owes compensation to her husband, the *mishnah* comes to tell us that the prisoner is executed despite her husband's economic interest in the fetus. Indeed, the Talmud goes on to say that an abortion is performed upon this woman prior to her execution, on the grounds that the emergence of the fetus following her death is considered *nivul hamet*, a desecration of the corpse. If the honor shown to a dead body takes precedence over the life of a fetus, writes Trani, then surely abortion cannot be considered homicide. Rather, he concludes, the abortion is permitted for purposes of the mother's "need" (*tsorekh imo*) or "healing" (*refu'at imo*).

Important here is that Maharit frames the issue of abortion entirely within the rubric of status, as established by Rashi's comment to *Sanhedrin* 72b. The question of whether to destroy the fetus is addressed exclusively as a function of its lack of legal personhood. There is no mention of Rambam, no

suggestion that childbirth would jeopardize the mother's life. While the abortion does have to be justified - there apparently must be *some* warrant for the destruction of the fetus - Trani casts this in terms of the mother's "need" and "healing", reasons which do not necessarily involve mortal danger.

A far different approach is taken by R. Yair Bacharach (d. 1702), who considers the case of a woman who became pregnant in an adulterous relationship.[24] Having repented and returned to her husband, she seeks an abortion so as to spare her the pain of raising a child who would be a permanent reminder of her sin. Where Maharit produces a relatively simple and straightforward answer, Bacharach creates a complex structure which moves first toward a permissive answer and then, inexorably, toward a prohibitive stance. He builds his argument for leniency by rejecting a suggestion that a confessed adulteress has no business turning to a rabbi with such a request. The issue has nothing to do, he retorts, with her marital or moral situation, nor with the fact that the child would be a *mamzer*. The real question is whether there is any sin in destroying a fetus. The answer is apparently "no". Relying on many of the sources cited by Trani, he notes that the fetus is not a *nefesh* until it emerges from the womb. On this ground - and *not*, he says explicitly, because it is considered a *rodef* - it is sacrificed on the mother's behalf. "If so, it would seem that the law answers your question with an unqualified `yes' (*heter gamur*)." At this point, however, Bacharach's argument turns sharply. He notes that there is a widespread custom among both Jews and Gentiles to abstain from performing abortions, as a preventive measure against licentious behavior. Moreover, he continues, Jewish law itself suggests that Gentiles ("the children of Noah") are forbidden to destroy the fetus; therefore, since Jews are not permitted anything that is prohibited to Gentiles, that prohibition must apply to us as well.[25] He then offers other arguments against abortion and proceeds to refute the permissive proofs he had raised before. In the case of *Sanhedrin* 72b, he suggests that Maimonides is right. The apparent meaning of the Talmudic *sugya*, that the fetus is not judged a *rodef*, is now reversed. It is precisely because the fetus endangers the mother's life that the prohibition against feticide is lifted in this case. The fetus ceases to be considered a pursuer only upon emergence from the womb, for

such "is the way of nature." Moreover, Bacharach writes, Rashi accepts this reasoning: although the fetus is not a legal person, it is only because of the threat to the mother's life that the abortion is permitted.[26] Thus, in the case before him, Bacharach cannot agree to the woman's request.

Trani and Bacharach, in other words, differ on more than merely the answer to the question: when is abortion permitted? They differ fundamentally over the identification of precedents: precisely *which* sources are to be consulted in the consideration of the issue? Trani does not take the *rodef* analogy into account, and the warrant for abortion accordingly extends to instances other than mortal danger. Bacharach, while recognizing that the Talmud does not call the fetus a *rodef* in a situation of difficult childbirth, sees Maimonides' ruling as important enough to resolve it (*leyashvo*) with the Talmudic passage (*Sanhedrin* 72b) that evidently contradicts it. The upshot is that the Talmudic text is reinterpreted; in Bacharach's rendition, it permits abortion only in cases where the fetus, prior to its emergence from the womb, endangers the mother's life.

This analysis suggests the fluidity of the Jewish legal discussion on abortion, at least in its early stages. In the seventeenth century, it was not at all obvious that the fetus could be aborted *only* when it threatened the mother's life. It was not at all obvious that Rambam's interpretation of the Talmudic materials was correct. Nor, as Trani's responsum shows, did it seem obligatory to take his position into account in reaching an *halakhic* conclusion. Jewish law was hardly univocal on the subject of the warrant for abortion.

How did univocality come to take the place of fluidity? How did Rambam's restrictive stance become the *halakhic* consensus? The answer, I believe, lies in *halakhic* method, the techniques of legal reasoning which recent authorities have employed in order to determine the "correct" legal conclusion from among the possible alternatives. These techniques, as I have indicated, are excessively formal and do not reflect legal discussion at its best. But, as the following three examples of *halakhic* "method" demonstrate, the

passion for the "correct" answer has worked a powerful effect upon the state of contemporary *halakhic* thought.

1. R. HAIM HALEVY SOLOVEITCHIK: THE PATH OF ANALYSIS

By the time of his death in 1918, R. Haim Halevy Soloveitchik had become the acknowledged giant of the Lithuanian "analytical" method of Talmud study that arose during the nineteenth century and continues to dominate the curriculum of many *yeshivot*.[27] Lithuanian analysis is characterized by a relatively high degree of conceptual abstraction. Problems in *halakhah* are studied not so much in terms of their real-world settings and circumstances as by means of the basic concepts said to underlie them. Drawing fine logical distinctions between aspects of a basic concept, the analyst seeks to dispose of a problem which had occupied the minds of Talmudists for generations. Put differently, he does not "solve" that problem; he makes it disappear of its own accord.[28] Particularly noteworthy in the case of Soloveitchik is his use of the technique *"shnei dinim"*, which explains an *halakhic* concept or principle as consisting of two basic components. A dispute over a legal issue can be resolved by showing that the view of each disputant is informed by one of the two aspects of the same principle. And since these two aspects constitute one legal principle, by definition there ultimately can be no real contradiction between the two authors or sources. What appears to be a disagreement among authorities is reduced to a difference of emphasis.[29]

Soloveitchik applies this method to our issue in his novellae to Maimonides' *Mishneh Torah*.[30] He notes that Rambam permits abortion of the fetus *in utero* on the grounds of "pursuit," and he recalls that many have raised difficulties against this ruling. Does not the Talmud itself, as interpreted by Rashi and others, reject the designation of the fetus as a *rodef*? Is not the abortion justified on the grounds that the fetus is not yet a *nefesh* and thus may be sacrificed to save the mother? He begins by positing that the law of the *rodef* is composed of two rules. The first rule, which pertains to the pursuer's intended victim, imposes a duty to save that person's life. It is essentially a

subset of the general requirements to preserve life (*pikuah nefesh*[31]) and to save lives that are in danger (*hatalah*[32]). The second rule, derived from a separate text, allows us to stop the *rodef* even at the cost of his life.[33] This second rule is necessary, argues R. Haim, since our duty to protect the victim does not in itself warrant the killing of the pursuer. Both lives are precious in God's sight; after all, whose blood is "redder" than whose?[34] Thus, even though a *rodef* threatens another's life, it is only because of a special Toraitically-imposed liability (*hiyuv*) that we may kill him, if need be, to save his intended victim.

In this way, Soloveitchik explains Rambam's designation of the fetus as a pursuer. Although the Talmudic *sugya* seems explicitly to reject this label, saying that the mother "is being pursued from Heaven," the fetus indeed qualifies as a *rodef* under the first of the two rules which govern that concept: it endangers the mother, whose life deserves protection. The phrase "she is being pursued from Heaven" comes simply to remove from the fetus the *hiyuv*, the second aspect of the law of the pursuer which permits us to sacrifice the *rodef* to save the victim. Thus, the fetus is a *rodef* in only one of the two senses of that concept. If so, why are we entitled, according to *M. Ohalot* 7:6, to destroy it while it is yet *in utero* in order to save its mother? The answer flows from a similar "*shnei dinim*" analysis of the concept of *pikuah nefesh*. The duty to preserve life also consists of two rules: the equal status of all persons, so that "one life does not override another", and the permission to set aside virtually all the commandments of the Torah in order to save human life. There is much debate in the *halakhic* literature over the status of the fetus as a *nefesh* with respect to this second rule: is the fetus enough of a *nefesh*, for example, to require that we violate the prohibitions against labor on Shabbat in order to save it?[35] But by ruling that the fetus "is like a pursuer," Rambam declares it is indeed a *nefesh* under the first rule and enjoys a claim to equal protection. Its life may not be set aside on behalf of another except in a case of dangerous childbirth, when it can be considered a *rodef*. It is the fetus, and not the mother, who is the aggressor in this case because she, a "full legal person" (*nefesh gamur*) to whom *pikuah nefesh* pertains in both its aspects, takes precedence over the incomplete *nefesh* of the fetus. Upon emergence,

however, this distinction disappears, and we apply the *Mishnah's* rule that "the *nefesh* of one person does not override the *nefesh* of another."

There is, of course, nothing unusual in the fact that R. Haim Soloveitchik seeks to resolve an apparent contradiction between Rambam's ruling and its Talmudic source. The resolution of difficulties (*yishuv kushyot*) has been a staple of rabbinic intellectual activity since the days of the Talmud and the *midrash*. Indeed, the *Mishneh Torah*, a fascinating blend of linguistic simplicity and legal complexity, has attracted more than its share of commentators, critics and defenders alike.[36] Still, R. Haim differs significantly from the rest, and we can glimpse that difference by comparing his approach to that of R. Yair Bacharach, who as we have seen also resolved the law in favor of Maimonides. Bacharach never strays from a plain reading of the text. When he claims that Rashi's interpretation of the Talmud concords with Rambam's, he does so on the basis of what Rashi actually says: the fetus "is not a *nefesh* and it is permitted to kill it to save its mother." Reading this statement literally, Bacharach opines that in Rashi's view it is *only* in order to save the mother that the fetus may be aborted. This is a plausible reading of Rashi's words, but an arguable one, for Rashi here is explaining the case under discussion, the dangerous childbirth of *M. Ohalot* 7:6. In *this* case the fetus is aborted clearly because the mother's life is in jeopardy. He says nothing about other cases, and it is possible that he holds that under different circumstances the fetus, as a "non-person," may also be sacrificed on the mother's behalf.[37] Soloveitchik's approach is both more powerful and more problematic. It is more powerful in that it removes any ambiguity in Rashi's position. When Rashi explains that the abortion is warranted because the fetus "is not a *nefesh*," this may now be read according to R. Haim's two-part definition of personhood: the fetus, while outranked by the mother (a *nefesh gamur*), is yet enough of a "person" to claim an equal right to life. If so, then Rashi *must* agree that the fetus, like other persons, forfeits this right only by virtue of a crime or transgression such as "pursuit." Under this construction, more lenient understandings of the *halakhah* such as that offered by Maharit become impossible to maintain. It is at the same time more problematic in that, in a real sense, it ignores the Talmudic text. Soloveitchik's *shnei dinim* method

draws conceptual distinctions which, if intellectually stimulating, have the most tenuous roots in legal reality. In our case, for example, he quite literally invents two *halakhic* institutions: the "semi-*rodef*" and the "semi-*nefesh*." These are unprecedented concepts of Jewish law, for while the Talmud and the *posqim* speak at length of the "pursuer" and the "person," never before has it been suggested that one can be "a pursuer who is not a full pursuer" or "a person who is not a full person." Soloveitchik's *hiddush* may resolve this particular ruling of Rambam, but it is patently artificial, forcing the Talmudic texts into interpretations that do not correspond to their plain or obvious meaning. It is a weak reed upon which to support an *halakhic* decision of the gravest import.

