

“My Children Have Defeated Me! My Children Have Defeated Me!”:
Halakhah and Aggadah in Conservative/Masorti Decision-Making

by

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Thesis submitted in partial fulfillment of
the requirements for the degree of
Master of Arts in the Graduate Program in Religion
in the Graduate School
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ABSTRACT

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Abstract

Despite the vast research on Jewish law (*halakhah*), fairly little has been done to analyze the contemporary responsa literature, particularly in the United States and particularly within the Conservative Jewish movement. These responsa can be defined in two ways: by their methodology and by their outcome. In this paper, I begin by reviewing the origins and development of the halakhah and the power of rabbis within this halakhic system. I then describe the Conservative movement and particularly its halakhic outlook—that is, how the Conservative movement has defined its own relationship to Jewish law and how Conservative responsa utilize that body of law. Finally, by examining contemporary Conservative responsa, I introduce a novel approach to analyzing contemporary halakhah. This approach separates methodology, categorizing it as “systematic” or “aggadic,” from halakhic outcomes, which I categorize as “traditional” or “progressive” depending on the extent to which they advocate halakhic change. I conclude that nearly all responsa use a blend of systematic and aggadic methodologies and that the methodology deployed has little to no bearing on the progressiveness of the halakhic outcome.

Dedication

As always, for my wife.

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1. Introduction

Surely, this [law] which I enjoin upon you this day is not too baffling for you, nor is it beyond reach. It is not in the heavens, that you should say, "Who among us can go up to the heavens and get it for us and impart it to us, that we may observe it?" Neither is it beyond the sea, that you should say, "Who among us can cross to the other side of the sea and get it for us and impart it to us, that we may observe it?"

No, the thing is very close to you . . . (Deuteronomy 30:11-14)¹

If Jewish law is not in heaven, then where is it? Fifteen hundred years ago, it was in the study-halls and classrooms of great Jewish Sages who tried to answer the most complicated questions of their day. A thousand years ago, it was in massive codes penned by giants in the study of Jewish law, who struggled to make Jewish law accessible in a vastly different world. And today, it is in the offices of rabbis and the meeting-rooms of committees who work to offer practical solutions to thoroughly modern questions.

In the first chapter of this paper, I will consider the nature of Jewish law and offer a brief history of its development and the power of decision-makers within it. In the second, I will attempt to place within this history the modern Conservative movement by describing the particular way Conservative legal decisions are made. And in the third chapter, I will question traditional understandings of Jewish legal

¹ Throughout, unless otherwise specified, translations of the Torah come from *Tanakh: The New JPS Translation According to the Traditional Hebrew Text* (Philadelphia: Jewish Publication Society, 1985).

methodology by trying to disentangle Jewish legal methodology used by Conservative decision-makers from the decisions they reach.

2. *The Halakhah: Its Origins and Development*

This entire Jewish legal system is called *halakhah*. Ephraim Urbach writes that “[n]othing has made its influence more profoundly felt on the course of the history of the Jewish people, shaping its way of life and giving it form and substance, than the *Halakhah*.”¹ For him, the halakhah, “reflects the life and character of the people” who follow it. Profoundly, then, Urbach believes that, in many ways, the Jewish people are defined by their law, that the Jewish people and the halakhah are almost synonymous.

The problem is that it is very difficult to define exactly what halakhah is. The word does not appear in the Torah and is not used in sources predating the Mishnah, which was codified around the year 200 CE. The Hebrew root of the word means “to go” or “to walk,” and the word “halakhah” may have derived from an Akkadian word for divine revelation.² Halakhah is, then, an evocative term. It could mean the path that one walks; the way that one conducts oneself along the way through life; or the rules of behavior revealed by the Divine. I may move, but the law stays constant, a sure path to follow, as appropriate in 2017 as it was in 600 CE.

But the word “halakhah” —like the halakhah itself, as we shall see—is multi-voiced. Perhaps halakhah means that the law itself is going, that the law itself should move and change. Like a river with its source in the words of those ancient Sages,

¹ Ephraim Urbach, *The Halakhah: Its Sources and Development* (Tel Aviv: Modan, 1986), 1.

² I. Tzvi Abusch, “Alaktu and Halakhah: Oracular Decision, Divine Revelation,” *Harvard Theological Review* 80, no. 1 (January 1987): 38.

maybe the halakhah meanders, meeting new challenges and diverting this way or that. Urbach writes that the word “halakhah” denotes the way in which a person observes the commandments of the Torah and therefore walks in its path. “Walking is parallel to observing,” he writes. “Just as one walks along known roads but the act of walking also lays new paths, so too, although one observes the commandments in established ways, the act of observance itself creates new forms.”³

Should halakhah be an unchanging rule in an ever-changing world or a flexible standard that takes the modern world as it is? Can it be both at the same time?

Even the word itself seems unsure of how the system is supposed to work.



Judaism’s sacred text is also the early written expression of the halakhah. The Five Books of Moses—also called the Pentateuch and, in Hebrew, the Torah—form the first section of the Hebrew Bible, which also includes the books of the Prophets, *Nevi'im*, and the collection of Writings, *K'tuvim*. Together, the three sections are often referred to by their acronym, *Tanakh*. This Torah, this written expression of both the story and law of the Jewish people, probably took its final form before the turn of the millennium and perhaps as early as the Babylonian exile in the sixth century BCE.⁴

³ Urbach, *The Halakhah*, 2.

⁴ Ronald Eisenberg, *The JPS Guide to Jewish Traditions* (Philadelphia: Jewish Publication Society, 2004), 488.

There is a second Torah. The first Torah—the one found in the Hebrew Bible—is called the written Torah, and the second is called *torah she-be-al-peh*, the oral Torah. The oral Torah includes all non-biblical Jewish law, including legislation and laws derived through rabbinic interpretive processes. While the oral Torah was originally unwritten, it has been committed to writing since around 200 CE; thus, the name “oral” Torah is something of an archaism referring to a belief that God gave two Torahs to Moses on Mount Sinai, one in writing and one only orally.⁵

While the written Torah went through a process of canonization that lent it authority as a religious document, the oral Torah went through no such process. However, the oral Torah has been recognized as authoritative for two thousand years. Through the process by which the Jewish people were created, the Sages who composed the oral Torah became the locus of an interpretive community through which the meaning of Jewish legal texts was both interpreted *and created*. The Sages were invested with interpretive authority by the community, empowered and constrained by a standard of discourse accepted by that community. Over time, their authority came, in a way, to rest on the fact that, if they were not authoritative, then the entire Jewish interpretive community would collapse.⁶ Their authority became tautological: The Sages had authority because they had authority. A rabbinic story illustrates the point well.

⁵ Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), 193.

⁶ See Michael S. Berger, *Rabbinic Authority* (Oxford: Oxford University Press, 1998), 132-141.

A gentile once came to [Rabbi] Shammai [who lived between the first centuries BCE and CE] and asked, “How many Torahs do you have?” Shammai said to him, “Two—a Written Law and an Oral Law.” The gentile responded, “I trust you with respect to the Written Law but I do not trust you with respect to the Oral Law. I wish to be converted on the understanding that you will teach me [only] the Written Law.” Shammai rebuked him and angrily sent him away.

The gentile [then] came to [another rabbi, this one named] Hillel, who agreed to convert him [on the gentile’s terms]. On the first day, [Hillel] taught him the alphabet in [the] correct order. The following day, he taught him the alphabet in reverse order. The gentile said to him, “Did you not teach me differently yesterday?”

Hillel responded, “Did you not put your trust in me [to teach you the Written Law]? Depend on me also with regard to the Oral Law.”⁷



The fundamental unit of halakhah is the *mitzvah* (pl. *mitzvot*), or commandment.

One could call a mitzvah an individual Jewish law, and just like laws in the American legal system, a mitzvah may have one of a number of different origins within the legal system.

In the American system, I might begin examining a law by determining whether its origin is the Constitution, an enactment of a legislature, or the decision of a judge or tribunal. In the halakhic system, the first question is whether a mitzvah originates in the Torah or with a rabbinic law or legal decision. That is, I must determine whether the

⁷ Shabbat 31a, as translated in Elon, *Jewish Law*, 191. Throughout, references to the Talmud are to the Babylonian Talmud, and therefore Talmudic references will not be preceded by TB.

mitzvah is *d'oraita*—deriving from the text of the Torah—or *d'rabbanan*—an original creation of the Sages.

This may sound like a simple determination—after all, shouldn't it be obvious if something is written in the Torah or not? However, not all mitzvot considered *d'oraita* are found, word for word, in the text of the Torah. In fact, it is “a well-known fact of rabbinic literature . . . that the talmudic sages regularly employ recognized exegetical principles to interpret the words of the Torah.”⁸ This authority to interpret, and to use common sense to derive such interpretations, is well-acknowledged in the traditional sources.⁹ Indeed, principles drawn from the use of logical reasoning can have the same authority as a statement made explicitly in the Torah.¹⁰

Even still, determining whether a mitzvah is *d'oraita* or *d'rabbanan* is difficult. Rarely did the Sages declare whether they had invented a mitzvah whole-cloth, and the scriptural origins of some mitzvot apparently derived through interpretation may be fuzzy. Ultimately, Rabbi Joel Roth draws four conclusions about the idea of *d'oraita*:

- (1) [the concept *d'oraita*] is a postulate of the [halakhic] system;
- (2) the system itself does not give any precise definition of it or any criterion on the basis of which to categorize *mizvot* as *de-oraita* or *de-rabbanan*;
- (3) there is no definite number of *mizvot* that must systemically be defined as *de-oraita* . . . ;
- and (4) a legitimate difference of opinion concerning the status of any given *mizvah* can have possible ramifications of consequence.¹¹

⁸ Joel Roth, *The Halakhic Process* (New York: Jewish Theological Seminary of America, 1986), 13.

⁹ Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakha* (New York: Ktav Publishing, 1983), 3.

¹⁰ *Ibid.*, 6.

¹¹ Roth, *The Halakhic Process*, 24.

That is to say: some mitzvot are definitely d'oraita, but we don't necessarily know which. Unfortunately, the distinction is an important one and, as Roth points out, making one determination or the other can have real consequences. For example, when mitzvot d'oraita and mitzvot d'rabbanan are in conflict, generally the mitzvah d'oraita takes precedence.¹² For example, a number of Jewish religious observances require fasting. But what if such a fast day falls on the Sabbath, a day during which Jews are commanded to be joyful? Should observers fast? In this case, it matters whether the fast is considered to be d'oraita or d'rabbanan. The fasts—outside of Yom Kippur, the Day of Atonement, which has its own rules¹³—are considered to be d'rabbanan¹⁴ while being joyful on the Sabbath is a mitzvah d'oraita.¹⁵ In this case, then, no fasting should take place, because the d'oraita-d'rabbanan distinction affects our choice between the two mitzvot.

The d'oraita-d'rabbanan distinction does not just help us determine which takes precedence in a given situation. In addition, matters considered d'oraita are generally dealt with more stringently than those considered d'rabbanan. One case of this

¹² Tracey R. Rich, "Halakhah: Jewish Law," *Judaism 101*, accessed March 15, 2017, <http://jewfaq.org/m/halakhah.htm>.

¹³ According to halakhic tradition, fasting on Yom Kippur is a mitzvah d'oraita (Mishnah Yoma 8:1). Another halakhic rule, which gives precedence to more specific rules over more general, require fasting on Yom Kippur even if it falls on the Sabbath.

¹⁴ Eruvin 41a.

¹⁵ Binyamin Tabory, "Simcha (Joy on Shabbat)," *The Israel Koschitzky Virtual Beit Midrash*, accessed March 15, 2007, <http://etzion.org.il/en/simcha-joy-shabbat>.

difference in stringency is in cases of *safek*, doubt. If there is a question of fact that would affect the outcome of a particular case, one should be stringent when the law in the case is d'oraita and lenient when the law in the case is d'rabbanan. The principle is stated "*kol sefeka de-oraita le-humera, kol sefeka de-rabbanan le-kula*," or "every doubt [in a case] d'oraita [should be decided] stringently, every doubt [in a case] d'rabbanan [should be decided] leniently."¹⁶

If the facts have been found, but there is a disagreement amongst the decisors—called in Hebrew *poskim* (sing., *posek*)—whether the facts indicate that the mitzvah was violated or not, the poskim should follow the principle "*be-shel Torah halokh ahar ha-mahmir, be-shel soferim halokh ahar ha-mekel*," that is, if an issue is "from the Torah, follow the more stringent [view], [but if an issue is] d'rabbanan, follow the more lenient [view]."¹⁷ The distinction between matters d'oraita and matters d'rabbanan affects how decisors answer questions of both fact and law.