Nonetheless, R. Haim's analysis figures significantly in the argumentation of those restrictive rulings which form the present *halakhic* consensus on abortion.[38] This may be the case because, while there are less-fanciful ways to explain Rambam's difficult ruling,[39] this one best supports the conclusion that abortion is permissible only in order to save the life of the mother. To follow this explanation is to refute the very possibility of *halakhic* alternatives, the idea that abortion might be warranted even when the mother's life is not at stake. It may be artificial, in other words, but it works; it creates *halakhic* certainty out of what is otherwise a plurality of plausible approaches. R. Haim's analysis is, at bottom, a most powerful means of deriving the one, "correct" answer to this legal question.

2. R. MOSHE FEINSTEIN: VICTORY BY DEFAULT

Prior to his death in 1986, R. Moshe Feinstein, head of Yeshivath Tifereth Jerusalem in New York, was universally acclaimed as the preeminent Orthodox *halakhic* authority in North America. Since so many observant Jews regard his pronouncements as "the" *halakhah* on a given issue, his severely restrictive responsum on abortion[40] is an important element in the creation of the *halakhic* consensus. And an examination of that decision reveals some interesting details.

Feinstein writes, as does Bacharach, that abortion is prohibited to Jews because it is also prohibited to Gentiles. Moreover, the *Tosafot* defines feticide as a category of murder. This statement is somewhat problematic, since *Tosafot Nidah* 44a, *s.v. ihu*, suggests that it might be permitted to destroy a fetus (*mutar lehorgo*). But Feinstein tells us that the latter passage is clearly a scribal error and should be disregarded.[41] Feinstein also relies heavily upon the ruling of Rambam. He dismisses as "worthless" the suggestion that Rambam could possibly be wrong in his explanation of the warrant for abortion. Maimonides, after all, was a great scholar, and to claim that he was imprecise in his interpretation of *Sanhedrin* 72b is to show "contempt for all the rulings of Rambam throughout his Code." To support Rambam's reading of the *sugya*, Feinstein proffers a formal rule of decision-making: we are not entitled to reject the rulings of the Rambam merely because we find them difficult. Who among us, after all, is worthy to disagree with him? His great contemporaries, men such as R. Avraham b. David of Posquierres who *are* worthy to express disagreement, do not object to this ruling. And if some of the very latest authorities (*aharonei ha'aharonim*) do object,[42] we have but to remember that R. Haim Soloveitchik, the greatest of all recent sages (*maran dedorot ha'aharonim shelifaneinu*), has sufficiently explained Rambam's position.[43] He then turns to the responsum of Maharit, which as we have seen takes a relatively permissive position on abortion. He raises two problems against this responsum. It is, first of all, apparently contradicted by another of Trani's rulings which takes a more stringent stance on the subject;[44] secondly, "how could he not mention the Rambam, who permits abortion only because it is a *rodef*, and the *Tosafot*, who forbid abortion on the grounds that it is prohibited to Gentiles?" We cannot rely upon Trani's permissive responsum, which is clearly a forgery (*teshuvah mezuyefet*) written and attributed to him by some "misguided student."

Feinstein begins his final paragraph with the following:

> "I write this in light of the outbreak of licentious behavior (*hapritsah hagedolah*) in many countries, including the state of Israel, which have permitted the killing of untold numbers

> of unborn children. The times demand a "fence around the Torah," let alone that we refrain from relaxing the prohibition against murder.

This leads him to critique the ruling of R. Eliezer Yehudah Waldenberg (whom he does not mention by name), which permits abortion in cases where amniocentesis reveals that the fetus has contracted Tay-Sachs disease.[45] Tay-Sachs, while always fatal to the child within a few years of its birth, poses no threat to the mother's life; Waldenberg allows the abortion in order to spare her emotional trauma. There is certainly no question of danger to the mother's life here, and Feinstein criticizes Waldenberg for ignoring most of the *halakhic* sources which would forbid abortion in non-mortal circumstances. "We should not make the mistake of relying upon the ruling of this rabbi; may God forgive his error."

This outline of Feinstein's opinion, if sketchy, will nonetheless suffice to highlight the means by which he solves the problem of *halakhic* plurality. Confronting a mass of texts and precedents which argue on either side of the abortion question, he adopts two decision-making mechanisms which allow him to identify the correct answer. First, he enacts a formal rule of *halakhic* decision, according to which we may not dissent from the rulings of Maimonides, even when they seem poorly supported by the Talmudic sources, unless that dissent is already registered by early commentators "worthy" enough to disagree with him. Feinstein, to be sure, is not the first to resort to such a rule. Jewish legal history knows of numerous cases in which scholars or communities pledge to follow unstintingly the rulings of a particular sage or group of sages. The method enunciated by R. Yosef Caro, to fix the law in accordance with the majority opinion the three "pillars of *halakhic* authority" - Alfasi, Rambam, and R. Asher b. Yehiel - is perhaps the most familiar example of this process.[46] Nonetheless, though amply precedented, Feinstein's rule is problematic in two major respects. First, however acceptable it may be in theory, the rule does not correspond to *halakhic* fact: it does not describe the actual debate over abortion in Jewish law. As Waldenberg notes in his response to Feinstein, rabbinic scholars (including some "early" ones) have

long disputed Rambam over the issue.[47] Indeed, leading *poskim* of our own generation are prepared to rule against Maimonides if the bulk of the Talmudic evidence seems to refute him.[48] Second, the rule may *not* be acceptable in theory. Many *halakhists* prefer an alternative principle of decision-making, which holds that the contemporary *poseq* is entitled to rule as he sees fit on a legal question, to follow his own understanding of the Talmudic sources even if the giants of the past disagree with him. That right, supported by many leading sages including Rambam himself, is based upon the recognition that ultimate legal authority lies in the Talmud rather than in the decisions of post-Talmudic sages and is regarded by some as the *sine qua non* of the *halakhic* process.[49] It is this independence, and not adherence to the views of one particular authority, that has characterized the abortion debate in the *halakhic* literature. This is not to say that Feinstein is "wrong" when he declares that *halakhists* ought to accept the opinion of Rambam - more properly, the most stringent possible interpretation of that opinion[50] - regardless of the persuasiveness of other options. But given that *posqim* past and present do not accept his assertion as a binding rule of *halakhic* decision, it is also difficult to establish that his approach is the better means of arriving at the proper *halakhic* ruling.

Feinstein's second mechanism is his dismissal of two *halakhic* sources - a passage of *Tosafot* and a responsum of Maharit - as scribal error or forgery. Waldenberg sharply rebukes Feinstein for this tactic, in language rarely heard in *halakhic* argument:

> With all respect...no, sir. This is not the way. We live by the words of the great sages of the generations, each of whom has toiled by his own lights to resolve the words of *Tosafot Nidah*. And not one of them ever thought to take the easy way out (*haderekh hapeshutah beyoter*) and say there is a scribal error in the *Tosafot*, that in place of *mutar* (permitted) it must read *asur* (forbidden).

> I cry: amazement! amazement![51] How can one excise a whole responsum of Maharit on the strength of such a fanciful supposition? This would be so even were there no evidence to counter his assertion; yet that evidence exists.[52]

Legal interpretation, Waldenberg would say, is not like the critical academic study of ancient literature. We are not permitted to emend troublesome texts, particularly when these have entered the canon and have for centuries been cited as evidence by scholars in their argumentation. If an authority seems to contradict himself between one text and another, the proper procedure is to accept that he wrote both and to utilize legal logic to resolve them.[53] We take the evidence as we find it; we do not take the "easy way out" and excise difficult texts from the law books.

Both of Feinstein's mechanisms are examples of what I have termed "*halakhic* method", the use of formal devices to derive the one "correct" answer to an *halakhic* question. Feinstein's method greatly simplifies the Jewish legal debate over abortion which is, to put it mildly, a complex one. As we have seen, there is much evidence in the texts and sources to support both the lenient approach which allows abortion in non-mortal cases as well as the more restrictive one which has become the *halakhic* consensus. This legal plurality is disturbing to Feinstein, who wants to show that the restrictive view is *the* correct interpretation of the law. His method, therefore, is designed to disqualify evidence which would support the opposing side. Declaring Rambam's *halakhic* supremacy by fiat, he invalidates all opinions which differ from the latter's stringent ruling; claiming "error" and "forgery", he removes from scholarly consideration two important texts upon which the lenient position is based. These moves, it must be emphasized, are external to the legal sources; they are not demanded by the texts themselves or by agreed-upon rules of *halakhic* procedure. In both cases, Feinstein invokes a *deus ex machina*, a factor from outside the texts which forces the *halakhic* discussion to a conclusion which it otherwise would not reach and which other competent authorities in fact do not reach. The result is an *halakhic* victory by default,

the arbitrary nullification of legitimate alternatives to Feinstein's own view. Therein lies the particular power of *halakhic* method: the elimination of plurality, the identification of *the* "correct" answer to the *halakhic* question of abortion.

3. R. RASSON ARUSI: THE WAY OF CLASSIFICATION

If Soloveitchik and Feinstein seek formal mechanisms with which to identify the "correct" interpretation of the *halakhah*, R. Rasson Arusi lifts that search to a new level of sophistication.[54] His method is to construct a system which classifies rabbinic texts in order of their *halakhic* importance. The goal is to distinguish texts which authoritatively determine the *halakhah* from those which are merely advisory in nature. Using these rules of classification, the *poseq* can separate the wheat from the chaff, basing his decision upon sources that truly apply to the issue at hand rather than those irrelevant to it, thus insuring that he will arrive at the correct answer to a controversial question of Jewish law.

In one sense, Arusi's system is nothing new. Jewish legal authorities have long differentiated between *halakhic* sources and *non-halakhic* (agadic) ones, ascribing authoritative force to the former and not to the latter.[55] Within the realm of the purely *halakhic* sources, too, the Talmud and the *geonim* introduce numerous rules of decision-making that identify the "winner" in the event of a legal dispute.[56] Here, however, in his rules to distinguish between conflicting *halakhic* sources, Arusi exceeds all earlier efforts, and the abortion issue affords him a test case for his method. He charges that some *posqim* (he cites Waldenberg and Rabbi Yehiel Ya`akov Weinberg by name) rely improperly upon "secondary" sources to permit abortion for reasons other than danger to the mother's life, when better, "primary" sources would demand the opposite, more stringent conclusion.[57] The "primary" sources may be identified as follows:

1. Sources which speak directly to the issue at hand. In our case, the only Talmudic text which deals directly with abortion is *M. Ohalot* 7:6, which

concerns a case of mortal danger. By contrast, *Arakhin* 7a, which some read as permiting abortion for other reasons, is "indirect" because its main concern is penal law, not abortion. This rule, says Arusi, is especially helpful as a buffer against the ill-conceived use of analogies as a basis for drawing legal conclusions, especially permissive ones.[58] Penal law in particular is a unique rubric of the *halakhah* from which no valid analogies may be drawn to other issues.

2. A ruling of an *halakhic* decisor (*poseq*) such as Rambam is to be preferred over a conclusion derived from the words of a Talmudic commentator, whose explanations may not be intended as *halakhically* binding. Since the stringent position on abortion is usually based on Rambam and the lenient one on Rashi, the former must prevail.

3. A ruling in an *halakhic* compendium, such as the *Mishneh Torah*, is more authoritative than a decision rendered in a responsum, since the former declares a general legal rule while the latter is often limited to a specific set of circumstances or even poorly reasoned. Since the strict position on abortion is declared in the "codes" while the lenient rulings are found primarily in the responsa literature, the stringent side wins again.

The stringent position is the correct *halakhah* on abortion, therefore, because it accords with Arusi's formal rules of decision-making. Arusi contends that these rules can function as a universal key to *halakhic* correctness, identifying the "right" answer to every controversial question by distinguishing the proper sources for decision. The problem, however, is that there is little evidence that *halakhic* authorities other than Arusi himself would accept this system as an objective standard of *halakhic* truth. Indeed, each of Arusi's "rules" is vulnerable to critique.