There is another important ramification of classifying a mitzvah as d'oraita or d'rabbanan. According to the principle "*hem ameru ve-hem ameru*" — which literally translates to, "they said, and they said" — decisors may, under certain circumstances, abrogate a mitzvah imposed only by rabbinic decree.¹⁸ This principle illustrates the "revolution" created by the Talmudic Sages. By creating different categories —

¹⁶ Roth, *The Halakhic Process*, 25.

¹⁷ *Ibid.*, 26.

¹⁸ *Ibid.*, 28.

classifying some mitzvot as d'oraita and some as d'rabbanan—the Sages “opened up possibilities for manipulation and relaxation under certain conditions.”¹⁹

These rules consistently enhance the status of the Torah. By requiring that poskim decide matters d'oraita stringently, the rules create an extra protective bubble around the Torah; poskim are so nervous about accidentally violating a mitzvah d'oraita that they will go out of their way to avoid it.

Obviously, the Torah is considered within the halakhah to be both sacred and authoritative. It is easy to understand why I might follow a rule stated plainly in the biblical text. But the halakhah includes many laws that are either clearly d'rabbanan or connected to the Torah through only an extremely tenuous interpretive link. Why I should follow these rules is much less clear.



How does the Talmud fit in to all of this, and how did it come to be? Because the Talmud is the touchstone, even today, of Jewish law, these are important questions. In fact, there are two Talmuds, the Jerusalem and the Babylonian

The younger of the two is the Jerusalem Talmud, which is also called the *Talmud Yerushalmi*. Scholars at the academy in Yavneh studied the *Mishnah*, a collection of rabbinic laws written by Sages known as the *Tanna'im* (sing. *Tanna*, “Repeaters”)

¹⁹ Adiel Schremer, “*Avot* Reconsidered: Rethinking Rabbinic Judaism,” *Jewish Quarterly Review* 106, no. 3 (Summer 2015): 300-301.

compiled and edited by Rabbi Judah HaNasi. Judah was the leader of the Jewish community in Palestine at the end of the second and the beginning of the third centuries, and his Mishnah became the foundation for later Jewish legal literature. The depth of study engaged in by these scholars who studied the Mishnah, called the *Amora'im* (sing. *Amora*, “Spokesmen”) and the laws they created in reaction to a changing world became an entirely new legal document. Most of this Talmud was redacted—compiled, edited, and organized—in Tiberias in the first part of the fifth century CE.²⁰ However, the political conditions in Tiberias at the time made it difficult to achieve “an orderly [or] definitive redaction.”²¹ Because of the quality of its redaction and the complex political atmosphere, the Jerusalem Talmud was not widely studied, and its authority was eventually eclipsed by the Babylonian Talmud.

Most of the Babylonian Talmud—or the *Talmud Bavli*—was composed by rabbis who lived between the third and sixth or seventh centuries in the part of the Sasanian Empire which now comprises Iraq.²² Like the Jerusalem Talmud, the foundation of the Babylonian Talmud’s text is a commentary on Judah HaNasi’s Mishnah. But—also like the Jerusalem Talmud—the Babylonian Talmud also contains statements unrelated to

²⁰ Elon, *Jewish Law*, 1097.

²¹ *Ibid.*

²² Richard Kalmin, “The Formation and Character of the Babylonian Talmud,” in *The Cambridge History of Judaism*, vol. 4, *The Late Roman-Rabbinic Period*, ed. Steven T. Katz (Cambridge: Cambridge University Press, 2006), 840.

the Mishnah and discussions of *baraitot* (Aram., sing. *baraita*, “external”)—statements from the Mishnaic period not included in Judah’s Mishnah.

Therefore, no single author can be given credit for the Babylonian Talmud, which is actually composed of layers of material from different eras. The earliest material is the *baraitot*, which date to the first through third centuries CE, the Tannaitic period.

Statements from the third through sixth centuries CE—the Amoraic period—form the second layer. Atop both of these are statements not attributed to any particular person which come from the fourth century CE and later.²³ The “fusion” of so many varied sources gave the Talmud “the joint authority of all the generations” before.²⁴ That is, the teachings of a single sage might have been persuasive or informative, especially to the students of that particular sage’s school, and would be endowed with the authority of that individual sage. The collection of so many Sages’ teachings, though, was imbued with the authority of *all* the Sages included, which made it very powerful indeed.

And the Talmud²⁵ was no dry legal document, no simple compendium or collection of legal responses or musings. Even at its most legalistic, the Talmud is composed largely of lively debates, both between named Sages and between anonymous sources. But the Talmud is not composed exclusively of halakhic material. The Talmud “opened its gates wide and absorbed everything which was studied in the [Sages’]

²³ Kalmin, “The Formation and Character,” 840.

²⁴ Urbach, *The Halakhah*, 346.

²⁵ From this point, all references to the Talmud will be to the Babylonian Talmud.

study-halls and everything which had been a subject of discussion and debate among the disciples” of the various Sages.²⁶ This non-halakhic material is called *Aggadah* (“tales/lore”). It includes various collections of wise sayings, philosophical discussions, traditions received from the Sages’ teachers, fanciful stories about biblical characters and the Sages themselves, prayers, poems, proverbs, and so on.²⁷

Even more than that, the Talmud came to include the very Sages upon whose teachings it was based; while we cannot know if stories about the Sages provided in the Talmud are historically accurate, they at least cause the Sages to appear as multi-faceted characters in the Talmud’s text. The *Tanna’im and Amora’im* are not only depicted as “scholars and teachers motivated by an aspiration to piety and the sanctification of life in all its manifestations, but also as private individuals, each with his own defects and virtues, concealing nothing and revealing everything to a degree which is not only astounding to the modern reader, but was also so to earlier generations.”²⁸



What right did these Sages have to make laws that control the actions of the entire Jewish people? And if a rule has no origin in the Torah, why shouldn’t we jettison it at will? While Urbach notes that the word “halakhah” itself “carr[ies] the connotation

²⁶ Urbach, *The Halakhah*, 346.

²⁷ *Ibid.*; Elon, *Jewish Law*, 93.

²⁸ Urbach, *The Halakhah*, 346.

of authority which is in no way inferior to that of the commandments of the Torah,"²⁹ it seems unreasonable that we should be bullied by an implication from a term, if there is no theoretical or practical reason we should submit to rabbinic authority.

A brief foray into American legal history may provide context for answering these questions. Article III of the Constitution provides for an American judicial system. In that system, according to the Constitution, the "judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³⁰ The Constitution empowers these courts with power over all cases in law and equity—that is, where the result may be incarceration or the payment of money—and requires certain matters to be tried by a jury rather than by judges sitting alone.³¹

But today's Supreme Court is, in fact, tasked with a very specific responsibility never mentioned in the Constitution: judicial review. That is, the Supreme Court has the power to declare a law or an executive act to be in violation of the Constitution's requirements. This type of judicial review seems obvious and absolutely necessary to us today, but it had not been included in the Constitution.

So where did this power come from? While a number of state courts had begun reviewing state statutes for constitutionality since the very early days of the United

²⁹ Urbach, *The Halakhah*, 3.

³⁰ U.S. Constitution, art. 3, sec. 1.

³¹ U.S. Constitution, art. 3, sec. 2.

States, the Supreme Court had not been given and had not exercised the same power.³²

In order to engage in judicial review, the Supreme Court would have to give itself the power. In 1803, the Supreme Court heard a case concerning the appointment of one William Marbury as a Justice of the Peace, one of the “midnight judges” appointed at the very end of John Adams’ term as president.

The facts of the case are not important here. The Court determined that a violation of the Constitution had occurred, and therefore found itself faced with the question of “whether an act repugnant to the Constitution can become the law of the land,” that is, whether an unconstitutional law can remain a law.³³ Chief Justice John Marshall, writing for the Court, stressed that the people have the right to establish the fundamental principles of their own government. “And as the authority from which [those principles] proceed,” Marshall wrote, “is supreme, and can seldom act, they are designed to be permanent.”³⁴

But what is the point of a supreme and permanent Constitution “if [its] limits may at any time be passed by those intended to be restrained?”³⁵ Either the Constitution is supreme or it isn’t. If we take for granted that the Constitution is intended to be supreme, then a law passed in violation thereof must not be effective. But what gives

³² See, generally, William Michael Treanor, “Judicial Review before ‘Marbury,’” *Stanford Law Review* 58, no. 2 (November 2005): 455-562, <http://www.jstor.org/stable/40040272>.

³³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): 176, accessed March 10, 2017, <https://supreme.justia.com/cases/federal/us/5/137/case.html>.

³⁴ *Ibid.*

³⁵ *Ibid.*

courts the right to make the determination of whether or not the Constitution has been violated?

It was in answer to this question that Chief Justice Marshall wrote one of the most famous lines in American judicial history. “It is emphatically the province and duty of the Judicial Department,” he wrote, “to say what the law is.”³⁶ If courts are to apply the laws, then they must interpret the laws, and if, in the process of interpretation, they discover that two laws are in conflict, they must decide between the two. Marshall believed that the responsibility given to the courts to decide cases based on laws made by legislatures both *implied* and *required* the courts to interpret the Constitution and to declare acts in violation of the Constitution unconstitutional.

“It is emphatically the province and duty of the [courts] . . . to say what the law is.” Not only do courts have the right to determine the meaning and acceptability of a law; in fact, it is the duty of those courts to do so.



John Marshall was writing about the judicial system of a very young country still struggling to be born, but, in many ways, he might have been writing about the Jewish legal system.

Just as the Constitution provides for the creation and empowerment of courts, the Torah both envisions a legal system and empowers that system’s officials. Indeed, in

³⁶ Marbury v. Madison., 177.

the biblical text, God not only serves as an example of legislator *par excellence*—consider, for example, the long list of laws given by God in Exodus 21—but adds to and adapts the law to fit changing circumstances the way a court might.

Consider, for example, the challenge presented by Zelophehad's daughters in the book of Numbers (27:1-11). When Zelophehad died, he left behind five daughters but no sons. At the time, the laws of inheritance would have provided them nothing, and so the daughters "stood before Moses, Eleazar the priest, the chieftains and the whole assembly" and asked that their "father's name [not] be lost to his clan just because he had no son! Give us a holding among our father's kinsmen" (Num. 27:2-4).

Moses did not have an answer for the daughters, so he "brought their case before the Lord," asking God to be judge in the case. God responded that the daughters were correct, that they should not have been denied their father's property just because he hadn't had any sons. God told Moses to "give them a hereditary holding among their father's kinsmen" by passing to them their father's share of the family's property (Num. 21:7). Then God made clear this was not a single exception to the law but in fact a new law: "[S]peak to the Israelite people as follows," He instructed Moses, "If a man dies without leaving a son, you shall transfer his property to his daughter" (Num. 27:8). God Himself shows that the law can be flexible in order to meet the needs of the time, to

solve problems that the law had perhaps not contemplated.³⁷ In this passage, God is both legislator and judge, exercising both powers simultaneously and setting an example for later rabbinic legislator-judges.

It is one thing for God to interpret and adapt the law. This does not require rabbis to have the same power. Yet even the earliest rabbinic interpreters “appear[ed to] . . . simply assume[] that they were empowered to legislate.”³⁸ Consider the very existence of the Mishnah, which contains only infrequent references to the Torah and is made up, instead, primarily of laws promulgated by early rabbis.³⁹

Still, they needed a justification for this power. Some scholars believe that the Sages felt empowered to legislate because of the connection they had to Moses. In *Pirkei Avot* (the “Chapters of the Fathers,” also called the “Ethics of the Fathers”), a work of short sayings attributed to early Jewish sages, it says that “Moses received the Torah at Sinai and transmitted it to Joshua, Joshua to the elders, and the elders to the prophets, and the prophets to the men of the great synagogue,” thus establishing an unbroken line of authority between Moses and the Sages themselves.⁴⁰ Rabbinic Judaism, in this view, originated at Sinai with the giving of the Torah.

³⁷ Richard S. Rheins, “*Asu Seyag LaTorah: Make a Fence to Protect the Torah*,” in *Re-Examining Progressive Halakhah*, ed. Walter Jacob and Moshe Zemer (New York: Berghahn Books, 2002), 97.

³⁸ *Ibid.*, 99.

³⁹ See, generally, David Kraemer, “The Mishnah,” in *The Cambridge History of Judaism*, vol. 4, *The Late Roman-Rabbinic Period*, ed. Steven T. Katz (Cambridge: Cambridge University Press, 2006), 299-315.

⁴⁰ See Boaz Cohen, *Law and Tradition in Judaism* (New York: Jewish Theological Seminary of America, 1959), 14.