1. The distinction between "direct" and "indirect" sources requires a criterion of classification that is foreign to and imposed upon the texts themselves. "Penal law" is just such a criterion. While Arusi simply declares that *Arakhin* 7a is "about" the law of execution and not "about" abortion, the

text itself neither says this nor demands such an interpretation. The text refers both to a condemned female prisoner *and* to her fetus; it is not "about" capital punishment more than it is "about" abortion unless and until the interpreter says so. True, penal law may seem a plausible classification for this text. But plausibility is not to be confused with fact, and it is a fact that leading *posqim* have understood *Arakhin* 7a to refer to the status of the fetus relative to the needs of its mother. Thus, to use this source to learn about the law of abortion is not necessarily an improper, "apples-to-oranges" analogy. Moreover, though Arusi is certainly justified in warning against the reliance upon poor or forced analogies as the bases for legal judgment, it is also a fact that *halakhists* have for centuries arrived at their rulings through the use of the inductive method.[59] And it is impossible to say in advance just how a text should be read, just which analogies are good ones and which are forced. Such determinations are made by the interpreter during the act of interpretation, and they are seldom made in accordance with a formal system of classificatory rules such as Arusi's.

2. To rank a *poseq* over a commentator is to forget that the *poseq* is perforce also a commentator.[60] All *halakhic* decision draws its validity from the text of the Talmud, the authoritative source of the law. Every ruling therefore assumes an interpretation of that text. In our case, the dispute between Rambam and Rashi is not so much a dispute between a *poseq* and a commentator so much as a disagreement between two commentators over the interpretation of *M. Ohalot* 7:6 and *Sanhedrin* 72b. If Rambam's ruling is "correct", it is not because he is a *posek* but because his understanding of the texts is more correct than Rashi's. Conversely, those *posqim* who reject his view do not rank him below Rashi; rather, they find Rashi's interpretation of the texts in this case a better one. The standard of judgment is not the relative prestige of the two authorities but the extent to which one offers a more persuasive understanding of the Talmud itself.[61] It is according to *this* criterion, the standard of persuasiveness, that the *poseq* no less than the commentator must be measured.

3. Many *halakhists* hold, contrary to Arusi, that a ruling found in a responsum is to be preferred over one contained in a "code". As R. Naftali Zvi Yehudah Berlin puts it: "when one rules in a concrete case (*halakhah lema`aseh*), he comes to a deeper understanding of the law than does the one who reaches the same decision by way of theoretical learning."[62]

Halakhic authorities, in other words, can and do dispute Arusi's iron rules of classification, and they do not feel obliged to decide the law in accordance with them. Thus has it always been. For every R. Yosef Caro, who posits a set of rules for decision-making, there is a R. Moshe Isserles who offers a different set of rules,[63] and there is a R. Shelomo Luria who rejects them both.[64] Arusi's system is therefore a failure. For any system of decisory rules to "work", to yield the indisputably correct legal solution, the rules themselves must be above controversy. They must be accepted as "the rules of the game" by the preponderance of those who play it. They cannot function merely as suggestions; as authoritative indices of correctness, they must be perceived as valid *a priori* constraints upon the freedom of the interpreter. Yet no such perception is current among the rabbis.[65] Indeed, Arusi is forced to spend a great deal of time critiquing all those eminent *posqim* - Trani, Bacharach, Waldenberg, R. Benzion Ouziel, R. Yehiel Ya`akov Weinberg, R. Shaul Yisraeli - who do not analyze the abortion question according to the rules he finds obvious.[66] Arusi may assert normative validity for his system; perhaps this is the way the Jewish legal process *ought* to work. But as a matter of description it is in error: the *halakhah*, as it exists and has been decided by *posqim* for centuries, simply does not work this way. Arusi "finds" that the lenient *posqim* are objectively wrong, but in fact they are wrong only because he says so, because they fail to conform to his own version of proper legal procedure. He therefore cannot argue that he has identified the objective standard of *halakhic* correctness.

To design a system of rules suggests a purpose, a goal which the system seeks to achieve. Consider Arusi's words:[67]

> Let us remember: there is no aspect of *halakhah* today that is not subject to dispute. *Everyone can find authorities who support a particular position* [emphasis added]...We must study the Talmudic sources in all seriousness, and after considering the commentators and codifiers, we must consider whether (a *poseq*) has sufficiently proven his conclusion.

Put differently, the specter of *halakhic* pluralism is haunting the rabbinic world. The texts and sources which are the building blocks of *halakhic* reasoning are malleable: legal scholars can combine them in a variety of ways so as to construct arguments in favor of more than one proposed answer to a legal question. These answers differ from and often openly contradict each other. And this is the phenomenon which is so troubling. How can the *halakhah* appear simultaneously to affirm both "X" *and* "not-X" as answers to the same question? In theory, *halakhah* might affirm a plurality of answers; both sides of a controversy may be "the words of the living God." Still, even in the argument of the schools of Hillel and Shammai the authoritative practice had to be decided one way or the other.[68] Whether as a matter of theology, logic, or common sense, many Jews believe that only one answer - "X" *or* "not-X" - can be correct. The Torah ought to speak with one voice, not 613.[69] Particularly on a question as fateful as abortion, there must be such a thing as a unified *halakhic* truth, one right answer. And though our powers of textual reasoning are fallible and the source material is recalcitrant, a scientific method of *halakhah*, a structure of formal decision-making rules may yet lead us to salvation. This is what Arusi attempts to give us. His method, like those of Soloveitchik and Feinstein, is formal, artificial, and controversial. It is a conceptual straightjacket, a constraint imposed upon the process of *halakhic* thought from outside the context of that thought, an intellectual fence to prevent the *posek* from wandering into error, however "error" is defined. And it is quite likely indispensable if the goal is to determine the one right answer out of the cacophony of interpretations, rulings, discussion and debate that is the *halakhic* literature.

II. *LEGAL FORMALISM AND INDETERMINACY.*

The foregoing is reminiscent of a complex debate among contemporary jurists, who like *halakhists* argue over whether and how a "right" answer can be derived from legal sources which bear more than one plausible interpretation. A brief summary of that argument may prove helpful in understanding the struggle over abortion in Jewish law.

One side of the debate in secular jurisprudence is denoted by the term "legal formalism" or some equivalent thereof. Formalism conveys a theory of judicial decision-making according to rule, the use of deductive reasoning to yield correct answers to even the most difficult questions of law. A purely formalistic approach would deny to a judge the element of choice in reaching a decision. There is no need for judicial "discretion," no need to appeal outside the law itself for materials to help decide the case. The legal system is "gapless": it contains antecedently existing right answers for every conceivable legal question, answers discovered through the rational development of its fundamental rules and principles.[70] The classic expression of legal formalism is associated with the Englishmen Edward Coke and William Blackstone and the American Christopher Columbus Langdell, the father of Harvard's "Socratic method" of legal instruction. These jurists tended to see law as a complete and consistent body of dogmatic rules, objective in nature, and autonomous from such non-legal concerns as politics and economics. In this conception the judge *discovers* the law through the application of right legal reason; he does not *create* it by means of judicial legislation. "The authority and weight of judicial opinions is the authority of an expert reporting his or her findings, not the final or formal authority of an official whose saying makes it so."[71]

This doctrine came under serious attack in the nineteenth century from such scholars as Jeremy Bentham and John Austin and their twentieth-century disciple H.L.A. Hart. These spokesmen of the doctrine of "legal positivism" argued that law is not the perfection of reason but rather a matter of social fact. Law is law because it is posited by some act of law-making; if a legal

question has no obviously correct answer, it therefore has no answer at all until one is enacted.[72] A judge who rules on a disputed question must create a new rule of law. As an act of creation rather than one of interpretation, that ruling is not determined by the pre-existing legal materials. Like an act of the legislature it is a choice, guided by considerations of a political and social nature rather than dictated by the immanent logic of the law. This point was pressed in America by Oliver Wendell Holmes, Jr., who wrote in a famous passage:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[73]

The insight that law owes much more to history, to economic and social forces than it does to formal logic was the guiding principle of the "American legal realists" who flourished in the law schools of the 1920's and 1930's. Realists largely discounted the belief in legal determinacy. Rules do not determine the law; they are but one factor among many which influence the actions of legal officials. The behavior of those officials *is* the law; its prediction, through the use of social science as a means of establishing patterns of regularity, is a more fruitful subject of study than are the supposed legal rules.[74] Those rules are but *ex post facto* justifications for actions taken for reasons of policy. Talk of rules is a myth, a smokescreen covering the very wide discretion that judges enjoy in the creation of the law.[75]

The arguments of the realists or "rule-skeptics"[76] were disturbing to those jurists committed to the proposition that determinacy of answers is a

central requirement for law. Without such determinate answers, the ruling laid down in a disputed case would be an act of judicial discretion, a choice based not upon accepted principles of law but upon controversial political values. Such a conception runs counter to commonly-held notions of justice, of rights inherent in the law rather than created by legislation, of the very "Rule of Law" which aspires to a "government of laws and not of men." Yet the logical structures of Blackstone and Langdell had long since collapsed. The intellectual proclivities of a scientific age had put an end to extreme formalism. The terms "mechanical jurisprudence"[77] and "oracular judging"[78] - two ways of expressing the conceit that legal doctrine determines the answer to every legal question - had become labels of opprobrium in the eyes of all.

Jurists therefore turned their attention to the search for remedies, theories by which to limit the scope of judicial discretion and thereby preserve to the greatest extent possible that which is truly "legal" in the law. Positivists, notably H.L.A. Hart, argued that discretion exists only at the boundaries of the law. Like language itself, legal rules possess both a core of settled meaning and an "open texture" at their edges, a range of uncertainty as to how the rule should be applied in the concrete case. Judges legislate in cases which fall on these edges; on matters touching the "core", the correct law is a matter of plain fact.[79] Many cases are, in fact, "easy cases" which admit of one obviously right answer; this implies that the legal system is plagued by at most a moderate amount of indeterminacy, an amount which does not challenge the system's legitimacy.[80] Others suggested that, though judges legislate, their special training, the sanctified principles and conventions that shape their role, and the traditions of legal reasoning which lie at the heart of the judicial process all work to constrain judicial choice.[81] Some demanded that judges be held to the standard of "neutral principles," justifications for discretionary decision which they could maintain in all areas of the law.[82] Others claimed that the judge's choice of analogies or decision whether to read legal principles narrowly or expansively is determined by moral norms and policies accepted in society.[83] The most ambitious effort to limit judicial discretion was undertaken by Ronald Dworkin, who argued that no such discretion in fact exists. Judges resolve legal ambiguity in "hard cases" by applying principles inherent to the

law instead of making extra-legal policy choices. Every legal question, says Dworkin, has a "right" answer, which the judge derives by fashioning a theory of political morality with which to explain the rules and precedents of the legal system. The emphasis is upon the coherence of legal materials, upon "law as integrity": the judge seeks an answer which concords with the fundamental legal principles that explain the rules and precedents of the settled law. Dworkin's judge derives this picture of the law through a process akin to that of artistic interpretation. Like the literary or aesthetic critic, who seeks to make the best possible sense out of the work of art, so the judge interprets the data of the legal system so as to understand it in its best possible light. While judges, like critics, exercise different canons of interpretation, the activity of interpretation is defined by the immanent standards of the artistic practice. Hence, differences in legal conclusions are differences in interpretation and not conflicts in social or political outlook.[84]