Pirkei Avot is unique among early sources, however, in giving this justification.⁴¹

The *Tosefta*, a collection of laws both reiterating and supplementing the Mishnah and probably dating from the Mishnaic period, provides a different origin of rabbinic authority. The *Tosefta*'s tractate *Eduyot* ("Testimonies") begins with a pastoral tale: "When the sages gathered in the vineyard at Yavneh they said: The time is coming at which a person will go looking for a word of Torah and will not find it, for a word of scribes and will not find it."⁴² A dire prediction, to be sure, but their proposed solution is somewhat unexpected. The problem is that, in the near future, no one will be able to find a word of *Torah*. In response, "[t]hey said: Let us begin: what are of the School of Shammai and what is of the School of Hillel?"⁴³ The solution to a lack of Torah was to compile a list of the teachings of Shammai and Hillel, two famous Sages from the first century BCE. They did not go back to the great assembly or to the prophets or to Joshua for their authority, they went back only a few centuries to Shammai and Hillel.

Moreover, these Sages who gathered at Yavneh were concerned with something *Pirkei Avot* was not. If the Sages of *Pirkei Avot* received their authority directly from Moses, then presumably, their statements had the same authority as Moses'; there was no hierarchy, then, between what Moses' Torah said and what the Sages said. All halakhah, regardless of its source, was equally authoritative. But the Sages of the *Tosefta*

⁴¹ Schremer, "*Avot* Reconsidered," 282.

⁴² Quoted in *ibid.*, 301.

⁴³ Quoted in *ibid.*, 302.

find their *rabbinic authority* in other rabbis and begin their endeavor by distinguishing between Hillel and Shammai. If all teachings are equally authoritative, the distinction between Hillel and Shammai is meaningless. The only reason, then, to distinguish between them is to begin creating a hierarchy in halakhic teachings.⁴⁴

If the revolution of Rabbinic Judaism was its ability to hierarchize and therefore to call some laws malleable and open to change, it could not have originated in a purely *Pirkei Avot* structure where the authority of Moses and the authority of the Sages was one and the same. If the Sages wanted to make legal changes, to allow halakhah to become a living system open to sometimes radical reenvisioning, they actually needed to speak with a voice a little less divine, a little more human.



Regardless of where the Sages of *Pirkei Avot* located their authority, they did know what they were responsible for doing. *Pirkei Avot* goes on to say that the so-called men of the great synagogue taught three things: “be patient [in the administration of] justice, rear many disciples, and make a fence around the Torah.”⁴⁵ These “fences” around the Torah are the extra-biblical laws established by the Sages, laws that *Pirkei Avot* apparently saw as protecting the Torah’s laws from accidental violation.

⁴⁴ Schremer, “*Avot* Reconsidered,” 308.

⁴⁵ Quoted in Rheins, “*Asu Sayag LaTorah*,” 99.

But the Sages faced a problem not faced by Chief Justice Marshall. While the Constitution was merely silent on the question of constitutional review, the Torah is not so generous towards its judges. Deuteronomy 4:2 says, “You shall not add (Heb., “*lo tosifu*”) anything to what I command you or take away (Heb., “*lo tigre’u*”) anything from it, but keep the commandments of the LORD your God that I enjoin upon you,” a command repeated at Deuteronomy 13:1.⁴⁶ At first glance, these verses appear to severely constrain the legislative power of Jewish judges, restricting them only to application of the laws already written.

So the Sages did what Marshall would do nearly two thousand years later: they interpreted the law to encompass their own power, never officially giving themselves legislative power but exercising it nonetheless.⁴⁷ The *Sifre* on Deuteronomy, a book of legal exegesis (*midrash halakhah*) redacted at the same time the Talmud was being composed, commented on Deuteronomy 13:1. The writers of the *Sifre* gave examples of what the commands “you shall not add” and “you shall not take away” meant. From “you shall not add,” they wrote, “we learn that people may not add to the number of species in a *lulab* or the number of threads in show-fringes”; and from “you shall not take away,” “we learn that people may not diminish” the numbers of either of those

⁴⁶ In Deuteronomy 13:1 the command is singular rather than 4:2’s plural: “Every thing that I command you, be careful to do it. Do not add (*lo toseif*) to it and do not take away (*lo tigre*) from it.”

⁴⁷ Cohen, *Law and Tradition*, 16.

items.⁴⁸ Rashi (Shlomo Yitzchaki, 1040-1105, France), a medieval French commentator added that “you shall not add” also indicates that a person cannot add a fourth blessing to the biblical threefold priestly blessing.⁴⁹ That is to say, the commentators in *Sifre* and Rashi limited this command only to situations where biblical mitzvot require a certain number of objects, recasting “you shall not add” merely as a prohibition on increasing or decreasing these specific numbers of items.

Nachmanides (Moses ben Nachman or “Ramban,” 1194-1270, Spain/France) did not interpret *lo tosifu* as narrowly as *Sifre* and Rashi. Even still, he believed that rabbis had the power to create new rules not expressed in the Torah so long as the new rule was intended to be a *gader*, a fence, around the mitzvot in the Torah in order to protect the Torah’s mitzvot from being violated. However, these fences are acceptable only so long as a person believes that rabbinic additions to the law are permitted at all.

Nachmanides accepted rabbinic additions as long as “one realizes that these [ordinances] . . . were enacted as a fence and are not from the mouth of the Holy One, Blessed be He, in the Torah,” that is, so long as it was clear that rabbinic ordinances did not have the same authority as the Torah.⁵⁰

⁴⁸ Jacob Neusner, trans., *Sifre to Deuteronomy: An Analytical Translation*, vol. 1, *Pisqaot One through One Hundred Forty-Three: Debarim, Waethanan, Egeb, Re’eh* (Atlanta: Scholars Press, 1987), 230.

⁴⁹ “Devarim – Deuteronomy – Chapter 13: The Complete Jewish Bible with Rashi Commentary,” *Chabad.org*, accessed March 9, 2017, http://www.chabad.org/library/bible_cdo/aid/9977#showrashi=true.

⁵⁰ Nahmanides (Ramban), “Ramban on Deuteronomy: Deuteronomy 4:2,” *Sefaria*, accessed March 9, 2017, http://www.sefaria.org/Ramban_on_Deuteronomy.4.2.1 (translation by author).

Maimonides (Moses ben Maimon or “Rambam,” 1135?-1204, Spain/Egypt)

similarly permitted a rabbi to create a new rule as a “*sayag latorah*,” a “safeguard for the Torah.”⁵¹ He explains the rabbis’ power thus:

What then is the meaning of the Scriptural prohibitions, “Do not add to it and do not detract from it”?

[This means that they lack the authority] to add to the words of Torah or to add to them or to establish a matter forever as [if it were] from the Torah. [This applies] to both the written Torah and the oral Torah.

What is implied? The Torah states [at Exodus 23:19], “Do not cook a kid in its mother’s milk.” According to the oral tradition, we learned that the written [Torah] forbade the cooking and the eating of meat and milk, whether the meat of a domesticated animal or the meat of a wild animal. But the meat of fowl is permitted [to be cooked] in milk according to the Torah. If a court came along and permitted [eating] the meat of a wild animal [cooked] in milk, that is detracting [from the Torah]. And if it forbids the meat of fowl [cooked in milk] saying that this is included in “the kid” forbidden in the Torah, that is adding to the Torah.

But perhaps [the court] says, “The meat of fowl is permitted [according to] the Torah, but we are prohibiting it and publicizing [the prohibition] to the people as a *gezerah* [rabbinic decree], lest the matter lead to a detriment and [the people] say: ‘[Eating] fowl [cooked in milk] is permitted, because it is not explicitly forbidden [by the Torah]. Similarly, [eating the meat] of a wild animal [cooked in milk] is permitted, because it is not specifically prohibited!’ Then someone else will come along after and say, ‘Even the meat of a domesticated animal is permitted [cooked in milk] outside of the goat.’ Then someone else will come along after and say, ‘Even the meat of the goat is permitted in cow’s milk or sheep’s milk. For the verse mentions only “its mother,” that is, [an animal] of the same species.’ Then someone else will come along after and say, ‘Even [a goat cooked] in goat’s milk as long as [the milk] is not its mother’s! For the

⁵¹ Maimonides, *Mishneh Torah: Sefer Shoftim: Hilchot Mamrim* §2.9, accessed March 10, 2017, http://www.chabad.org/library/article_cdo/aid/1181853/jewish/Mamrim-Chapter-2.htm.

verse says, “its [own] mother.” For these reasons, we shall forbid all meat [cooked] in milk, even meat of a fowl.’

This is not adding [to the Torah]. Rather it is creating a safeguard around the Torah. And this is true in all similar situations.⁵²

Maimonides used logic to imagine how people might react upon hearing a certain pronouncement: They might make reasonable inferences from the ruling and the behavior of others and eventually violate the Torah’s rule. So long as the court does not say, “This law is written in the Torah” – which it is not – they are free to create laws that safeguard the Torah’s laws against violation.



This explains how Jewish courts—already invested with judicial and legislative power—can make new laws. It does not explain how these courts received this judicial and legislative power in the first place.

In *Marbury*, Marshall found the right of the judiciary to interpret the constitution and determine the constitutionality of enacted laws in the very existence of the Constitution. “The theory,” he wrote, that unconstitutional laws may not stand “is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society.”⁵³ That a written Constitution exists means logically that laws violating it must be unacceptable. And if

⁵² Maimonides, *Mishneh Torah: Sefer Shoftim: Hilchot Mamrim* §2.9 (translation adapted by author).

⁵³ *Marbury v. Madison*, 177.

unconstitutional laws can have no effect, it must be the province of the judiciary to determine that constitutionality, as the branch of government tasked with hearing “all cases arising under the Constitution.” Otherwise the courts would be forced to decide “a case arising under the Constitution . . . without examining the instrument under which it arises.”⁵⁴ If the courts cannot interpret the Constitution, they cannot apply it, and this would make the judiciary laughably useless, hamstrung by its own authorizing document.

The Sages did not need to appeal to unstated but fundamental principles to find their own right not only to interpret but to legislate. Deuteronomy 17:4 invests local courts with the power to “make a thorough inquiry” into alleged violations of the law. But if a case is “too baffling” for the local officials to decide, the judge should “promptly repair to the place that the Lord your God will have chosen” — that is, the Temple — “and appear before the levitical priests, or the magistrate in charge at the time, and present your problem” (17:8-9). When that higher authority announces its decision, the lower official must “carry out the verdict that is announced . . . act[ing] in accordance with the instructions given . . . [Y]ou must not deviate (Heb., *lo tasur*) from the verdict that they announce to you either to the right or to the left” (17:10-12).

The authority to issue legal decisions naturally requires the authority to interpret the law. Since “[l]aws are necessarily expressed in human language, no matter what

⁵⁴ Marbury v. Madison, 179.

their imputed origin may be . . . their meaning must be declared by a judge, or court, or some authority which has the power to execute or enforce them.”⁵⁵ To determine the right answer in a legal dispute, a court must decide which law applies, what that law means, and whether the facts of a particular situation amount to a violation of that law. All of these are interpretive steps, because laws are written in inevitably imprecise human language.

After the destruction of the Temple, Deuteronomy 17:8-9 needed to be reinterpreted. The “place the Lord your God will have chosen” —that is, the Temple— was no longer standing and the levitical priests no longer had any judicial authority, and so the Sages stepped in to fill the gap. The Sages “saw themselves as the rightful heirs to judge, guide and instruct the Jewish people in the post-Temple era,” when there was no levitical priest or special magistrate to whom one might look for answers.⁵⁶ And because the Torah says *lo tasur*, “you must not deviate,” from the decisions of these authorized courts, *lo tasur* became an important basis on which the Sages grounded their own authority.



But the power of the rabbis to legislate by making decisions from which Jews *lo tasur* cannot be unlimited. Chief Justice Marshall would never have said that the

⁵⁵ Cohen, *Law and Tradition*, 40.

⁵⁶ Rheins, “*Asu Seyag LaTorah*,” 100.

Supreme Court could simply rewrite the text of the Constitution at will or even pass a new law in place of one declared unconstitutional; even the power of judicial review has its limits. Similarly, the power of the Sages was circumscribed, especially if the Sages wanted to be viewed as legitimate inheritors of the judicial and legislative powers of the prophets and the great synagogue.

The borders of the Sages' authority were marked by hermeneutical rules, *middot*—that is, special rules of interpretation—that reined in illegitimate interpretations. However, there was no *single* listing of hermeneutical rules according to which all Sages interpreted scripture. Different Sages preferred different hermeneutical systems. The most striking way in which these systems differed was how they decided between relevant laws. Sometimes, two different laws might apply to a given set of facts, each law leading to a different legal outcome; therefore, which law a judge decides governs the situation is very important indeed.

These *middot* relate to different aspects of interpretation: grammar, exegesis, analysis of certain words and letters, numerical analysis (*gematria*), word division and word re-division (*notarikon*), logical deduction, and so on. Three of the most important collections of *middot* are ascribed to Hillel, Ishmael, and Eliezer ben Yose ha-Gelili. Though, as just mentioned, rabbinic interpretation was guided by many different kinds of rules, the collections of Hillel, Ishmael, and Eliezer ben Yose ha-Gelili are mostly

limited to rules of logical deduction.⁵⁷ A few examples of such middot will illustrate how middot in general work.

One set of middot help a rabbi draw inferences between different verses or laws. *Kal v'homar*, "light and heavy," is a principle that deals with how to move from one premise about which a rabbi feels very sure to a premise in which the rabbi has less confidence. In English, we call this argument "how much the moreso." For example, "If it is illegal to drive 75 MPH where the speed limit is 70 MPH, how much the moreso if the speed limit is 25 MPH!" *Gezerah shavah*, "a comparison with the equal," like *kal v'homar*, allows a rabbi to gain more information about one law or premise by comparing it to another. In this case, if a word is used in two laws in the Torah, the rabbi can assume that it means the same thing in both places. *Binyan av*, literally "building through a father," allows a rabbi to derive a rule from a verse or pair of verses and apply that rule to all similar cases.⁵⁸

Another set of middot help the rabbi understand a particular verse. *Klal u'prat*, "generality and specific," says that if a rule gives a general category followed by a list of specifics within that category, only those specifics are meant to be included in the general category. For example, in Leviticus 1:2, the Israelites are instructed to bring their sacrifices "from the domesticated animals, from the cattle or the flock." Here, *klal u'prat*

⁵⁷ "Talmud Hermeneutics," *Jewish Encyclopedia*, accessed March 15, 2017, <http://www.jewishencyclopedia.com/articles/10801-middot-the-seven-of-hillel>.

⁵⁸ Daniel A. Klein, "Rabbi Ishmael, Meet Jaimini: The Thirteen Middot of Interpretation in Light of Comparative Law," *Hakirah: The Flatbush Journal of Jewish Law and Thought* 16 (2013): 92.

tells us that by “from the domesticated animals,” the verse means *only* from the cattle or the flock and therefore does not include other domesticated animals like chickens, cats, or horses.⁵⁹ On the other hand, if the list of specifics is followed by the mention of a general category, *prat u’klal* tells us that the entire general category is meant, and the specifics are only examples.⁶⁰

Klal u’prat u’klal tells us what to do when a rule starts with a generality, lists a certain number of specifics, and then ends with another generality. This rule tells us that while the list of specifics is not meant to be totally exhaustive, the rule is talking only about things *like* that list of specifics. If a person was instructed, “Eat whatever you’d like: the apples, the bananas, the grapes, whatever you’d like,” then *klal u’prat u’klal* would tell the person that she can eat whatever she would like so long as it is from the class “fruits.” She could not, for example, eat the hamburgers or the ice cream or the family pet.⁶¹

The previous principles, however, only apply when either the generality or the specific appears at first glance unnecessary to understanding the rule. If, in fact, both the generality and the specific are *required* to understand the rule, then none of the previous

⁵⁹ Jack Abramowitz, “Torah Methodology #4 – Klal U’Prat,” *Orthodox Union*, accessed March 15, 2017, <https://www.ou.org/torah/gemara/the-13-rules-of-rabbi-yishmael/methodology4/>.

⁶⁰ See, for example, Exodus 22:9: “When a man gives to another an ass, an ox, a sheep, or any other animal to guard...” In this case, the ass, ox, and sheep are just examples and this rule applies when a man gives *any* animal to another person to take care of.

⁶¹ Jack Abramowitz, “Torah Methodology #6: Klal U’Prat U’Klal,” *Orthodox Union*, accessed March 15, 2017, <https://www.ou.org/torah/gemara/the-13-rules-of-rabbi-yishmael/methodology6/>.

klal/prat rules apply. For example, Deuteronomy 15:19 says, “Every firstborn that is born in your herd and in your flock, the male you shall sanctify to the Lord.” Neither “firstborn” nor “male” are unnecessary—each appropriately limits the other and therefore both are operative.⁶²

There are many other such middot that help interpreters navigate the often difficult scriptural text. Interpreters like Hillel and Ishmael used these middot to decide which parts of the text were really important—that is, which parts provided new information about how humans should conduct their behavior. Akiva, on the other hand, believed that there were no superfluous phrases, words, syllables, or letters in the Torah and that, therefore, each needed to be interpreted.



While the middot of Sages like Ishmael and Hillel guided rabbinic interpretation of scripture, different principles governed rabbinic power to create wholly new legislation prohibiting or requiring certain actions. While we have established that, in general, the Sages did not feel permitted to jettison mitzvot d’oraita altogether, certain exceptions existed. Certain principles both authorized rabbis to permit violations of mitzvot d’oraita and limited this power.

⁶² Jack Abramowitz, “Torah Methodology #7: Klal shehu Tzarich l’Prat/Prat shehu Tzarich l’Klal,” *Orthodox Union*, accessed March 15, 2017, <https://www.ou.org/torah/gemara/the-13-rules-of-rabbi-yishmael/methodology7/>.

The first principle, “*shev v'al ta'aseh*” (“sit and do not do”), for example, concerns “positive commandments.” Positive commandments are those which require the performance of a certain act or acts, while their counterpart, negative commandments, are those which require a person to refrain from doing something. *Shev v'al ta'aseh* empowers a rabbinic court to legislate that a particular “positive commandment” not be carried out, even if this would result in a passive violation of a mitzvah.⁶³ Using this principle, for example, the Sages prohibited the blowing of the *shofar*—a ceremonial horn—on the holiday Rosh Hashanah, an action required by the Torah, if Rosh Hashanah fell on the Sabbath. This prohibition was based on the fear that a person might inadvertently carry the *shofar* too far and incidentally violate the rules of the Sabbath related to carrying objects.⁶⁴

The converse of *shev v'al ta'aseh* is “*kum va'aseh*,” “get up and do.” According to this principle, the Sages could require the performance of certain acts prohibited by the Torah; that is, they could require the violation of a negative commandment. This principle was not universally accepted by the Sages. The Talmud records a conflict between two Sages—Rabbah and Ḥisda—over whether they had the power to compel violation of the Torah.⁶⁵ Ḥisda argued that rabbinic courts had the power to legislate even if their legislation required the violation of the Torah. Rabbah rejected Ḥisda’s

⁶³ Elon, *Jewish Law*, 505.

⁶⁴ *Ibid.*, 506.

⁶⁵ Yevamot 90b.

position; while requiring passive violation was acceptable, requiring active violation was simply too much.

Ultimately, the Sages rejected the power of *kum va'aseh* by adopting Rabbah's position. However, they allowed three exceptions when *kum va'aseh* could be utilized, exceptions broad enough to give the Sages wide authority to require violations of the Torah.

The first exception is called "*hefker bet din hefker*," "what the court nullifies is nullified" or, more colloquially, "the court has the power to expropriate property."⁶⁶ This exception allowed the Sages power to create new legislation that requires the performance of a negative commandment in the area of the property ownership by granting Jewish courts the power to expropriate the property of an individual and even to transfer ownership of that property to another individual.⁶⁷ While this exception may sound narrow, in reality it forms the basis for much of the halakhah on property, wills, and actions involving monetary compensation for harm.⁶⁸ *Hefker bet din hefker* was also the basis of one of the most well-known halakhic decisions, Hillel's famous "*prosbul*" (a Greek term of uncertain meaning).⁶⁹ According to the Torah, every seventh year should bring with it the remission of debts in which all creditors release all of their debts (Deut.

⁶⁶ Elon, *Jewish Law*, 507.

⁶⁷ Joshua Ratner, "Hard Choices," *Rabbinical Assembly*, accessed March 15, 2017, http://www.rabbinicalassembly.org/sites/default/files/public/social_action/hard-choices/hard-choices.pdf.

⁶⁸ Elon, *Jewish Law*, 510.

⁶⁹ *Ibid.*, 511; David Curwin, "Prosbul," *Balashon* (October 8, 2007), <http://www.balashon.com/2007/10/prosbul.html>.

15:1-2). This system may have worked well in an era when most loans were agricultural loans which could be paid from the next harvest; it did not work very well in the urban commercial economy in which many Jews lived by Hillel's era (first century BCE to first century CE). Hillel issued a legislative decree allowing a creditor to appear in front of judges and announce that all he would be able to continue to collect all of his outstanding debts, regardless of the sabbatical year. The judges would then sign witnessing that they had heard the creditor's statement.

Later commentators struggled to explain Hillel's decree, which required the debtors to pay money which the sabbatical year should have remitted. Rava, an *Amora* from the early fourth century CE, argued that Hillel had used *hefker bet din hefker*. What the court had done, by signing that they had heard the creditor's demand, was transfer ownership of the owed funds from the debtor to the creditor. Thus, when the creditor later collected the money, he was collecting *his own money*, not that of the debtor.⁷⁰ This legal fiction gave creditors the power to collect debts even after the sabbatical year should, by law, have nullified the debt.

The second exception, "*le'migdar milta*," "to safeguard the matter," allowed the Sages to issue legislation in criminal law cases, even if the legislation required violations of the Torah, if the exigencies of the time required it.⁷¹ For example, the Talmud records

⁷⁰ Elon, *Jewish Law*, 513.

⁷¹ *Ibid.*, 515.

that Rabbi Eliezer ben Jacob, a *Tanna* from the first century, said, "I have heard that the court may impose flogging and punishment not prescribed in the Torah . . . not to transgress the law of the Torah, but in order to make a fence around the Torah."⁷²

The third exception, "*hora'at sha'ah*," "a decision for the hour," allowed the Sages to create legislation requiring violation of the Torah if the measure was only temporary and was required to bring people back to the faith.⁷³ The Sages took their ability to issue this type of legislation from the story of Elijah offering a sacrifice on Mount Carmel (1 Kings 18:19-46) even though the Torah forbids the offering of sacrifices anywhere but the central Temple in Jerusalem (Deut. 12:13-14). The Sages viewed Elijah's sacrifice as a desperate act to bring back the people from the worship of a foreign god and therefore defensible. They gained more support for the power of *hora'at sha'ah* from the verse, "It is a time to act for the Lord, for they have violated Your Torah" (Psalms 119:126), which suggests a power to violate the Torah to bring people back to the Torah.⁷⁴



The Sages thus clearly believed that and acted as if they had the power to interpret the Torah, issue decisions based on those interpretations, and even to issue extra-biblical legislation. But these decisions, even if rabbis had the power to make them, must exist at some lower level of authority than the Torah itself; or, if they are at the

⁷² Sanhedrin 46a, as translated in Elon, *Jewish Law*, 515.

⁷³ Elon, *Jewish Law*, 519.

⁷⁴ See *ibid.*, 520n117.

same level of authority, there is a danger that members of the community will question them, because they are “only” rabbinic laws.⁷⁵

But if these decisions and enactments are viewed as being of lesser authority than the Torah, it follows that they may need special protection to guard against their violation. The system would be perilously unstable if any Jew might refuse to follow a rabbinic decree because he believed the Torah took a different and therefore superior position. Indeed, “[i]f we left every person to interpret the law for himself, there would be as many versions of Judaism as there are Jews.”⁷⁶

The Sages were aware of this instability. In the Talmud tractate Rosh Hashanah, the Sages anonymously discuss certain days on which fasting is prohibited.⁷⁷ The text notes a discrepancy—for certain holidays, fasting is prohibited on the holiday itself *and* on the days before and after the holiday, while for other holidays, fasting is permitted on the days before and after. The text determines that the second class of holidays—those when a person does not fast on the day before or after the holiday itself—are holidays decreed in the Torah. These scriptural holidays do not need special “buffer” days around them because “they are [from] the words of Torah, and the words of Torah do not require strengthening.” The rabbinically decreed holidays, however, are from “the

⁷⁵ Rabbi Jack Abramowitz comments on this phenomenon—it’s “only rabbinic law!”—at Jack Abramowitz, “495. It’s ‘Only’ D’Rabbanan: The Obligation to Follow the Rulings of the Sanhedrin,” *Orthodox Union*, accessed March 15, 2017, <https://www.ou.org/torah/mitzvot/taryag/mitzvah495/>.

⁷⁶ *Ibid.*

⁷⁷ Rosh Hashanah 19a.

words of the Sages, and the words of the Sages require strengthening.” Sometimes, then, a rabbinic law may be more stringent than a mitzvah d’oraita and require more than the Torah’s text seems to demand.