None of this has really worked. The general philosophical disillusionment with reason and its power to yield certain knowledge has worked its corrosive effects upon jurisprudence.[85] The criticism of Dworkin's writings from all sides - positivists,[86] pragmatists,[87] and left-wing critical scholars[88] - testifies to the suspicion that his "principles" and "interpretive theory" are but neutral labels for what remain, at bottom, policy choices. The feeling remains strong, particularly among the pragmatists and the adherents of the Critical Legal Studies movement,[89] that indeterminacy is rife throughout the system, that legal reasoning is so flexible and legal theory is so ambiguous that the inventive judge may easily use them to justify any result he or she chooses. And though this conclusion may appear extreme, it is evidence of what is truly at stake in this debate. Is there such a thing as "law", a unique manner of discourse which possesses its own intellectual integrity and yields properly "legal" conclusions which constrain the decisor's freedom to choose a desired answer? Or is legal reasoning an elaborate device to lend the appearance of value-neutrality to what is essentially political choice, so that "there is never a `correct legal solution' that is other than the correct ethical or political solution to that legal problem"?[90]

The *halakhic* debate over abortion is shaped by similar concerns. *Halakhists* studying the question find that the texts and sources support more than one plausible answer to it. The *poseq*'s task, as traditionally conceived, is to determine which of these answers is the "correct" one, the one which best represents the attitude of Jewish law. He does this, in good Dworkinian fashion, by forging an interpretive theory which in his view makes the best sense of the Talmudic and *halakhic* "data" and thus dictates his ruling. This requires, however, that he account for those sources in the literature contrary to his theory. He may try to explain them away by arguing that, in fact, they do not speak to the issue at hand ("distinguishing the precedent").[91] Failing that, he may concede that these data indeed contradict his understanding of the *halakhah* but that, since his interpretive theory is the *best* understanding, they are mistakes, declarations of the law which, though enjoying specific authority in their time and place, need not exert "gravitational force" upon his own ruling. The problem, as Dworkin notes,[92] is that there is a limit to the amount of legal history that can be disposed of in this way. When a significant number of authorities rule the other way, the rightness of a *poseq*'s own decision is cast into serious doubt. On the abortion issue, while the stringent position has achieved the status of "consensus", the text-interpretations upon which it rests do not convince a number of leading "orthodox" *posqim*, both past and present, let alone the liberal *halakhists*. It is possible to read the same texts which buttress the stringent ruling and yet remain unpersuaded by it. Hence, Balfour Brickner can legitimately claim that the lenient view, which tends in a "pro-choice" direction,[93] is a legitimate expression of Jewish tradition.

The Jewish law of abortion is therefore indeterminate: abortion may be permissible only in cases of mortal danger, or it may be permissible under a wider range of circumstances. This indeterminacy is inevitable so long as the texts allow more than one plausible reading and so long as *halakhists* are free to draw their own conclusions from them. Legal indeterminacy, though, is profoundly disturbing to many orthodox Jews. Surely the Torah does not speak with more than one voice; surely the *halakhah* offers clear and unambiguous guidance on a moral question as important as this. The faith in the existence of "one right answer" means that the very possibility of

alternative *halakhic* positions must be forestalled. One way to do this is to rely upon the fact of an *halakhic* consensus, to turn the descriptive fact of widespread agreement into a normative standard of correctness. Many orthodox Jews make this claim for the *halakhic* consensus; the law is what the majority of *posqim* say it is. When the legal sources are ambiguous, it is the province of the *gedolei hador*, the great authorities of this generation, to choose the "correct" interpretation.[94] Indeed, since the *gedolim* are recognized by all within the orthodox community as men of uncommon spiritual insight and religious probity, they are uniquely qualified to make this choice.[95] It is important to note, however, that while an *halakhic* consensus may determine in practice the law as it is followed by most orthodox Jews - when in doubt, it is always safer to follow the majority - the *gedolim* themselves do not practice in this way. They do not reach their conclusions through a process of legislation, declaring their opinions correct on the grounds that "I say so" or "I and a preponderance of my spiritually-gifted colleagues say so."[96] They assume, rather, a "judicial" approach: they "say so" precisely because the decision is the correct one, that reading of the law best supported by the texts and sources. Within the halakhically-literate community, a decision's correctness is established not primarily by the exalted stature of its author but by the persuasiveness of the textual evidence which backs it. Were this not so, *halakhists* could never critically examine each other's work or offer counter-arguments to it. Yet rabbinic responsa and *halakhic* journals are replete with such criticism. The language of *halakhah* is a language of argument rather than that of legislative pronouncement. When a *poseq* wants to issue a ruling of law, he must justify it according to techniques which other halakhists accept as legitimate and can use, if need be, to critique his conclusion.

Such, however, is not the way to reach the "one right answer." *Halakhic* argumentation is an arena of debate, of *shakla vetarya*, the give-and-take familiar to all students of Talmudic literature. It does not always produce an answer which all in the community accept as the single correct statement of the law. If *halakhists* want to produce such a statement, they may have to resort to extraordinary means to impose unity upon plurality. As we have seen, some scholars will go to great lengths to "find" the right answer to

the abortion question in the *halakhic* texts. Yet despite their efforts the goal of "correctness" eludes them. They have not uncovered the indisputably right answer through interpretation of the sources. On the contrary: they have *created* it. Through the invention of new *halakhic* concepts, the arbitrary elimination of inconvenient evidence, or the institution of a contestable system of decision-making rules, they force their version of the right answer upon sources which otherwise support more than one conclusion. Each of them thus circumvents the indeterminacy of the *halakhah* by an act of legislation masking as interpretation. They make the correct *halakhic* practice appear to be a plain fact when, in *point* of fact, it is highly controversial. And this, ultimately, is the chief sin of formalism: the use of artificial technique, a procedural or logical device which, appearing to dictate the exclusively correct conclusion, disguises the reality that the "right" answer is the product of a rabbinic choice among available alternatives.

III. *THE MODEL OF CONVERSATION*

This situation arises, I believe, out of a rigid misconception of the nature of legal reasoning. In the thinking of many orthodox *halakhists* there can be but two alternatives: either there is a single, correct solution to every legal problem, or there is no correct solution at all. Either the sources dictate a right answer to an *halakhic* question, or that answer is not to be found in the texts and must be imposed from without. The latter alternative is unpalatable, because it implies that in hard, contestable questions, *halakhic* truth does not lie within the Torah of Moses but is rather legislated by an act of rabbinic discretion, a choice determined largely by the debatable religious, cultural, or ideological tendencies of the rabbi or rabbis who make it. To concede this point, argued by many academic scholars of Jewish law,[97] is to concede that *halakhic* truth is developmental and historically conditioned rather than fixed, eternal, and immutable. But to affirm the existence of a single correct answer derivable from the sources raises the difficulty that on many issues these sources will inevitably support more than one plausible interpretation. The result is *mahloqet*, the stubborn legal dispute. In theory, orthodoxy can tolerate differences of opinion as the necessary price of the *halakhist's*

intellectual independence. In practice, however, especially when the question at hand is one of vital religious or ethical concern, it "knows only too well that some conclusions are ruled out from the beginning even if these appear convincing from the point of view of abstract logic and pure legal theory."[98] And when the question is abortion, some *halakhists* are prepared to rule out the "wrong" conclusions in the most arbitrary manner. By resorting to such egregious formalistic devices, they unwittingly lend support to the contention of the Critical Legal Studies movement that legal reasoning places no objective constraint upon judicial discretion, that a decisor can manipulate the texts so as to arrive at whatever answer is dictated by his or her value-preferences, that "law" (read: *halakhah*) is but "politics" (or theology, ideology, and so forth) by another name.

Liberals need not accept these two stark alternatives. Nor, for that matter, should any honest student of the *halakhic* process. There is another conception of Jewish legal decision which does not insist upon the existence of one right answer to a question of *halakhah*. I call it "the model of conversation," and I want to sketch it here in the broadest outline.

The term "conversation" implies a discourse between two or more speakers, each of whom is open to learning from the others. A "legal conversation" is an exchange between several points of view whose legitimacy is mutually recognized by the conversants. "Legitimacy" means that each position represents an acceptable interpretation of the law, one which is justified by analysis and reasoning which that particular legal tradition (as experiences and understood by the participants) holds as adequate. Together, these alternatives chart an intellectual map whose boundaries mark the range of interpretive freedom available to the decisor.

The notion of a legal conversation requires two theoretical commitments. The first is that there *are* legitimate interpretations of the law, from which it follows that others are illegitimate. The conversational model accepts the fact of boundaries, limits which legal reasoning exerts upon a judge's freedom of choice. True, legal "realists" and critical scholars can cite

numerous examples of legal indeterminacy, cases where the existing law did not dictate the decision, where the ruling seems clearly a choice informed by the judge's political, cultural, or social values. But others respond, correctly, that the law contains many more "easy cases," questions which seem to admit of only one right answer, instances where the language of the legal texts constrains judges to reach decisions that, left to their own devices, they would rather not reach.[99] To be sure, such a loose definition of legal determinacy while it rules out some "wrong" conclusions, does not lead inevitably to the "right" one. And this brings us to the second theoretical commitment demanded by the conversational model: the acceptance that for a potentially large number of legal issues there is a plurality of legitimate solutions.

The thesis of "more than one right answer" is associated with an approach in jurisprudence called "law as practical reason." Its proponents[100] argue that law is best understood as a species of practical reason, which has been accepted since the days of Aristotle as a valid approach to logic.[101] As opposed to formal logic, which reasons from premises to conclusions, practical reason proceeds from ends to means. Unlike mathematics or precise science, which aim at an accurate description of a conceptual or ontological reality, practical reason seeks to justify a particular plan of action based upon a normative vision of "how things ought to be." The correctness of a "practical" syllogism lies not in its deductive validity but in its reasonableness: how *satisfactorily* does it achieve the goal for which it is designed? To say, with Chaim Perelman, that "legal reasoning is an elaborated case of practical reasoning"[102] is to say, with John Dewey, that it is a logic not of formal syllogism but of discovery, a process of thinking which starts not from the premises but from a vague conception of the conclusion and which searches for principles or data that either support the conclusion or lead to intelligent choice among rival conclusions.[103] Law as practical reason therefore eschews the discovery of "one right answer" in favor of a good sense judgment that one conclusion, among all that are possible, is best suited to secure an agreed-upon goal. Judicial reasoning, like logic generally, is an ordered discourse, but instead of working deductively, from rules to conclusions, "courts are led to

accept a rule if following it will be satisfactory to the relevant goals and purposes of the legal system."[104]

How are those goals and purposes to be identified? And what constitutes an argument "satisfactory" toward their attainment? These questions point to the centrality of rhetoric in law, to its definitive role in the shaping of legal argument. By "rhetoric" I do not mean merely the eloquence or ornamental style with which a message is expressed, although such is the common sense of the term. I refer instead to the more classical understanding whereby *rhetoric* includes all the means by which a writer or speaker attempts to persuade an audience, to elicit its "adherence" to the rightness of a proposition. In this sense, rhetoric is equivalent to argumentation itself.[105] Its province encompasses every intellectual discipline whose discourse does not admit of "proof" in the mathematical or hard-scientific sense. It denotes the methods "by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation."[106] By this light, the humanities are all "rhetorical disciplines," since demonstrable validity lies beyond the reach of humanistic inquiry. More than that: the contemporary philosophical revolt against what is called "objectivism" or "foundationalism" - the positivistic outlook which holds that truth is discoverable by means of rule-bound scientific method - has produced a growing conviction that *all* inquiry is at least to some extent rhetorical. That is, what constitutes "fact" or "logic" in any discipline is socially constructed and mediated, the product of a community of researchers which in defining its manner of inquiry determines the kinds of questions asked of the material.[107] If Thomas Kuhn can argue that even the hard sciences reach their conclusions on the basis of paradigms, conceptual maps of the nature of physical reality whose transformation causes "scientific revolutions,"[108] it is no wonder that the social sciences are being stripped of their objectivist pretensions and reconfigured as disciplines resting upon procedures that are in essence interpretive, narrative, and rhetorical rather than "scientific."[109]

Legal theoreticians, too, have recently begun to consider the extent to which law ought to be regarded as a literary and interpretive activity as

opposed to a logical or social-scientific one. And if there is much controversy within the broad parameters of this "Law and Literature" movement,[110] there is a growing awareness that the legal (and especially the judicial) process is best understood as a form of "constitutive rhetoric," a discourse through which lawyers translate accepted texts into new ways of speaking about the legal world. A judge's decision is therefore a literary composition framed in light of certain rhetorical assumptions: the definition of the intended audience, the conception of the speaker's role, the notions of what kinds of arguments this particular audience will find persuasive. It is an invitation to the readers to think of the law in the same way that the writer or speaker talks about it.[111] Its logic invokes all those criteria, such as shared values, custom, consequences, and common sense, which, though invalid in syllogistic reasoning, are accepted as persuasive within a particular community of legal interpretation. It seeks meaning not so much in any objective property inherent within the texts themselves as in the shared response of the legal community which, through its reading of and reaction to the texts, determines their actual significance.[112] The goal *is* persuasion, not "proof." Indeed, the fundamental assumption of the rhetorical conception of law is precisely that legal validity cannot be objectively demonstrated. A "true" legal proposition is one which elicits the assent (adherence, to use Perelman's term) of the intended audience.