So while it may seem, at first glance, that rabbinic law must occupy some less-authoritative space than mitzvot d’oraita, the stability of the halakhic system requires that rabbinic law be followed as strictly as law clearly d’oraita. The Talmud records a discussion of whether a blind person is excluded from the mitzvah of reading the Haggadah, a document read at the Passover Seder which includes the story of the Exodus from Egypt. Rav Aḥa bar Ya’akov believes that the Torah itself exempts blind people from the requirement of reading the Haggadah. The text replies that several stories were known of blind Sages who recited the Haggadah on behalf of others, which means that they were also required to read it.⁷⁸ The text defends this by saying that “*b’zman hazeh*,” “these days,” the requirements to eat matzah and read the Haggadah at the Seder are rabbinic requirements, not requirements d’oraita. How can Aḥa maintain that a blind person is exempted by the Torah from reading the Haggadah when it is

⁷⁸ Only a person equally obligated under the halakhah can perform a mitzvah on another’s behalf. Pamela Barmash, “Women and Mitzvot,” *The Rabbinical Assembly* (April 29, 2014), <https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/womenandhiyyuvfinal.pdf>.

generally accepted that the requirement to read the Haggadah is rabbinic? The Talmud replies that “everything that the Sages decreed, they decreed as (equal to) the Torah.”⁷⁹



So, now we must ask: how did the Sages make these “decrees”? In general, there are two methods of issuing a rabbinic decree, either issuing new legislation or circulating legal decisions. The Sages regularly created new laws by promulgating novel legislation. As noted above, when constructing their own power, the Sages gave themselves the power to add to or subtract from the Torah, at least in certain circumstances.

If the rabbis have broad power of interpretation, which will be discussed in a moment, why do they need the power to legislate? That is, couldn't they just interpret the text to say whatever they want? Despite the Torah's breadth, the world has changed dramatically since it was written, and it therefore simply fails to provide rules for certain situations. These gaps, or *lacunae*, must be met with “corrections and changes” that take two legislative forms: the *gezerah* (pl. *gezerot*), or decree, and the *takkanah* (pl. *takkanot*), or ordinance.⁸⁰ Historically, *gezerot* were pieces of legislation that further restricted action or added prohibitions to the Torah, while *takkanot* were “intended to correct a situation

⁷⁹ Pesachim 116b, *The William Davidson Talmud*, accessed March 15, 2017, <http://www.sefaria.org/Pesachim.116b>.

⁸⁰ Roth, *The Halakhic Process*, 154.

in a positive manner” by requiring Jews to do more than the Torah required.⁸¹ Thus, while *gezerot* are like the “fences” made around the Torah—further prohibitions to protect people from accidentally breaking a central mitzvah—a *takkanah* “initiates something new and thus it corrects an aberration which has developed.”⁸²

Some of these new laws did not originate from the minds of the Sages but rather were codifications of customs, or *minhagim* (sing. *minhag*), both of the people generally and of specific individuals.⁸³ For example, “[t]he practice of a man of Rabban Gamaliel’s stature”—a well-respected sage—“had no less validity than an official *takkanah*.”⁸⁴ Even if a practice is widely practiced by the public, it requires the imprimatur of “a recognized figure or an accepted institution to make it into a *halakhah*.”⁸⁵



Aside from creating entirely new legislation, the Sages could create new legal standards by issuing decisions on legal questions. A decision of this type is called a *g’zer din*, a legal decree, and these decisions may have precedential value, either compelling later judges to decide similarly or at least guiding their decision-making. The body of

⁸¹ Urbach, *The Halakhah*, 7.

⁸² Ibid.

⁸³ See, generally, chapter three of Roberta Rosenthal Kwall, *The Myth of the Cultural Jew: Culture and Law in Jewish Tradition* (Oxford: Oxford University Press, 2015)

⁸⁴ Urbach, *The Halakhah*, 37.

⁸⁵ Ibid., 38.

precedent is called collectively *ma'asim* (sing. *ma'aseh*, “doing/deed”). Such precedents have, over time, become accepted halakhah.⁸⁶

In order for an individual *g'zer din* to become authoritative precedent that can bind later judges, those judges must accept as authoritative the process by which the original court came to its original decision.⁸⁷ That is, if we are to accept as valid precedent one of the Sages' decisions, we must accept that their methods of exegesis and interpretation are valid ways to determine the meaning of biblical commandments and to extrapolate the unsaid from the biblical text. We must accept the very system that the rabbis invented for themselves.

The system of *ma'asim* began very early, primarily with explanations of words or terms that early Sages did not understand. They typically explained these words or terms by looking to other verses in the Tanakh that might shed light on the word's meaning, usually because the same word was used in a different context.⁸⁸ That explanation was then used by other Sages when they were called upon to interpret scripture. Over time, exegesis and interpretation were accepted as valid legal sources and so study—of the Bible and of other legal literature—became the primary way in which law was developed.⁸⁹ While the Torah might not say something explicitly, the Sages used their exegetical and interpretive methods, the middot discussed above, to

⁸⁶ Urbach, *The Halakhah*, 77.

⁸⁷ *Ibid.*, 89.

⁸⁸ *Ibid.*, 96.

⁸⁹ *Ibid.*, 107.

derive new laws and to reinterpret laws that might have appeared clear in the Torah. This gave rabbis great flexibility in deciding legal questions. The Sages no longer needed explicit biblical references to make a decision or issue a decree, but only “supports and hints” from the Torah.⁹⁰

Surely, however, this new methodology – which relied less and less on the biblical text and more and more on these “supports and hints” – created a certain danger. The Sages themselves seem to have recognized this danger as early as the Mishnah. The Mishnah says that the laws of the dissolution of vows, which are only vaguely alluded to in the Torah, “fly in the air and have nothing to support them.”⁹¹ The numerous laws of the Sabbath, about which only a small amount is written in the Torah, “are like mountains suspended by a hair.”⁹² The Sages who responded to the Mishnah bristle at its suggestion that there are no supports for these laws and adduce a number of scriptural references that, they insist, support the dissolution of vows and the laws of the Sabbath.⁹³ Other concerns related to this nearly limitless power of interpretation will be considered below.



This “top down” approach is the dominant narrative used to explain the development of the halakhah: The Sages of old and their rabbinic successors create law

⁹⁰ Urbach, *The Halakhah*, 109.

⁹¹ Ḥagigah 10a, *The William Davidson Talmud*, accessed March 15, 2017, <http://www.sefaria.org/Chagigah.10a>.

⁹² Ibid.

⁹³ Ibid. 10a-10b.

that the community then follows. This “hegemonic conception . . . understands law’s development from the perspectives of society’s most dominant, or powerful, viewpoints.”⁹⁴ Because rabbis have been the ones to write Jewish legal history, they have emphasized their own power to create and enforce law. But this is hardly the only way to view a legal system, including the halakhic system.

Instead of a hegemonic system, law can be viewed as a system that reflects the culture of which it is a part and a creator of that culture. Law can have “the capacity to reflect and constitute social forces and relationships of power.”⁹⁵ Law, then, is reciprocal: It is a product of culture, society, and power structures at the same time as it creates culture, society, and power structures. When viewed this way, law is not objective or autonomous—self-evident and self-creating—but is deeply subjective and entirely context-dependent.⁹⁶

One result of studying halakhah largely from a hegemonic perspective is that the role of custom seems to be consistently underestimated in the development of the halakhah. But “custom” describes the lives of the actual people subject to the halakhic system, and while those lives are molded by the halakhah, the halakhah is also molded by these customary practices. The incorporation of custom into legal decision-making

⁹⁴ Kwall, *The Myth of the Cultural Jew*, 5.

⁹⁵ *Ibid.*, 8.

⁹⁶ *Ibid.*

creates a “feedback loop . . . in which custom influences the law, the law reinforces the custom, and the custom then becomes further entrenched.”⁹⁷

Perhaps even more importantly, the top-down understanding of halakhah almost entirely ignores the cultural realities in which the halakhah developed. Jewish legal culture, like every other culture, is “not hermetically sealed but continuously interact[s] with the world around [it].”⁹⁸ The halakhic system did not develop in a single direction, rabbi to layman, authority to subordinate. It did not develop in a sealed bubble, ignorant of and unaffected by changes in the world around it. And it did not develop only in clearly written laws or purely legal decisions. It developed *out of* a narrative of rabbinic power; it utilized the power of narrative to contextualize and support itself; it created a narrative of Jewish life and law that *required* the halakhic system. Indeed, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”⁹⁹ Because law is embedded in narrative—both a product of narrative and a producer of narrative—it “becomes not merely a system of rules to be observed, but a world in which we live.”¹⁰⁰

Perhaps this narrative element can be equated to the aggadah. The aggadah played a major role in the Talmud, which uses narrative to create a world lush with

⁹⁷ Jennifer E. Rothman, “The Questionable Use of Custom in Intellectual Property,” *Virginia Law Review* 93, no. 8 (Dec. 2007): 1946. While Rothman was writing about the American system of intellectual property law, her observation seems equally as pertinent to the halakhic system.

⁹⁸ Kwall, *The Myth of the Cultural Jew*, 23.

⁹⁹ Robert M. Cover, “Forward: Nomos and Narrative,” *Harvard Law Review* 97, no. 1 (Nov. 1983): 5.

¹⁰⁰ *Ibid.*

contradiction and community, even as it establishes the Sages as the arbiters of law.¹⁰¹ But the role aggadah would be minimized as the halakhah developed, and while Jews would continue to live their own narrative, it would appear less and less often in halakhic sources.



Over time, legal literature shifted from the lively debate that defines the Talmud to compilations of laws largely regarded as fixed. Unsurprisingly, then, work turned from interpreting the Torah or the halakhah to collecting and organizing the rules interspersed almost at random throughout the Talmud. The earliest legal code with known authorship is the *Sefer ha-She'iltot* (“*The Book of Questions*”) by Aḥa (Babylonia, eighth century CE). While this book is probably a collection of sermons, it is largely halakhic and codificatory.¹⁰² Other early attempts at codification include *Halakhot Pesukot* (“*Settled Laws*”) by Yehudai Gaon and *Halakhot Gedolot* (“*Great Laws*”) by Simeon Kayyara, both of whom lived in Babylonia in the eighth century CE.¹⁰³

In the eleventh century, rabbi Yitzḥak Alfasi (“Rif,” 1013-1103, Fez) composed *Sefer ha-Halakhot*, the Book of the Halakhot. Alfasi was considered to be the leading authority on the Talmud in Spain, where he settled after being forced to flee North

¹⁰¹ Samuel J. Levine, “*Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*,” *Utah Law Review* no. 4 (1998), 492.

¹⁰² Elon, *Jewish Law*, 1150.

¹⁰³ *Ibid.*, 1153-1156.

Africa.¹⁰⁴ In this book, Alfasi compiled many, but not all, of the legal decisions the Sages reached in the Talmud, limiting his code only to those laws still of practical relevance in the post-Temple period.¹⁰⁵ However, he maintained the same organizational system as the Talmud, which is to say, hardly any organizational system at all, and therefore laws on related topics were not grouped together. Importantly, Alfasi included not just the final Talmudic ruling but also statements he considered important to the conclusion; studying just *Sefer ha-Halakhot* therefore introduced a student to the main ideas in the Talmudic discourse.¹⁰⁶ Maimonides would later praise Alfasi's code, writing in his commentary to the Mishnah that the code of Alfasi "suffices to supplant all the others [that came before it], because [it] includes all the legal judgments and decisions needed in our times . . . [Alfasi] clarified and corrected all the errors that crept into legal works that antedated him. We cannot find difficulty therein save in very few [cases]."¹⁰⁷

While several smaller efforts at codification occurred after Alfasi's, the next major code was written by Maimonides, an Andalusian rabbi who was acclaimed even in his own lifetime. Between 1170 and 1180, Maimonides compiled his *Mishneh Torah* ("Restatement of the Torah"). In its introduction, Maimonides wrote that "from the whole of the two Talmuds, the *Tosefta*, the *Sifra*, and the *Sifre* one can derive the forbidden and

¹⁰⁴ Elon, *Jewish Law*, 1168.

¹⁰⁵ Ronald Eisenberg, *Essential Figures in Jewish Scholarship* (Lanham, MD: Jason Aronson, 2014), 47; Elon, *Jewish Law*, 1169.

¹⁰⁶ Elon, *Jewish Law*, 1169.

¹⁰⁷ Maimonides, *Introduction to His Commentary on the Mishnah*, trans. Fred Rosner (Northvale, NJ: Jason Aronson, 1995), 107.

the permitted, the impure and the pure, the liable and those who are free of liability, [and] the invalid and the valid.”¹⁰⁸ That is, the body of halakhic literature provides all that a person needs to know about halakhah. Maimonides then notes that by the twelfth century it had become difficult, at best, for the average person to glean an answer to a halakhic question by turning to the halakhic literature because “everyone feels [financial] pressure, the wisdom of our Sages has become lost, and the comprehension of our men of understanding has become hidden.”¹⁰⁹ Moreover, understanding the vast sea of halakhic literature “require[s] a breadth of knowledge, a spirit of wisdom, and much time,” all of which the average person may lack.¹¹⁰ “Therefore,” Maimonides writes,

I girded my loins. . . . I contemplated all these texts and sought to compose [a work which would include the conclusions] derived from all these texts regarding the forbidden and the permitted, the impure and the pure, and the remainder of the Torah’s laws, all in clear and concise terms, so that the entire Oral [Torah] could be organized in each person’s mouth without questions or objections.¹¹¹

What did Maimonides hope to achieve with this endeavor? He hoped that “[i]nstead of this one claiming such and another such, [this text will allow for] clear and correct statements based on the judgements that result” from studying the preexisting body of halakhic literature. In fact, he intended that, aside from the *Mishneh Torah*, “a person will not need another text at all with

¹⁰⁸ Maimonides, “Introduction to Mishneh Torah,” trans. Eliyahu Touger, *Chabad*, accessed March 15, 2017, http://www.chabad.org/library/article_cdo/aid/901656/jewish/Introduction-to-Mishneh-Torah.htm.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

regard to any Jewish law” except the Torah.¹¹² As bold as this intention was, it was not the most revolutionary aspect of the *Mishneh Torah*. Rather, Maimonides’ innovation was that he stated the law as he gleaned it from the halakhic literature “categorically, prescriptively, and without reference to [sources or] contrary opinions.”¹¹³ He was criticized by many for these omissions. Abraham ibn Daud (“Rabad,” ca. 1110-1180, Spain) was perhaps Maimonides’ fiercest contemporary critic. He wrote

[Maimonides] sought to improve, but he did not improve, for he has forsaken the method of all authors who preceded him; they adduced proof and cited the authority for their statements. This method was of great value, for often a judge is inclined to declare something prohibited or permitted on the basis of a particular source, but if he knew that an authority greater than himself took a different view, he would change his mind.¹¹⁴

However great the criticism, however, the *Mishneh Torah* paved the way for increasing acceptance of citation-less codes in the future.

Though the *Mishneh Torah* was not the first Jewish legal code, it is widely believed to be the first comprehensive code, the first to include *all* the laws.¹¹⁵ It was not, however, the last. The number of books of halakhot and commentaries on those books exploded in the years after the *Mishneh Torah* was published, and

¹¹² Maimonides, “Introduction to Mishneh Torah.”

¹¹³ Elon, *Jewish Law*, 1205.

¹¹⁴ Quoted in *ibid.*, 1224-5.

¹¹⁵ See, for example, the introduction to Maimonides, *The Essential Maimonides: Translations of the Rambam*, trans. Avraham Yaakov Finkel (Northvale, NJ: Jason Aronson, 1996), xv.

it became more and more challenging for Jewish decisors to navigate a path through so much material.¹¹⁶

Jacob ben Asher (1270-1303), a German-born rabbi who served for many years as a judge in Toledo, Spain, decided to compose a code to address the difficulty judges faced. He had two goals when compiling his *Sefer ha-Turim* (“*The Book of the Rows*”): he wanted to “restore definitiveness to Jewish law,” and he wanted to find an acceptable codificatory method which was clear and definitive while maintaining the law’s connections to the past.¹¹⁷ To do so, he would state a law briefly, as it was found in the Talmud, and then he would briefly summarize relevant opinions of various authorities on that law and indicate which one he believed to be correct.¹¹⁸

The next major codifier was Joseph Caro (1488-1575), who was born in Spain but lived most of his life in the Ottoman Empire and then in the Land of Israel. Caro determined that the best way to walk the line between respecting the traditional halakhic method and providing a clear and definitive halakhic reference was to compose two volumes. The first, a massive work called *Bet Yosef* (“*The House of Joseph*”), collected material from more than thirty halakhic works to explain the laws already stated in Jacob ben Asher’s *Sefer ha-Turim*. The

¹¹⁶ Elon, *Jewish Law*, 1279.

¹¹⁷ *Ibid.*, 1283.

¹¹⁸ *Ibid.*, 1285.

second, called the *Shulḥan Arukh* (“*The Set Table*”), gathered the halakhic conclusions from *Bet Yosef* in a systematic and concise way.¹¹⁹ The *Shulḥan Arukh* presents only the final rule, providing neither rationale or any other considerations.¹²⁰

The *Shulḥan Arukh* was glossed by Moses Isserles (“Rema,” 1520-1572, Poland) in his work *HaMappah* (“*The Tablecloth*”). The *Shulḥan Arukh* had relied primarily on works written by commentators from Spain and North Africa. *HaMappah* supplemented the halakhot listed in the *Shulḥan Arukh* with the views of authorities Caro had not consulted, primarily from Germany and France.¹²¹



Aside from the commentaries—like Maimonides on the Mishnah, for example—and the codes, a third body of Jewish legal literature developed. Even in the period during which the Talmud was being written, a Sage might receive letters containing halakhic questions from those who could not visit the places where the Sages studied and worked.¹²² The Sage’s responses to those letters were called *teshuvot* (sing. *teshuvah*, “response”) and are often called “*responsa*.” In the Geonic period—which spanned from

¹¹⁹ Elon, *Jewish Law*, 1312-22.

¹²⁰ *Ibid.*, 1339.

¹²¹ *Ibid.*, 1361.

¹²² Solomon Freehof, *The Responsa Literature and a Treasury of Responsa* (New York: Ktav Publishing House, 1973), 25.

about 600 CE to about 1000 CE—the heads of the Babylonian academics were particularly respected and were given the title *gaon* (pl. *geonim*), a marker of deep respect translating to something like “excellency.” Because of the respect given the *geonim*, they received questions from throughout the Jewish diaspora, and their *teshuvot* make up the bulk of Geonic literature.

This process—wherein a rabbi receives a question and issues a response in the form of a *teshuvah*—continues even today. In my third chapter, I will consider contemporary responsa at length.



It should be clear how broad the body of law to be applied by a Jewish decisor attempting to write a *teshuvah* today is. The modern decisor must contend with not just the Talmud but fifteen-hundred years of commentary, codification, and judicial decision-making. What this modern decisor retains, however, in the face of so many rules and precedents, is the power of judicial discretion. We might define judicial discretion as the power of a court to answer “all questions as to what is right, just, equitable, or reasonable.”¹²³ Even with the weight of two thousand years of law, then, the modern Jewish legal decisor retains the ability to accept arguments and to reject them, to choose between applicable laws, to make decisions and to issue orders—all based on the decisor’s understanding of what is right, just, equitable, or reasonable.

¹²³ Roth, *The Halakhic Process*, 52.

This power of judicial discretion leads to what is perhaps the most definitional complexity of the halakhic system: halakhic pluralism. If different decisors can make their own decisions based on their personal understanding of what is right or reasonable, we should expect that many different decisions might be made on the same issue. Instead of requiring that only one decision be deemed correct, the halakhic system allows “divergent behaviors, not only divergent theoretical positions, [to be considered] systemically legitimate within the halakhic system.”¹²⁴ Not only are these divergent positions considered legitimate, they are often preserved together, side by side, in halakhic literature. Sources as early as the Mishnah simply present a disagreement about a particular issue without stating which position is to be followed in practice.¹²⁵

A modern decisor thus faces a difficult problem: how to choose between two or more apparently equally acceptable positions. However, the Talmud itself provides a rule to guide the decisor in choosing between opposing positions: “a judge has only what his eyes see,” that is, “One must rule according to his own understanding.”¹²⁶ And because a given *posek* might see things differently than another, both of their divergent opinions may still be open as possible precedents available to later decision-makers.

In fact, *poskim* are not only permitted to use their own eyes—and ears, and minds—and to venture outside of the written texts, they are obligated to do so. Rabbi

¹²⁴ Roth, *The Halakhic Process*, 61.

¹²⁵ Kraemer, “The Mishnah,” 303.

¹²⁶ Bava Batra 130b with commentary by Rabbi Adin Steinsalz, *The William Davidson Talmud*, accessed March 15, 2017, http://www.sefaria.org/Bava_Batra.131a.

Abraham (1186-1237, Egypt), the son of Maimonides, said that the written documents provide only the “foundation, and it is the obligation of the one who is judging a case or rendering a decision to ponder them in every matter that comes before him, to draw analogies between the case and things comparable to it, and to extrapolate from those foundations.”¹²⁷

Precedent is important, then, but not decisive in a matter, because each *posek* has his own senses and intellect to rely on. This flexibility means that no particular historical era of Jewish decision-making and no group of long-dead decision-makers has the final say on a question posed today. Thus, rather than feeling burdened by the history of Jewish Sages, a modern *posek* is in a position to feel, just as those Sages did, that he is working in partnership with God to develop and expound the law for a new generation.

The danger, of course, is that a *posek* might exceed the bounds of his authority, perhaps even by making a decision that seems to controvert the Torah. And the Torah appears to command that, even if a rabbi were to make an apparently absurd or immoral ruling, the people should abide by it. Deuteronomy 17:11, discussing the rulings of appointed magistrates and levitical priests, instructs: “You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate (*lo tasur*) from the verdict that they announce to you either to the right

¹²⁷ Quoted in Roth, *The Halakhic Process*, 86.

or to the left.”¹²⁸ The *Sifre* comments on this verse that “even if, before your very eyes, they instruct that right is left, or left is right, you must obey them.”¹²⁹ Nachmanides, in his commentary on Deuteronomy, wrote that

[e]ven if you are convinced that they [the appointed decision-makers] have erred, and it is as obvious to you as the difference between right and left, you must still act in accordance with their ruling. You must not think, “How can I eat this obviously forbidden fat? How can I execute this obviously innocent man?” Say rather, “The Lord who gave the commandments has also commanded that I observe all His commandments according to the verdict announced by the those who stand in the place that He will choose. He has given me the Torah in accordance with *their* view of it, even if that is mistaken.”¹³⁰

However, Nachmanides determined that this “do not deviate” principle “refers only to what the Rabbis said in interpreting the Torah, such as those things that are deduced from the Torah . . . [for example] using any of the thirteen middot [of Rabbi Ishmael], or [interpretations derived from] the [plain] meaning of the language of the scripture itself or, indeed, from what was handed down as halakhah to Moses at Sinai.”¹³¹ “You must not deviate” did not apply, according to Nachmanides, to novel rabbinic legislation.

¹²⁸ Similar statements are made in Deuteronomy 5:32, Joshua 1:7, and Joshua 23:6, but in those cases it is specifically the law of Moses from which a person should not deviate.

¹²⁹ Marty Jaffee, trans., *Sifre Devarim* (2016), accessed March 13, 2017, <http://jewishstudies.washington.edu/book/sifre-devarim/chapter/pisqa-154/>.

¹³⁰ Michael Carasik, trans. and ed., *Mikra'ot Gedolot: The Commentators' Bible*, vol. 5, *Devarim—Deuteronomy* (Philadelphia: Jewish Publication Society, 2015), 118.

¹³¹ Nachmanides, “Hasagot HaRamban al Sefer HaMitzvot,” *Sefaria.org*, accessed March 13, 2017, https://www.sefaria.org/Hasagot_HaRamban_al_Sefer_HaMitzvot,_Shorashim.1.4.

Maimonides was not nearly as restrained. He believed that the “do not deviate” principle obligated Jews to follow the words of the rabbis “whether they learned them from the tradition, derived them on the basis of their own knowledge through one of the attributes of biblical exegesis . . . [or] instituted the matter as a safeguard for the Torah.”¹³² Maimonides, like the Sages long before him, saw the “scope of rabbinic authority [as] extend[ing] even to the most extreme theoretical possibility, that of an apparently gross miscarriage of the will of God.”¹³³

The authority of the Sages to interpret the Torah was authority they gave to themselves, and they placed no binding limit on that power. Because they are the “the sole normative interpreter of the meaning of the Torah, Torah means whatever the rabbis say it means.”¹³⁴ In giving themselves this authority, the Sages essentially said precisely what Chief Justice Marshall would say in 1803: “It is emphatically the province and duty of the Judicial Department to say what the law is.”

This fact has led to constant development of the halakhah over the centuries. It has also resulted in situations where multiple divergent decisions have been made on the very same issue, where different decisors have thought differently about what exactly the law is. A student of the halakhah is encouraged by the Talmud to “make [his] ear like a grain-hopper, and acquire for [himself] an understanding heart to hear [both]

¹³² Maimonides, “Introduction to Hilchos Mamrim,” trans. Eliyahu Touger, *Chabad*, accessed March 15, 2017, http://www.chabad.org/library/article_cdo/aid/1181852/jewish/Mamrim-Chapter-1.htm.

¹³³ Roth, *The Halakhic Process*, 122.