Viewed from this perspective, R. Yair Bacharach's prohibitive ruling is an instructive example of *halakhic* rhetoric, of practical reasoning employed in the service of justifying the desired conclusion. Bacharach, we will recall, begins by offering arguments which would permit an abortion for the repentant adulteress; then, after citing the "widespread custom" among Jews and Gentiles alike to prohibit abortion as a means of discouraging illicit sex, he refutes each one of these arguments, giving the law a stringent cast. His rhetorical strategy, I think, is clear: he sweeps the reader in his wake toward a lenient reading of the sources which clashes directly with the reader's moral sense, which in that day can be assumed to conform with the "widespread custom." Then, by showing how the sources can be understood so as to affirm the moral sense, he leaves the reader with the distinct impression that the prohibitive theory is the better of the two possible ways of reading the law.

Given the indeterminacy of the precedents, Bacharach determines that the law must accord with that alternative reading that lies closer to the Torah's overriding purpose, to establish justice and holiness. His answer is both textually justifiable and chosen, over the other textually justifiable possibility, on the basis of criteria that are external to the texts but no less vital to the law as we know it must be.

Feinstein and Arusi, too, seem driven by considerations that pertain to practical reasoning. Feinstein, remember, sees abortion as *hapirtzah hagedolah*, a great outbreak of licentious behavior. It is not implausible that he begins his reasoning with an almost instinctive sense that abortion is wrong, a violation of all that is good and holy. Such a sense might account for the vehemence of his legal argument, his strenuous - and artificial - attempt to prove that the *halakhic* sources support the stringent view and *only* that view. Arusi seems motivated by similar moral commitments,[113] as well as by his fear that in the absence of one objectively correct answer, the power and prestige of the *halakhah* will suffer. Neither of these motivations is inherent in the *halakhic* texts and sources on abortion, which support a lenient along with a stringent position. Thus, Arusi's "extra-legal" commitments lead him to "interpret" the law in his exceedingly formalistic manner.

When we say that the *halakhist* supports his decision by means of practical reason or rhetoric, we do not thereby imply that legal logic is worthless or false. We mean simply that these techniques are an inevitable component of *halakhic* reasoning. *Halakhah*, like law in general, is not a discipline that admits of scientific objectivity. This is hardly a revolutionary statement; no less an authority than Nahmanides openly concedes that demonstrable proof eludes the grasp of the Talmudist.[114] *Halakhah*, in its orthodox as well as in its liberal variety, becomes *halakhah* through argument, through persuasive speech aimed at eliciting the adherence of a particular legal community. To achieve persuasion, the argument must of course be textually sound, since the community's legal existence is founded upon a discourse of text. But it must be more than that. For when the texts could lead their readers toward more than one conclusion, argument of necessity becomes goal-

oriented. The purely legal reasoning is directed toward ends which, though not demanded by the texts themselves, are informed by the *poseq*'s general religious sensibilities, his deeply-held convictions as to what God and the Torah require of us. To the extent that these commitments are shared by his community, the *halakhic* reasoning which expresses them will determine its practice. True, since other answers are possible and plausible, this reasoning will never attain the status of objective truth. But the absence of objective truth does not imply that *no* answer is correct interpretation of Jewish law, that all conclusions are nothing more than the subjective preferences of rabbis dressed in legal garb. It means that we accept the fact that *halakhah* is and has always been inescapably rhetorical, the product of an ongoing argument among Jews who structure their religious reality through the medium of text. And *that* means that "correctness" is a more variegated and complex reality than the advocates of "one right answer" believe.

The conversational model of *halakhic* reasoning incorporates these insights. It postulates, first of all, that there is no *halakhic* reasoning in the absence of an *halakhic* community, a self-identified grouping of Jews who look to the body of rabbinic-legal text and tradition as its linguistic reservoir. An *halakhic* community, stated metaphorically, uses rabbinic texts as the bricks and mortar with which to structure its religious and moral discourse. The conversational approach denies as a matter of principle that demonstrable logical proof is the goal or even a serious possibility of this activity. The aim, rather, is persuasion, whose achievement is a matter of considerable ambiguity. At times, persuasion is easy. There will be *halakhic* propositions that are not at all controversial, not necessarily because they are objectively inherent in the texts (inscribed, as it were, in the "fabric of the Toraitic universe") but because the members of the community simply do not derive any other possible meaning from the sources.[115] There will be issues on which some controversy exists, at least in theory, because the texts can plausibly be understood in different ways. Nonetheless, these will be "settled" issues because the community has reached, through the historical process of its *halakhic* discourse, the most persuasive answer, the one which commands general assent as the most coherent interpretation of the texts or the one which

most closely conforms to the ultimate purposes of the *halakhah* as that community understands them.[116] Finally, there will be issues that remain profoundly controversial, even after extensive *halakhic* analysis. The community will be divided over which possible interpretation is the best one, because each interpretation expresses a plausible reading and/or a legitimate religious end. In this last case, the conversational model will reject any attempt to discard one of these possibilities through some "scientific method" of *halakhic* decision.[117] In the rhetorical discipline that is law and *halakhah*, the absence of general persuasion means that all of the realistically potential interpretations of the texts have a claim to legitimacy. Moreover, each one of them represents a perspective that the *halakhah* as a whole ought to consider, an interpretive possibility that it ignores at significant cost to the overall integrity of Jewish law.

The ruling on any particular question of *halakhah* is the result of a conversation conducted by the community among these legitimate interpretations. The conclusions of each conversation may vary over time and place and even within the same community. But so long as they are informed by the conversational model, so long as they aim at rendering a persuasive argument based upon the *halakhic* tradition, each conclusion stakes a legitimate and serious claim to *halakhic* validity.

On the abortion issue, the persistence of the comparatively-lenient "Rashi" position alongside the comparatively stringent "Rambam" viewpoint is evidence of just such a profound and enduring controversy. We have seen that some *halakhists* are persuaded that one or the other ruling is correct. We have also seen that others are prepared to invoke (or concoct) a decision-making method that makes the dispute disappear artificially. The *halakhic* community that adopts the conversational model, however, can live quite well within the boundaries of this *mahloqet*. Accepting both positions as legitimate interpretations of Jewish law, it will allow both to inform the ultimate decision as to the circumstances under which abortion is warranted. Rambam, to begin with, must have his say. To speak of the justification of abortion on grounds of "pursuit" is to remind ourselves that abortion cannot be permitted for any

reason or for no reason at all. The destruction of the fetus is a potentially dreadful prospect. The fetus, if not possessed of a "right to life," deserves at the very least our most serious moral concern. To justify the termination of a pregnancy requires a moral consideration of the first order: the fetus must pose a significant danger to the mother. And Rashi, too, must be heard: this danger need not be mortal. The fetus is not a person. Its destruction, if a forbidden act, is not tantamount to murder. There are situations other than threat to life and limb wherein it is possible that a woman's well-being will argue for or even demand an abortion. Jewish law has long recognized and acted upon this possibility; that option should not now be arbitrarily denied to observant Jews.

Two broad conclusions emerge from this picture of a conversation between *halakhic* positions. The first is that a woman would not be entitled to abortion on demand; there must exist a warrant, a sufficient and carefully-reasoned justification for the procedure.[118] The second is that the definition of "sufficient" will differ from case to individual case. Since the circumstances of each person's life are unique, it is impossible to fix an *a priori* set of circumstances that warrant abortion in all situations. Abortion, for example, has been permitted in order to spare a woman "severe emotional trauma", a diagnosis of which must be based upon the psychological state of a particular individual. The consequences of an unwanted pregnancy may be emotionally shattering to some women; others will find a way short of abortion to cope with those consequences. The very sources which prohibit abortion, in other words, will also permit it, under identical circumstances, depending upon the situation of the individual human being who seeks rabbinic guidance. This is the inevitable outcome of a discussion which proceeds from texts that support more than one right answer to our question. The texts will provide an agreed-upon starting point for analysis, the outlines within which the discussion must occur. But the *pesaq*, the direction and end of that discussion cannot be determined in advance of considering the individual case.

This element of indeterminacy is profoundly disturbing to those who seek clear and certain solutions from the law. Yet this unease assumes a faulty conception of law as a system of determinate rules and principles designed to

yield unified legal truth, one objectively right answer to every legal question. When we think of law rather as a textual discourse, as a literary-rhetorical endeavor, we begin to accept the unreality of such expectations. Our answers, in truth, are almost never "objectively" correct. Again, though, the absence of one indisputably right answer does not mean that there are *no* right answers at all or that the search for truth must inevitably deteriorate into radical skepticism. On the contrary: it demands that the members of a legal community, aware of the tentative nature of their conclusions, redouble their efforts toward determining the best and most persuasive understanding of their law as it speaks to their lives.

Halakhah, like law, is best understood not as science but as an enterprise in world-construction. When we "do" *halakhah*, we do not give shape to our religious and moral existence by some coldly rational method of deduction from first principles. Nor do we simply create our truth, making whatever statements we wish to make in the name of religion and then hiding them cynically behind acceptable legal language. *Halakhic* decision is the provisional result of an ongoing hermeneutic, a communication between "objective" and "subjective", a confrontation between the texts that comprise Jewish legal discourse and the moral and political commitments with which we read those texts and give them voice. It is the world of argument, the process of testing our assumptions against and through a tradition of shared and inherited meaning.