¹³⁴ *Ibid.*, 126.

the words of those who declare [objects] impure and those who declare [the same items] pure, the words of those who forbid [certain actions] and those of them who permit [the same actions], the words of those who disqualify and those of them who declare fit.”¹³⁵

Thus, a judge is required to hear both sides of an issue before he renders a decision, because both decisions are equally valid if they were made by decisors who seriously considered the information before them. A story from the Talmud illustrates this cleverly. R. Abba, in the name of Samuel, is reported by the Talmud as saying that for several years there was an ongoing dispute between the schools of two great Sages, Hillel and Shammai in which each contended that they were right about a certain law. From the heavens came a voice which announced that the positions of both Hillel and Shammai “are the words of the living God, but the halakhah is according to Hillel.”¹³⁶

Yom Tov ben Abraham Ishbili (“Ritba,” 1250-1330, Spain) wondered how it could be possible that both spoke the words of the living God when they came to contradictory positions. He wrote that “when Moses ascended to Heaven to receive the Torah he was shown, concerning every matter, forty-nine reasons for forbidding, and forty-nine reasons for allowing.” Moses was understandably perplexed, and he asked God why there were so many arguments for and against the same issue. God then told

¹³⁵Hagigah 3b, *The William Davidson Talmud*, accessed March 15, 2017, <http://www.sefaria.org/Chagigah.3b>.

¹³⁶Raymond Habbaz, “These and these are the words of the Living God,” *Sefaria.org*, accessed March 15, 2017, <http://www.sefaria.org/sheets/3834>; Eruvin 13b.

Moses that “it would be for the sages of Israel in each generation to decide.”¹³⁷ While Hillel’s position might have been the correct law in this case, both Hillel and Shammai’s positions were not only equally valid, both men spoke with the authority of God’s own voice.



Huge swaths of time and space and language divide today’s *poskim* from the Sages of old. What draws them together is not the decisions they reach or the laws they apply, but the process that they are a part of, with all of its codes and its complexities.

In Poland in the sixteenth century, Rabbi Samuel Eliezer Edels (“Maharsha,” 1555-1631) wrote:

The intention is that one should not say that it is evil in the sight of God that a man should, of his own mind, add laws and fences which are not written in the Torah He gave us, for what is man that he should consider himself capable of making another Torah like the Almighty. . . . To the contrary! The Lord desires that which is done for the sake of His righteousness, so that men should be righteous and not transgress the Torah He gave us. He desires that man should magnify the Torah and add more instructions and commandments, that he should add to His Torah so that man should be righteous in God’s commandments. . . .

Perhaps you will say: Who permitted you, O man, to make yourself into the partner of God who gave the Torah and its commandments that you come to add to it? Therefore the [scripture] says that to the contrary, the Lord desires it.¹³⁸

¹³⁷ Avi Sagi, *The Open Canon* (London: Continuum, 2007), 71.

¹³⁸ Quoted in Urbach, *The Halakhah*, 357.

3. Conservative Judaism and Conservative Legal Decision-Making

Ultimately, after centuries of interpretation, extrapolation, and codification, after the building of fences and the writing of *teshuvot*, the halakhah came to contain rules governing every aspect of human life. Some of the laws as they are followed today might have been completely foreign to the Sages of the Talmud; and yet, in their wisdom, they seem to have expected that, too. The Talmud imagines that

[w]hen Moses ascended on high [to receive the Torah from God] he found the Holy One, blessed be He, engaged in attaching [decorative] crownlets to the letters. He said to Him, "Lord of the Universe, why should you bother with this?" [God] answered, "There is a man who is destined to arise at the end of many generations, named Akiva ben Yosef, who will expound upon each crownlet heaps and heaps of laws. [Moses] said to Him, "Master of the Universe, show him to me." He replied, "Turn around."

[Moses discovered that he was in the classroom of Rabbi Akiva.] Moses went and sat down behind the eighth row of students [in the very back of the room], but he could not understand what they were saying. His strength left him.

But then they came to a certain topic and the disciples said to [Rabbi Akiva], "Rabbi, how do you know it?" He replied, "It was a law given to Moses at Sinai." And Moses was comforted.¹

In this story, Moses and Akiva (ca. 50-132 CE) are separated by thousands of years. Moses, the greatest—and, at least initially, the only—halakhist of his age was

¹ Menachot 29b, translation from Elizabeth Shanks Alexander, "The Orality of Rabbinic Writing," in *The Cambridge Companion to the Talmud and Rabbinic Literature*, ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee (Cambridge: Cambridge University Press, 2007), 42-43.

frustrated that he could not understand the conversation in Akiva's classroom. But what comforted him, it seems, was the idea that he and Akiva were talking about the same things, that they were involved in the same endeavor. The Sages who wrote the story and included it in the Talmud appear to have understood that the halakhah had changed dramatically over the course of previous generations and that it would continue to do so into the future.

Ultimately, then, it is not the content of the halakhah that draws together the Sages of old and rabbis today. Instead, it is the decisors themselves and the process in which they thoughtfully engage, creating and developing "religious prescriptions the purpose of which was to ensure the due performance of the commandments and laws of the Torah, with a regard for dynamic human needs."²

But when society has moved so far from the tightly-knit communities of old where Jewish decisors had actual authority over an entire community, it may seem unbelievable that the halakhah can still meet our dynamic human needs. Can the halakhah continue to be relevant when Jews are decreasingly observant and increasingly dispersed? Each modern Jewish movement has had to grapple with this question in this time of cultural diffusion and assimilation, of nation-states with their acknowledged legal authority, of feminism, capitalism, and individualism.



² Urbach, *The Halakhah*, 44.

In 1845, a group of Reform rabbis met in Frankfurt, Germany. On the third day of the meeting, one of the rabbis, Zechariah Frankel, “left the meeting in protest against a proposed resolution that declared that the Hebrew language was not ‘objectively necessary’ for Jewish worship, but should be retained [only] ‘in deference to the older generation.’”³ Frankel would come to call his way of viewing Judaism “Positive-Historical Judaism.”

Reform had been the first movement in Germany to officially splinter off into its own denomination. Before the early 1800s, there was only one “kind” of Judaism, though it may have been practiced differently by Jews in different times and places. German Jews had largely lived in ghettos and were subject to unequal treatment under German law. Germany’s Jews first experienced equality when Napoleon’s army had demolished the ghettos, and when the German regime was reinstated in 1815, many Jews were unwilling to give up that equality. Some felt that the only way to maintain their equal status with non-Jewish Germans was to “shed the ways of the ghetto” and remake Judaism in Germany’s image.⁴ As one change led to another, these new Reform Jews reconsidered and often revised principles of traditional Jewish thought and practice, jettisoning much of the traditional halakhah.⁵

³ *Emet ve-Emunah: Statement of Principles of Conservative Judaism* (New York: Jewish Theological Seminary of America, 1990), 7, <http://www.bjpa.org/Publications/downloadFile.cfm?FileID=18410>.

⁴ Lawrence Grossman, “Jewish Religious Denominations,” in *The Cambridge Companion to American Judaism*, ed. Dana Evan Kaplan (Cambridge: Cambridge University Press, 2005), 82.

⁵ *Ibid.*

Members of the Positive-Historical movement agreed with the Reform that modernity required changes in traditional Judaism. However, they also believed that the halakhah continued to be binding in the modern era. By using the new *Wissenschaft des Judentums*—“the scientific, scholarly study of Judaism”⁶—they believed Judaism could be updated to meet modernity using the same process of interpretation that Jews had used for centuries.⁷ While Reform had stressed that Judaism was a religion, and therefore that Judaism’s essence was its “ethical monotheism,” the Positive-Historical school believed that Judaism was an “historical product” of the Jewish people,⁸ an “historic process and not merely a theological doctrine.”⁹ The defining characteristic of this historical product was the halakhah and it therefore could not simply be cast aside for something more “authentically” Jewish.

This notion of the halakhah as an historical product allowed it to be maintained despite the fact that Frankel questioned the halakhah’s divine origins. The law had not been handed down from Moses at Sinai all the way through the Sages and so on, Frankel said. Rather, it had come to be so long ago that its purpose and origin was no longer known and it had merely been ascribed Mosaic authority.¹⁰

⁶ Michael R. Cohen, *The Birth of Conservative Judaism: Solomon Schechter’s Disciples and the Creation of an American Religious Movement* (New York: Columbia University Press, 2012), 2.

⁷ Grossman, “Jewish Religious Denominations,” 84.

⁸ Louis Ginzberg, *Students, Scholars and Saints* (New York: Meridian Books, 1958), 204.

⁹ *Ibid.*, 215.

¹⁰ *Ibid.*, 207.

By questioning the divine status of the law and attributing it rather to an historical process, Frankel had equipped the Positive-Historical to address the question of modernity. If Judaism is an historical creation, then the history of the modern day can have as much impact on it as the history of a day long past. But how can Judaism remain Judaism if the effect of modernity is too great? Frankel wrote,

Maintaining the integrity of Judaism simultaneously with progress, this is the essential problem of the present. Can we deny the difficulty of a satisfactory solution? . . . What out to be our point of departure in the attempt to reconcile essential Judaism and progress . . . ?

[Positive-Historical Judaism] bases itself upon rational faith and recognizes that the task of Judaism is religious action, but it demands that this action shall not be empty of spirit and that it shall not become merely mechanical . . . We must, it feels, take into consideration the opposition between faith and conditions of the time. . . . [Positive-Historical Judaism], then, declares that Judaism must be saved for all time. It affirms both the divine value and historical basis of Judaism and, therefore, believes that by introducing some changes it may achieve some agreement with the concepts and conditions of the time.¹¹

In 1853, Frankel published an article calling for the establishment of a new kind of Jewish seminary, one that embraced modernity and respected history and one that offered both clerical and academic programs. This caught the attention of several financial backers, and in 1854, the world's first positive-historical rabbinical school, the Jewish Theological Seminary, opened in Breslau with Frankel at its head.¹²

¹¹ Zecharias Frankel, "On Changes in Judaism," in *Tradition and Change: The Development of Conservative Judaism*, ed. Mordecai Waxman (New York: Burning Bush Press, 1958).

¹² Esther Seidel, "The Jewish Theological Seminary of Breslau (1854-1938)," *European Judaism* 38, no. 1 (Spring 2005), 135-136.



In 1886, another school called the Jewish Theological Seminary (JTS) was created, this time in New York. Its founders were American traditionalists who had rejected the progressivism at the Reform Hebrew Union College. Though it suffered from low enrollment in its early years, JTS flourished under the leadership of Rabbi Solomon Schechter, who became its head in 1902. While many connected with the school believed in the tenets of the Positive-Historical school, Schechter questioned whether the Positive-Historical movement truly had any theological foundations on which to ground itself.¹³

Schechter proposed instead the idea of “Catholic Israel,” the body of Jewry as a whole, as a method for actually implementing the ideas of Positive-Historical Judaism. Only, Schechter believed, “a unified Jewry had the authority to adapt Jewish law to its modern surroundings and . . . no individual group or sect had the authority to do so.”¹⁴ Out of this theory—or, perhaps more accurately, out of JTS—came a new American religious movement called Conservative Judaism.

Throughout the first half of the twentieth century, the concept of “Catholic Israel” proved impossible to implement. There was, it seems, no unified body of Jews, a fact apparent from Conservatism’s regular disagreements with organizations representing the traditional Orthodox movement in America.¹⁵ If “Catholic Israel” was

¹³ Cohen, *The Birth of Conservative Judaism*, 2.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 11-12.

the only body capable of changing Jewish law, then no changes in Jewish law were ever likely to occur.

In fact, there was not even a united Conservative Jewry. In 1927, Rabbi Louis Finkelstein submitted a paper to the Rabbinical Assembly—the organization of Conservative rabbis in America—called “The Things that Unite Us.” That the Conservative movement in 1928 was not already aware of what united it already shows the lack of unity within its membership. Finkelstein was frustrated that, instead of meeting to discuss their commonalities, Conservative rabbis “prefer[red] to discuss . . . those aspects of our work and faith which divide us.”¹⁶ In the paper, Finkelstein went on to outline what he believed was “a rational basis [of] our indefinite consciousness of unity,” or, in other words, a list of propositions so basic he did not believe any Conservative rabbi would disagree.¹⁷ These basic ideas included the rejection of an anthropomorphic God, a belief that the development of the halakhah is evidence of its growth and not of its deterioration, willingness to consider changes in ritual, a generally positive attitude toward the establishment of a Jewish state, and an affinity for the Hebrew language.¹⁸ But even in 1928, the only thing that truly bound Conservative

¹⁶ Louis Finkelstein, “The Things that Unite Us” (1927), in *Tradition and Change*, 313.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 314-323.

rabbis together was their mutual commitment to JTS, the seminary where all of them had studied.¹⁹

By mid-century, the experiment in “Catholic Israel” had essentially come to an end. There was no unity among Conservative Jews, let alone among Jews at large. In 1948, a group of rabbis within the Rabbinical Assembly established the Committee on Jewish Law and Standards (CJLS), an halakhic decision-making body which announced that it was no longer interested in getting the approval of Catholic Israel, and specifically of the Orthodox, for its rulings.²⁰ Bold decisions—permitting, for example, the use of electricity on the Sabbath, an action firmly forbidden by the Orthodox—illustrated that “[n]o longer would the emerging Conservative movement be defined by Catholic Israel and a quest for inclusivity; it would now stand on its own.”²¹

Over time, Conservative Jews came to see themselves as members of a distinct third branch of American Judaism. Today, echoing the Positive-Historical Frankel, the Conservative movement sees itself as “directly confront[ing] the challenge to integrate tradition with modernity. By retaining most of the tradition while yet being hospitable to the valuable aspects of modernity, it articulates a vital, meaningful vision of Judaism in our day,” at least according to the movement’s own leadership.²²



¹⁹ Finkelstein, “The Things that Unite Us,” 324.