To live in this perpetual dialogue between our sources and ourselves means, of course, that though we keep searching for truth we can never be sure that we possess it in its absolute and final form. Such, however, is our lot; to disguise it, to pretend that we possess some scientific method that can reduce every legal, religious, or moral controversy to a state of plain fact, is to distort the reality in which we find ourselves. In *halakhah* as in life, indeterminacy is the price we pay for being human. But then, if we are satisfied with that condition, it is a price we are prepared to pay.[119]

IV. *A FINAL NOTE*

The conversational model of *halakhah* described here is, to be sure, an ideal picture. I do not mean to suggest that all *halakhic* communities conduct their legal discourse in this manner. Indeed, we have seen that some Jewish legal thinkers go to great lengths to deny the plurality of *halakhic* meaning inherent to such a model. I do suggest, however, that the metaphor of conversation accurately describes the *halakhah* as it has been practiced throughout its long history. It is by ongoing argument, the refusal to be committed to the existence of one exclusively correct answer to every question of law, that Jewish law has preserved the vitality needed to accommodate the never-ending changes and transformations of Jewish life. Orthodox thinkers, therefore, no less than liberal ones, can accept the conversational model (with its attendant indeterminacy) without thereby questioning the validity of the *halakhah*, because it captures the rhetorical, argumentative process that has for centuries characterized Jewish law. As they inhabit different *halakhic* communities, different religious worlds than ours, the answers they derive from this argument will of necessity differ from those that we find persuasive. But they, no less than we, should reject any and all attempts to impose "scientific" methods that would arbitrarily force an end to the *halakhic* conversation on abortion and other questions of legitimate controversy. For Jewish law has always worked best as an argument, the searchor truth conditioned by the humble realization that "the" final truth may always escape us. *That* is *halakhah* at its best. And that is how all Jews, liberal or orthodox, who are committed to *halakhah* ought to conceive and practice it.

Notes

1. Rabbi Balfour Brickner, Statement of the Religious Coalition for Abortion Rights before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, March 24, 1976.

2. Chaim Dovid Zweibel, "Combatting Abortion Distortion," *The Jewish Observer* 22 (May, 1989), p. 7. Zweibel, Director of Government Affairs and General Counsel for Agudath Israel of America, authored that organization's *amicus curiae* brief to the U.S. Supreme Court in the case of *Webster v. Reproductive Health Services*, 490 U.S. 490 (1989). The brief argued that the Court should reverse its decision in *Roe v. Wade*, 410 U.S. 113 (1973), which guaranteed a woman's right to an abortion during the first two trimesters of pregnancy.

3. Moshe D. Tendler, "Contraception and Abortion," in Fred Rosner, ed., *Medicine in Jewish Law*, Northvale, NJ, 1990, pp. 117-118.

4. Zweibel, pp. 9-10, on the determination by Agudath Israel's Council of Torah Sages that *Roe* must be opposed in the name of *k'vod Shomayim*. See also the Postscript, p. 10, which stresses the unity of organized Orthodoxy over the abortion issue.

5. See A.S. Abraham, *Nishmat Avraham*, Jerusalem, 1987, *Hoshen Mishpat* 425, pp. 420-422: while "most *rishonim* and *aharonim*" hold that abortion is prohibited in the absence of danger to the mother, "a few of the authorities (*ketsat mehaposqim*)" regard the prohibition to be a lesser one, rabbinic (*derabanan*) rather than Toraitic (*de'oraita*) in nature.

6. The most extensive treatment by a liberal *halakhist* is that of David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law*, New York, 1968, pp. 251ff. Feldman offers a summary of his position in his *Health and Medicine in the Jewish Tradition*, New York, 1986, pp. 79-90. See also Isaac Klein, *A Guide to Jewish Religious Practice*, New York, 1979, pp. 415-417. Reform writers include Solomon B. Freehof, in Walter Jacob (ed.) *American Reform Responsa*, New York, 1983, no. 171, Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, no. 16; Moshe Zemer, *Halakhah Shefuyah*, Tel Aviv, 1993, pp.280-282; and Mark Washofsky, in Barry S. Kogan, ed., *A Time to Be Born and a Time to Die: The Ethics of Choice*, New York, 1991, pp. 73-81.

7. See, for example, A. S. Abraham, *Lev Avraham*, Jerusalem, 1978, v. 2, p. 135, and *Comprehensive Guide to Medical Halakhah*, Jerusalem, 1990, p. 205; Fred Rosner, *Modern Medicine and Jewish Ethics*, Hoboken-New York, 1986, pp. 139-160 (and especially 152 ff., where he argues that abortion is "moral murder") and *Practical Medical Halakhah*, New York, 1980, pp. 35-36; J. David Bleich, *Judaism and Healing: Halakhic Perspectives*, New York, 1981, pp. 96-103, and "Abortion in Halakhic Literature," in Fred Rosner and J. David Bleich, eds., *Jewish Bioethics*, New York, 1979, pp. 134-177; and Immanuel Jakobovits, "Jewish Views on Abortion," in Rosner and Bleich, pp. 118-133

8. Bleich, *Judaism and Healing*, p. 97, n. 1.

9. Some tentative steps toward an analysis of the function of the halakhic consensus within the rabbinic legal process are taken in Mark Washofsky, "The Search for a Liberal *Halakhah*: A Progress Report," in Walter Jacob and Moshe Zemer, eds., *Dynamic Jewish Law*, Tel Aviv and Pittsburgh, 1991, pp. 25-51.

10. Good discussions are provided in the works cited in notes 6 and 7. See especially Avraham, *Nishmat Avraham*, pp. 420ff. A most comprehensive and thorough survey of the sources is found in M. Stern, ed., *HaRefu'ah le'Or HaHalakhah*, Vol. 1, Jerusalem, 1980.

11. Hebrew *rubo*; other versions, particularly the Babylonian Talmud *Sanhedrin* 72b, read *rosho*, "its head." Maimonides reads the latter version; see *Yad, Rotseah* 1:9.

12. *Hatra'ah*, normally a prerequisite for capital punishment under the *halakhah*. Execution is permitted only if witnesses testify that the offender was warned prior to the act that his contemplated deed is punishable by death. *Tosefta Sanh.* 11:1; *Sanh.* 8b and 80b.

13. *San.* 72b, *s.v. yatsa rosho.*

14. *Hiddushei HaRamban, Nidah* 44b; Meiri, *Beit HaBehirah, San.* 72b; *Tosafot Yom Tov* and *Tiferet Yisrael* to *M. Ohalot* 7:6.

15. This has direct reference to the issue of "whose blood is redder?"; see *Sanh.* 74a and parallels, along with Rashi *ad loc., s.v. sevara hu* and *ma'i hazit.*

16. See also *San.* 84b and *Nidah* 44a-b, along with *Tosafot*, 44a, *s.v. ihu*: one who kills a day-old infant is guilty of murder, while one who kills a fetus, which is not a *nefesh*, is not guilty of that crime.

17. *Yad, Hil. Rotseah* 1:9.

18. See, for example, *Sefer Me'irat Einayim* to *Hoshen Mishpat* 425, no. 8, who turns interpretive somersaults in order to reconcile Maimonides (and the *Shulhan Arukh*, which repeats his ruling here) with the plain sense of the *sugya*. The phrase "this is the way of nature" comes to tell us that, although the fetus is *not* a *rodef*, it is still sacrificed on behalf of its mother, since prior to emergence it is not a *nefesh.*

19. This difficulty is raised by R. Yehezkel Landau, *Resp. Noda Biy'hudah*, II, no. 59, end, and R. Akiva Eger, *Hiddushim, M. Ohalot* 7:6.

20. *Arukh Hashulhan, Hoshen Mishpat* 425, no. 7; *Tiferet Yisrael, M. Ohalot* 7:6.

21. Note that the Talmud never challenges the first clause of *M. Ohalot* 7:6: *i.e.*, if the mother is being "pursued from Heaven" and the fetus is not a *rodef*, why do we sacrifice it *in utero* in order to save her? Perhaps the Talmud fully accepts that the fetus is a pursuer. Why then do we not regard it a *rodef* upon emergence? The Talmud may follow the reasoning of the Talmud Yerushalmi, *Sanhedrin* 8:9, which explains that, upon parturition, "one does not know who is killing whom". That is, the case of difficult childbirth is properly viewed as one of aggression. Until the child's emergence, we are certain that it is the fetus--and not the mother--who is the aggressor. After that point, such a determination is impossible to make, and we may harm neither mother nor child to save the other.

22. *Resp. Maharit*, Vol. 1, no 99. On the apparent contradiction between this *teshuvah* and Trani's responsum Vol. 1, no. 97, see below in the text.

23. Trani cites the sources referred to in note 16, above.

24. *Havat Yair*, no. 31.

25. See *Tosafot, Hulin* 33a, *s.v. ehad*, and *San.* 59a, and *Tosafot, s.v. leika*. It should be noted, however, that not all *posqim* hold that Gentiles are prohibited from destroying the fetus; if that is correct, then the analogy to Jews collapses. See R. Haim Ozer Grodzinsky, *Ahiezer*, v. III, no. 65, sec. 14.

26. See the text at note 13. Rashi writes that "it is permitted to kill [the fetus] *to save its mother* [emphasis added]."

27. Norman Solomon, *The Analytic Movement: Hayyim Soloveitchik and His Circle*, Atlanta, 1993. The book is based upon the author's dissertation and upon several articles previously published. These include "Definition and Classification in the Works of the Lithuanian Halakhists," *Dinei Israel* 6, 1975, and "Hilluq and Hakira: A Study in the Method of the Lithuanian Halakhists," *Dinei Israel* 4, 1973. Solomon regards Soloveitchik's novellae on Maimonides as the "classic" work of the Analytical school; see *Analytic Movement*, p. 49.

28. The following anecdote, reported by Solomon, p. 50, as well as others, illustrates the situation nicely. R. Haim's father, R. Yosef Baer Soloveitchik (d. 1892) is said to have remarked: "When anyone asks me to solve a problem about a passage from Maimonides or the Talmud, I look into it deeply and answer. Both of us are happy; I, that I have been able to solve the problem, and the questioner, because his problem is solved. But it is not so with my son. If anyone asks him a question neither is satisfied. With his brilliant and penetrating mind he completely destroys the question. As there is no question any more there is no opportunity for a reply."

29. See Solomon in all his writings and S.J. Zevin, *Ishim veShitot*, Tel Aviv, 1952, pp. 43-85 on Soloveitchik. As Solomon notes, this approach justifies the use of the term "analytic" as applied to the Lithuanian school: just as the twentieth-century English "analytical" philosophers claim that philosophical problems often arise from a lack of linguistic clarity, so too do halakhic disputes vanish once we redefine the terms of the discussion (*Analytic Movement*, p. 50).

30. *Hiddushei Rabbenu Haim Halevy al haRambam, Hilkhot Rotseah* 1:9. This, as Solomon notes, is Soloveitchik's "one authentic published work" (*Analytic Movement*, p. 49).

31. Leviticus 18:5; *Yoma* 85b and all the authorities.

32. Leviticus 19:16; *San.* 73a; *Yad, Hil. Rotzeah* 1:14.

33. *San.* 73a.

34. *San.* 74a and Rashi, *s.v. ma'i hazit.*

35. See *Hilkhot HaRosh, Yoma* 8:13, and *Nishmat Avraham, Orah Hayim* 330, no. 19.

36. Aharon Jellinek, *Kuntres HaRambam*, Vienna, 1893, lists over 200 separate works of commentary on the *Mishneh Torah*. The production of such works has continued apace in this century; witness the writings of Soloveitchik, R. Yosef Rosen (*Tzofnat Paneah*) and R. Meir Simchah of Dvinsk (*Or Sameah*). As Menachem Elon puts it, "the major part of the *hiddushim* literature in this century assumes the form of commentary upon Rambam's *Mishneh Torah*;" *HaMishpat Ha`Ivri*, Jerusalem, 1989, 3rd edition, p. 930, n. 104.

37. Thus, in fact, is how those authorities who rule permissively on the abortion question, such as Maharit, read the Talmud and Rashi. Both the restrictive and permissive constructions are essentially arguments from silence: Rashi does not refer to non-mortal circumstances at all. The question turns on the issue of which phrase in Rashi's comment can said to be the "controlling" one: that "the fetus is not a *nefesh*" or that "it is permitted to kill it to save the mother"?

38. These include R. Issar Yehuda Unterman, in *No`am*, vol. 6, 5723/1963, pp. 1-11, and R. Moshe Feinstein, discussed below.

39. See note 18, above. See also R. Haim Ozer Grodzinsky, *Ahiezer*, vol. III, no. 72, sec. 3, who points out that Rambam calls the fetus a *rodef* only after childbirth has begun. Only at that point, when it has become a "separate entity" (*gufa aharina*; see *Arakhin* 7a), do we need the element of "pursuit" to justify the abortion. It follows that prior to childbirth, this "non-person" might be aborted in situations other than mortal danger. R. Benzion Ouziel, *Resp. Mishpetei Ouziel*, vol. III, *Hoshen Mishpat*, no. 47, adopts this same reasoning. Unterman, *op. cit.*, objects on the grounds that Rambam never draws a distinction between the fetus before and during childbirth. True; but then, neither Rambam nor the Talmud ever explicitly draws the distinctions among pursuers and persons which Unterman, following Soloveitchik, would have us accept.

40. *Igerot Moshe, Hoshen Mishpat*, Bnei Brak, 1985, vol. 2, no. 69. The responsum is written to his son-in-law, R. Moshe David Tendler, whom we encountered above.

41. Feinstein argues that the text should be emended to read *patur hahorgo*, "the one who kills [the fetus] is not liable to execution," which still supports the conclusion that abortion is a prohibited act. To repeat, not all authorities hold that abortion is forbidden to Gentiles. For a survey of centuries of rabbinic discussion of this *Tosafot* passage, see A.S. Avraham, *Nishmat Avraham, Hoshen Mishpat* 425, pp. 220-221.

42. Feinstein mentions Bacharach's responsum as well as the novellae of R. Akiva Eger (d. 1837) to *M. Ohalot* 7:6; see at note 19, above.

43. Feinstein offers his own resolution, based upon Yerushalmi *Sanhedrin* 8:9; see note 21, above. Similar in method to Soloveitchik's, this explanation concludes that "Rashi, too, would agree."

44. *Maharit*, Vol. 1, no. 97.

45. *Tzitz Eliezer*, Jerusalem, 1975, Vol. 13, no. 102.

46. *Beit Yosef*, Introduction. This tendency is especially pronounced in Sefardic communities. See, in general, R. Ovadyah Yosef in *Sefer HaYovel leRav Yosef Dov Halevy Soloveitchik*, Jerusalem, 1984, pp. 267-280. On the Sefardic "reception" of Rambam's *Mishneh Torah* as "the" authoritative key to halakhic decision see Y.Z. Kahana, *Mehkarim BeSifrut HaTeshuvot*, Jerusalem, 1973, pp. 8-88. On the similar "reception" of Caro's *Shulhan Arukh*, see Menahem Elon, *HaMishpat HaIvri*, pp. 1139-1144.

47. *Tzitz Eliezer*, Jerusalem, 1985, vol. 14, no. 100. Waldenberg lists a number of those who disagree with Rambam, including the *Sefer Me'irat Einayim* (16th century; see note 18), who lived "close to the period of the *rishonim*." He writes: "I am astonished that [Feinstein] either ignores or does not notice these great *posqim*." He also relates an anecdote reporting that R. Haim Soloveitchik considered the words of R. Akiva Eger (who as we have seen also has problems with Rambam's ruling) "as though they were the words of one of the *rishonim*."

48. On the abortion issue, see R. Yehiel Ya`akov Weinberg, *Seridei Esh*, Jerusalem, 1966, Vol. 3, no. 127.

49. See Rambam's Introduction to the *Mishneh Torah*: when one of the post-Talmudic sages (all of whom he calls *geonim*) interprets the Talmud in a way that contradicts the opinion of another *gaon*, the law is in accord with the more persuasive argument. No sage is compelled to follow the rulings of another merely upon the latter's authority. The classic statement of this position is that of R. Asher b. Yehiel, *Hilkhot HaRosh, Sanhedrin* 4:6. On the subject of rabbinic independence in legal interpretation see Joel Roth, *The Halakhic Process: A Systemic Analysis*, New York, 1986, pp. 81-114.

50. See note 39, above: some *halakhists* resolve Rambam in favor of leniency.

51. A pun, playing on the words *tameah* ("to be amazed") and *tamei* ("impure, defiled"); *cf.* Lev. 13:45.

52. Waldenberg refers to R. Haim Benveniste (d. 1673), a student at Trani's academy in Constantinople who cites the "suspect" responsum (vol. I, no. 99) without objection in his *Knesset HaGedolah* to *Yore De`ah* 154, no. 6. This, says Waldenberg, is evidence that the responsum is genuine.

53. Waldenberg, among others, has resolved the apparent contradiction between Maharit's responsa no. 97 and no. 99 so as to maintain Trani's stance permitting abortion in situations when the mother's life is not at risk. See *Tsits Eliezer*, Vol. 9, no. 51, part 3.

54. Rasson Arusi, "*Halakhah veHalakhah leMa`aseh beVitsu`a Hapalah Melakhutit baMishpat ha`Ivri*," *Dinei Israel*, Vol. 8, 1977, pp. 119-132, and "Derakhim beHeker haHalakhah uveVerurah," *Tehumin*, Vol. 2, 1981, pp. 513-522. R. Arusi is the Chief Rabbi of Kiryat Onoand a member of the Israel Chief Rabbinate Council. He earned a doctoratein law from the University of Tel Aviv, where he taught law form any years. He is currently a lecturer in Jewish studies at Bar Ilan University.

55. This rule is stated by Rav Sherira Gaon and Rav Hai Gaon; see B.M. Levin, *Otsar HaGeonim, Hagigah*, nos. 67-69. There are, of course, exceptions to this rule. R. Nissim Gerondi, for example, learns that it is sometimes a *mitsvah* to pray for the speedy death of a sick person from the story of R. Yehudah HaNasi's last days (*Ketubot* 104a); see his commentary to *Nedarim* 40a.

56. One thinks of works of *kelalim* ("rules"), such as *Yad Malakhi* and *Sedei Hemed*, which summarize all of these. See also Kahana, pp. 1-8, and Simhah Asaf, *Tekufat HaGeonim VeSifrutah*, Jerusalem, 1976, pp. 223-245.

57. Arusi in *Dinei Israel*, p. 121. Weinberg's ruling is found in *Seridei Esh*, Jerusalem, 1966, Vol. 3, no. 127.

58. *Baba Batra* 130a: one may act on a teacher's explicit instruction that "this is the law in practice (*halakhah lema`aseh*)" provided that one does not analogize from that ruling in order to learn the law on another question.

59. *Baba Batra* 130a, one of the two sources Arusi cites as a warning against reasoning by analogy, also says: "we learn all of *halakhah* [literally, `the entire Torah'] by way of analogy."

60. Arusi's penchant for classification leads him to overlook the extent to which the *Mishneh Torah* is as much a commentary, an exegetical-expository guide to Jewish religious thought and practice, as an apodictic code. See, at length, Isadore Twersky, *Introduction to the Code of Maimonides*, New Haven, 1980, pp. 143ff.

61. Rambam himself would apparently agree; see at note 49, above.

62. *Meshiv Davar, Orah Hayim*, no. 24. For discussion of this issue see Kahana, pp. 97-107, and Elon, pp. 1215-1219.

63. *Darkhei Moshe* to *Tur*, Introduction. Isserles rejects Caro's reliance upon the "three pillars" of authority in favor of the rule *hilkheta kevatra'ei*, "the law follows the latest authorities," in particular the scholars of Germany and Poland who flourished during the 15th-16th centuries.

64. *Yam shel Shelomo, Hulin*, Introduction: "I shall not rely upon any one of the *poskim* more than upon any other...the Talmud itself decides the law."

65. That even the accepted rules of decision-making possess only tentative validity--that is, they "work" only when the *posqim* decide not to ignore them--is stressed by Eliezer Berkovits, *HaHalakhah: Kohah veTafkidah*, Jerusalem, 1981, pp. 11ff.

66. See, for example, his essay in *Dinei Israel*, p. 123, n. 13.

67. Arusi, *Tehumin*, p. 520.

68. *Eruvin* 13b. The heavenly voice, of course, declared that the *halakhah* follows the opinion of the school of Hillel.

69. See once again R. Yosef Caro's introduction to the *Beit Yosef*: "As a result of our long years of dispersion and wandering, `the wisdom of its sages has disappeared' [cf. Isaiah 29:14]. The Torah has become not two Torahs but innumerable Torahs (*torot ein mispar*) on account of the many books that have been written to explain its laws." The difficulty at discerning the correct judgment is one of the chief reasons Karo cites for his composition of the *Beit Yosef*.

70. For good summaries of the doctrine of legal formalism, the reader might consult Frederick Schauer, "Formalism," *Yale Law Journal*, Vol. 97, 1988, pp. 509 ff; Raymond Bellioti, *Justifying Law*, Philadelphia, 1992, pp. 4-5; Richard A. Posner, *Problems of Jurisprudence*, Cambridge, MA, 1990, pp.9-33; H.L.A. Hart, *The Concept of Law*, Oxford, 1961, pp. 121-132.

71. Gerald J. Postema, *Bentham and the Common Law Tradition*, Oxford, 1986, p. 9. See also Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review*, Vol. 45, 1983, pp. 1-53.

72. I focus here on legal positivism's implications for judicial decision. As a full-blown jurisprudential theory, positivism emerged as a reaction against natural-law thinking: law should be understood as something separate from morality. This theoretical turn was useful to liberals, since by "demystifying" the law they rendered it more hospitable to reform through enlightened legislation. See, in general, H.L.A. Hart, *loc. cit.*, as well as Joseph Raz, *The Authority of Law*, Oxford, 1979, pp. 37-45, and Mario Jori, ed., *Legal Positivism*, New York, 1992.

73. Oliver Wendell Holmes, Jr., *The Common Law*, Boston, 1881 (rev. ed, Boston, 1963), p. 5. Consider as well his dictum in *Southern Pacific Co. v. Jensen*: "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified;" 244 U.S. 205 (1917), Holmes, J., dissenting.

74. See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review*, Vol. 10, 1897, pp. 457-478, and Karl N. Llewellyn, *The Bramble Bush*, New York, 1951, pp. 12-13, and *The Common Law Tradition*, Boston, 1960.

75. The sharpest presentation of this view is that of Jerome Frank, *Law and the Modern Mind*, New York, 1930.

76. Hart's term for "realists"; *Concept of Law*, pp. 132 ff.

77. Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review*, Vol. 8, 1908, pp. 605-623.

78. G. Edward White, *The American Judicial Tradition*, New York, 1976, pp. 196-198.

79. Hart, *The Concept of Law*, pp. 120 ff.

80. Frederick Schauer, "Easy Cases," *Southern California Law Review*, Vol. 58, 1985, pp. 399-440; Ken Kress, "Legal Indeterminacy," *California Law Review*, Vol. 77, 1989, pp. 283-327.

81. See Benjamin Cardozo, *The Nature of the Judicial Process*, New Haven, 1921; Henry M. Hart, Jr., and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge, MA, tentative edition, 1958; (on the doctrine of "process jurisprudence", which stressed, *contra* the realists, the institutional limitations upon judges, see G. Edward White, "The Evolution of Reasoned Elaboration," *Virginia Law Review*, Vol. 59, pp. 279ff.; Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review*, Vol. 34, 1982, pp. 739-763, and "Conventionalism," *Southern California Law Review*, Vol. 58, 1985, pp. 177-197.

82. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, Vol. 73, 1959, pp. 1-35.

83. Melvin Eisenberg, *The Nature of the Common Law*, Cambridge, MA, 1988.

84. Ronald Dworkin, *Law's Empire*, Cambridge, MA, 1986; *A Matter of Principle*, Cambridge, MA, 1985; and *Taking Rights Seriously*, Cambridge, MA, 1977.

85. See the discussion by Robin West, "Disciplines, Subjectivity, and Law," in A. Sarat and T. Kearns, *The Fate of Law*, Ann Arbor, 1991, pp. 119ff. and the literature she cites.

86. See many of the collected essays in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence*, London, 1983; Ken Kress, "The Interpretive Turn," *Ethics*, vol. 97, 1987, pp. 834-860; H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, 1983, pp. 137-144; Kent Greenawalt, *Law and Objectivity*, New York, 1992, pp. 217ff.; Aharon Barak, *Judicial Discretion*, New Haven, 1987, pp. 28-33.

87. Posner, *Problems of Jurisprudence*, pp. 21-23; Richard Rorty, "The Banality of Pragmatism and the Poetry of Justice," *Southern California Law Review*, Vol. 63, 1990, pp. 1811ff.

88. See the essays collected in Alan Hunt, ed., *Reading Dworkin Critically*, New York, 1992.

89. On the movement in general, see Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge, MA, 1987; David Kairys, ed., *The Politics of Law*, New York, 1982; and Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, Cambridge, MA, 1986. On the issues of legal formalism and

indeterminacy, see Duncan Kennedy, "Legal Formality," *Journal of Legal Studies*, Vol. 2, 1973, pp. 351-398; Allan C. Hutchinson, "Democracy and Determinacy: An Essay of Legal Interpretation," *University of Miami Law Review*, Vol. 43, 1989, pp. 541-576; and Joseph W. Singer, "The Player and the Cards: Nihilism and Legal Theory," *Yale Law Journal*, Vol. 94, 1984, pp. 1-70. Closely related is an approach that attacks the mainstream legal tradition on feminist grounds; see Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, MA, 1987.

90. Duncan Kennedy, "Legal Education as Training for Hierarchy," in Kairys, *Politics of Law*, p. 47.

91. The Talmudic *shanei hatam* ("that case is different") and *la kashya* ("the difficulty is only apparent") are early examples of this method.

92. Dworkin, *Taking Rights Seriously*, pp. 118-123.

93. I say "tends in the direction" because few halakhists, however liberal, would argue seriously that Jewish law supports the choice for abortion in the absence of sufficient cause. The lenient halakhic position differs from the stringent one in that it accepts a significantly wider range of causes as sufficient to warrant abortion. "Pro-choice", as I understand it, leaves the entire matter to the discretion of the woman, whether or not she can cite any such cause which would be persuasive to anyone else.

94. On this "systemic" functioning of the halakhic consensus, see Mark Washofsky, "The Search for a Liberal *Halakhah*: A Progress Report," in Walter Jacob and Moshe Zemer, eds., *Dynamic Jewish Law*, Tel Aviv and Pittsburgh, 1991, pp. 25-51.

95. On the special role of the *gadol* in making discretionary halakhic decision, see Avraham Zvi Rabinowitz, "He`arot le-Nosei Mediniut Hilkhatit," *Techumin*, Vol. 2, 1981, pp. 504-512. On the charismatic halakhic authority of the *gadol* see Emanuel Feldman, "Trends in the American Yeshivot: A Rejoinder," in R. Bulka, ed., *Dimensions of Orthodox Judaism*, New York, 1983, pp. 334ff.

96. This is not the place to enter into an analysis of the modes of rabbinic legislative or quasi-legislative authority. On these methods, the *takanah* (legislative enactment) and the *da`at Torah* (an *ex cathedra* statement of opinion by a sage or group of sages instructing the faithful as to the path they should walk), see Elon, pp. 391ff., and Jacob Katz, *Hahakhah beMeitsar*, Jerusalem, 1992, pp. 18-20. All that needs to be said is that, on the abortion question, the *poskim* have eschewed these approaches in favor of the more traditional "judicial" approach: they wish to show that the law of abortion is dictated by the existing sources rather than imposed by rabbinic decree.

97. There is a huge literature on the subject of intellectual, cultural, and sociological influence upon the direction of *pesaq*, rabbinic decision. The list of contemporary scholars in the field includes Jacob Katz, Israel Ta-Shema, Haym Soloveitchik (the professor, not the great Talmudist of Volozhyn), David Ellenson, and many others. For summaries see Mark Washofsky, "Medieval Halakhic Literature and the Reform Rabbi: A Neglected Relationship," *CCAR Journal*, Fall, 1993, pp. 61-74, and "The Study of Talmud and Halacha: A Survey of Some Recent Scholarship," *Journal of Reform Judaism*,

Spring, 1991, pp. 1-16.

98. Louis Jacobs, *A Tree of Life*, Oxford, 1984, pp. 11-12.

99. Frederick Schauer, "Formalism," *Yale Law Journal*, vol. 97, 1988, pp. 509-548. See also the articles by Schauer and Ken Kress, note 78, above.

100. See the following works of Steven Burton: *Judging in Good Faith*, New York, 1992; *An Introduction to Law and Legal Reasoning*, Boston, 1985; "Law as Practical Reason," *Southern California Law Review*, Vol. 62, 1989, pp. 747-793; and "Judge Posner's Jurisprudence of Skepticism," *Michigan Law Review*, Vol. 87, 1989, pp. 710ff. See also Vincent A. Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory," *U. of Colorado Law Review*, Vol. 57, 1985, pp. 45ff; Neil MacCormick, *Legal Theory and Legal Reasoning*, Oxford, 1978, pp. 1-8; and John Ladd, "The Place of Practical Reason in Judicial Decision," in Carl J. Friedrich, ed., *Nomos VII: Rational Decision*, New York, 1964, pp. 126-144.

101. Aristotle's *Rhetoric* is often cited as the major source.

102. Chaim Perelman, *Justice, Law, and Argument*, Dordrecht, 1980, p. 129.

103. John Dewey, "Logical Method and Law," *Cornell Law Quarterly*, vol. 10, 1924, pp. 17ff.

104. Wellman, p. 96.

105. Such is the sense in which "rhetoric" is treated by Chaim Perelman, its foremost contemporary theorist. His *magnum opus* is Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric*, Notre Dame, 1969; see also his *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*, Dordrecht, 1979, and *The Realm of Rhetoric*, Notre Dame, 1982.

106. The words are those of Richard Posner, *Problems of Jurisprudence*, Cambridge, MA, 1991, pp. 71ff. While Posner calls this kind of argumentation "practical reason," the references to Pereleman's studies in p. 72, n. 2, indicate that he means the enterprise described here as "rhetoric."

107. See, in general, Herbert W. Simons, ed., *The Rhetorical Turn*, Chicago, 1990, and David R. Hiley, James F. Bowman, and Richard Shusterman, eds., *The Interpretive Turn: Philosophy, Science, and Culture*, Ithaca, NY, 1991. The pragmatist Richard Rorty is often cited with respect to this conception of inquiry; see his *Consequences of Pragmatism*, Minneapolis, 1982, and *Philosophy and the Mirror of Nature*, Princeton, 1980. But any list of relevant theoreticians would have to include Heidegger, Wittgenstein, Ricouer, Gadamer, and Hilary Putnam. A helpful introduction, especially for those of us who are not professional philosophers, is Richard J. Bernstein, *Beyond Objectivism and Relativism*, Philadelphia, 1983.

108. Thomas Kuhn, *The Structure of Scientific Revolutions*, second edition, Chicago, 1970.

109. Out of a vast literature, the following works may be mentioned: Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, New Haven, 1983; Clifford Geertz, "Blurred Genres: The Refiguration of Social Thought," *The American Scholar*, Vol. 49, 1980, pp. 165-179; Donald N. McCloskey, *The Rhetoric of Economics*, Madison, WI, 1985; John Nelson, Allen Megill, and Donald N. McCloskey, eds., *The Rhetoric of the Human Sciences*, Madison, WI, 1985; and Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation*, Baltimore, 1987.

110. See the literature cited in Mark Washofsky, "Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision," in the forthcoming festschrift for Professor Ben Zion Wacholder.

111. The preceding is heavily informed by the writings of James Boyd White, a leading "Law and Literature" theoretician. See his *Justice as Translation*, Chicago, 1990; *Heracles' Bow*, Madison, WI, 1985; *When Words Lose Their Meaning*, Chicago, 1984; and *The Legal Imagination*, Boston, 1973.

112. This raises the controversial issue at the hub of contemporary hermeneutics: does meaning reside in the text, in the reader's response to it, or in some combination of the two? This is not the place to discuss this complex question, which awaits sustained analysis from the standpoint of halakhic interpretation. In the meantime, see Sanford Levinson and Steven Mailloux, *Interpreting Law and Literature: A Hermeneutic Reader*, Evanston, IL, 1988. The notion suggested here, that legal meaning is ultimately to be located within the shared assumptions and common practices of an "interpretive community," is the major contribution of the literary scholar Stanley Fish to the field of jurisprudence. See his *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durham, NC, 1989, and *Is There a Text in This Class?*, Cambridge, MA, 1980.

113. Does Arusi begin with the instinctive sense that abortion is wrong, that *halakhah* surely forbids it in all cases save danger to the mother's life, and then seek to create a formal set of rules to lend the appearance of plain fact to this essentially controversial point of law? I think the answer is yes. I confess that my evidence for this is impressionistic, culled from the intensity of his language and the consistency with which he rejects any and all arguments offered by the lenient *poskim*. I may be wrong; still, it is difficult to escape the impression.

114. See Ramban's Introduction to his *Sefer Milhamot HaShem*, his defense of Alfasi from the criticisms of R. Zerahyah HaLevy, usually printed at the beginning of Alfasi *Berakhot*.

115. An example would be the laws of divorce. Any "*halakhic*" community worthy of the name would, upon reading Deut. 24:1ff. and its rabbinic commentaries, probably accept the requirement of a religious divorce effected by a written document before a woman can be allowed to remarry.

116. To continue with the divorce example: while the validity of civil divorce under Jewish law could be argued as an extension of the doctrine *dina demalkhuta dina* ("the law of the realm is legally binding upon us"), the long tradition of Jewish legal autonomy in the area of personal status law makes it highly doubtful that a serious *halakhic* community would accept a civil decree of divorce in lieu of the Jewish legal procedure. See Solomon B. Freehof, *Reform Jewish Practice*, New York, 1976, Vol. 1, pp. 99ff., who recounts the quasi-*halakhic* justifications offered for the American Reform movement's 1869 decision to accept civil divorce. The crucial point, that divorce in rabbinic law is a

"civil" as opposed to "religious" matter, is problematic, as such a distinction is arguably foreign to Jewish law. Still, the issue is one of persuasion: what makes the decision halakhically "wrong" is not that the legal sources flatly deny the validity of civil divorce but that to prove otherwise requires a reading of the sources which does not persuade most readers.

117. A *halakhic* community which regards religious divorce as a legal necessity would also recognize the potential validity of various solutions proposed to ease the burden on the wife whose husband unconscionably refuses to issue her a *get*. These proposals are backed by halakhic argumentation that many responsible scholars find persuasive. But they are judged "invalid" in orthodox circles for the simple fact that they run counter to the consensus opinion among the *gedolim*. See Mark Washofsky, "The Recalcitrant Husband: The Problem of Definition," *Jewish Law Annual*, Vol. 4, 1981, pp. 144-166, and "The Search for a Liberal *Halakhah*," p. 34. The conversational model would not accept "consensus" as an automatic indication of the invalidity of a serious halakhic proposal.

118. The question "who makes the abortion decision?", though a serious one, is irrelevant to the point here. We are talking about the halakhic-moral criteria that ought to inform the decision regardless of who--the woman herself; a communal authority; a combination of the two--ultimately makes it.

119. Was it good or bad, on balance, that mankind was created? See *Eruvin* 13b and commentaries.