²⁰ Cohen, *The Birth of Conservative Judaism*, 14.

²¹ *Ibid.*

²² *Emet ve-Emunah*, 10.

In the 1988 *Emet ve-Emunah: Statement of Principles of Conservative Judaism*, a group of respected Conservative thinkers, rabbis, and laypeople came together to try—after more than a hundred years—to write an official statement of Conservative Judaism’s principles. In summarizing the commonalities of faith among Conservative Jews, the committee wrote that “by descent and destiny, each Jew stands under the divine command to obey God’s will.”²³ While the movement “recognize[s] the authority of the Halakhah,” it does not believe that the halakhah has ever been “monolithic or immovable,” but rather that it has “grown and developed through changing times and diverse circumstances.”²⁴ The committee also noted Judaism’s long commitment to halakhic pluralism—“though the term was unknown” in the past—and their belief that “all aspects of Jewish law and practice are designed to underscore the centrality of ethics in the life of the Jews.”²⁵

Several notes can be made about this discussion of halakhah. First, the committee did not define halakhah as “law” but rather as “the norms taught by the Jewish tradition.”²⁶ While “[m]ost Jewish norms are embodied in the laws of the Bible and their rabbinic interpretation and expansion over the centuries,” halakhah also includes

²³ *Emet ve-Emunah*, 15.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, 21.

customs and ethical ideals.²⁷ The inclusion of ethical ideals leaves open the possibility of halakhic reform based on changing social circumstances and changes in social mores.

Second, by the 1980s, Conservative Judaism faced real pressure from the secular world and the Reform movement to reconsider the question of the halakhah's authority. Why shouldn't, the world seemed to ask, Conservative Jews merely abandon the strictures of halakhah and fully embrace modernity? *Emet ve-Emunah* points to the fact that the halakhah "is what the Jewish community understands God's will to be" and is "a concrete expression of our ongoing encounter with God."²⁸

But by this time, even within Conservative Judaism there were obviously different concepts of what it meant for the law to be "God's will." In fact, there was not even agreement about who or what God was. At most, *Emet ve-Emunah* could assert that Conservative Jews "believe in God" and that the Conservative movement "affirms the critical importance" of that belief, but it could not "specify all the particulars of that belief."²⁹ Or, in fact, any particulars: God could be a supernatural being, a process in the universe, a way of understanding the world. What, then, can it mean for the halakhah to be "God's will"? Because they do not expect that all Conservative Jews conceive of God as having the power to decree laws, the committee cannot claim that the halakhah *actually* God's will—that is, that it came directly from the mouth or divine inspiration of

²⁷ Ibid.

²⁸ *Emet ve-Emunah*, 21.

²⁹ Ibid., 17-18.

God—only that the community of Jews has agreed that it is so. Moreover, halakhah helps “i-identify[] and preserv[e] the Jewish people,” “trains and sharpens the moral conscience of individuals,” “establishes minimal standards of behavior,” and “gives ideals concrete expression.”³⁰ These statements on the law as a collective product of Jewish history hearkens back to the Positive-Historical movement of mid-nineteenth century Germany.

Emet ve-Emunah also stresses the ability of modern rabbis to change the halakhah. The “sanctity and authority of Halakhah attaches to the body of the law, not to each law separately,” which means that the Conservative movement can be both committed to the halakhah *as a system* and willing to change *individual mitzvot*, sometimes dramatically.³¹ While “[e]very effort is made to conserve and enhance” the halakhah, legal actions must sometimes be taken to align the law with the practice of modern observant Jews, the pace of technological innovation, changing material conditions for Jewish communities, and the demands of justice.³²



One of the Conservative movement’s mottos is “tradition and change.” This sounds like a good motto for an individual person—“I’m going to wear traditional clothing, but in blue instead of black,” perhaps. But as the motto for an entire

³⁰ *Emet ve-Emunah*, 21.

³¹ *Ibid.*, 22.

³² *Ibid.*, 24.

movement, what does it mean? Since the time of Frankel, the question has hung in the air: Is it truly possible to preserve tradition and, at the same time, demand that it change?

Rabbi Mordecai Waxman—a prominent Conservative rabbi who served Temple Israel in Great Neck, NY for 55 years—explained the phrase:

Reform [Judaism] has asserted the right of [halakhic] interpretation but it has rejected the authority of the legal tradition. Orthodoxy has clung fast to the principles of authority, but has in our own and recent generations rejected the right to any but minor interpretations. The Conservative view is that both are necessary for a living Judaism. Accordingly, Conservative Judaism holds itself bound by the Jewish legal tradition, but asserts the right of its rabbinical body, acting as a whole, to interpret and to apply Jewish law.³³

Conservative Judaism, then, makes a conscious effort to walk a middle path, acknowledging the authority both of halakhic history and of contemporary social change, of the ancient Sage and the modern rabbi.

According to Rabbi David Golinkin—the current president of the Schechter Institute, the major Conservative organization in Israel—these dual sources of authority are, in fact, vitally necessary to modern Judaism. He writes that “without gradual and constant change within the framework of tradition, the *halakhah* would become fossilized and be unable to function in the modern world. . . . However, before we approach our

³³ Quoted in David Golinkin, *Halakhah for Our Time: A Conservative Approach to Jewish Law* (New York: United Synagogue of America, 1991), 3.

tradition with the purpose of changing it, *we must accept the authority of that tradition.*"³⁴

To make halakhic change, one must first accept the halakhic system as it has emerged from Jewish history. This means accepting the rules and procedures of the halakhic system and accepting its results as authoritative. It also means accepting that the *only* place that change in halakhah can be made is within the halakhic system itself. If we do not accept the system and its authority, Golinkin asks, "What right have we to change [the halakhah]?"³⁵

It may be difficult to understand how commitment to a two thousand-year-old system can produce real halakhic change. And if many of the sources upon which a decisor can draw are so ancient, if the world has changed so much in the intervening years, how can the traditional system offer the resources that could lead to progressive changes?

Golinkin, who has written dozens of *teshuvot* in Israel and the United States, remarks that "Moses our Teacher cannot solve the problems of today and Rabbi Akiva cannot provide answers to our questions, because *our* problems were not *their* problems. In every generation, we must grapple with halakhic problems according to the circumstances and conditions of *that generation.*"³⁶ The voices of Moses and of Akiva and of all the other Sages of the past offer modern Conservative decisors a strong basis upon

³⁴ Golinkin, *Halakhah for Our Time*, 3-4 (emphasis in original).

³⁵ *Ibid.*, 4.

³⁶ *Ibid.*, 18-19 (emphasis in original).

which to ground their halakhic decisions, but those voices cannot decide modern legal disputes. Only a *posek* today—who understands the circumstances and the conditions of his or her own generation—can answer today’s questions.

This “tradition and change” model of halakhah is obviously not a recent invention; Frankel spoke of the same halakhic methodology in the mid-1800s. But the Positive-Historical movement’s commitment to this methodology was not immediately taken up by Conservative Judaism in the United States. In fact, it may not have been until the CJLS was founded in 1948 that “tradition and change” was truly adopted as a halakhic methodology in American Conservative Judaism.

Since then, however, it has become perhaps the defining feature of Conservative Judaism. In 1977, Rabbi Seymour Siegel—called “an architect of contemporary Conservative Jewish theology”³⁷—wrote, “New times require new ways of observing Jewish law. . . . Therefore, Conservative Judaism [has] had two aims, both of which are discerned in the writings and thought about *halachah* in the literature of the movement: to validate and promote the observance of Jewish law, and to make modification and change possible.”³⁸ This change comes from a commitment, as Boaz Cohen—who was a faculty member at JTS for forty years and a member of the CJLS—describes it, to the idea

³⁷ Ari L. Goldman, “Rabbi Seymour Siegel, 61, Leader in Conservative Judaism, Is Dead,” *New York Times*, Feb. 25, 1988, <http://www.nytimes.com/1988/02/25/obituaries/rabbi-seymour-siegel-61-leader-in-conservative-judaism-is-dead.html>.

³⁸ Seymour Siegel, “The Meaning of Jewish Law in Conservative Judaism: An Overview and Summary,” in *Conservative Judaism and Jewish Law*, ed. Seymour Siegel (New York: The Rabbinical Assembly, 1977), xiii.

that “[t]raditional Judaism is a product of historical forces, and like every living organism is constantly in a state of eternal flux.”³⁹ Louis Finkelstein, a Conservative luminary who became a professor at New York’s Jewish Theological Seminary in 1920, wrote that

[t]he truth is . . . we need law and discipline in life. But . . . [it] is only in bureaucracies, in prisons, and backward schools, that discipline is something regarded as an end in itself. It is one of the great achievements of Jewish law that it provides in itself the machinery for its interpretations, its expansions, and its application to changing circumstances. . . . To effect this plan is not to break with traditional Judaism, but to return to it.⁴⁰

Seymour Siegel also noted that one of the most important aspects of Conservative halakhic decision-making was the “introduction of the aggadic [non-halakhic] and ethical component.”⁴¹ Because, Siegel wrote, “the Law is the expression of the covenant, and a basic aim of the covenantal obligation is the practice of justice and compassion, we cannot sustain the authority of any norm which results in unethical outcomes.”⁴² He believed that a law that results in an outcome that does not meet the standards of Jewish ethics must be rejected, and thereby offered Jewish ethics as the very purpose of the entire halakhic system.



³⁹ Cohen, *Law and Tradition*, 21.

⁴⁰ Quoted in Siegel, “The Meaning of Jewish Law,” xiii-xiv.

⁴¹ *Ibid.*, xxiii.

⁴² *Ibid.*

This idea, that the halakhah could and even should be adapted to address contemporary problems, was not invented by Conservative Judaism or even by the Positive-Historical movement. From rabbinic Judaism's very beginning, the Sages envisioned Jewish law as a human, and thus dynamic, endeavor. Judges from all walks of Jewish life were expected to bring themselves and their worlds to their legal decision-making, and the least prestigious judge was considered as authoritative in his time as the most respected. According to the Tosefta,

Scripture has [in 1 Samuel 12:6-11] placed in the balance three lightweights of the world along with three great of the world, to teach you that the court of Jerubbaal is as great before the Omnipresent as the court of Moses; and the court of Jephthah is as great before the Omnipresent as the court of Samuel, to tell you that anyone who is chosen a *parnas* [leader] of the community, even the lightest-weight of all, he is deemed equivalent to the mightiest of the mighty. . . . You have only the judge who serves your generation.⁴³

As noted in Chapter 1, these judges have also long been endowed with the power to change the halakhah. And throughout history, they have used that power. Rabbi Yehuda Aryeh Modena (1571-1648, Italy) noted that "[t]he words of the Sages must be understood according to the time, the place and the individual . . . *since there is no end to the number of things forbidden by the Sages which became permitted as the time and place changed.*"⁴⁴ Rabbi Jacob Emden (1697-

⁴³ Catherine Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine* (Tubingen: Mohr Siebeck, 1997), 304.

⁴⁴ Quoted in Golinkin, *Halakhah for Our Time*, 25.

1776, Germany) wrote that “it is as clear as the sun that the commandments are dependent upon the time, the circumstances, and the people of every age.”⁴⁵

Thinkers throughout Jewish history have thus held that even if God’s law is immutable, it was “given to mortal men, who are liable to be influenced” by changes in the world; thus, the Torah was intentionally given “without clear definition and with clear wisdom, and can therefore receive every true interpretation at all times” through the work of each generation’s judges.⁴⁶ In the Talmudic story of Moses receiving forty-nine reasons to forbid and forty-nine reasons to permit, recall that all ninety-eight reasons were valid and true interpretations, and that both Hillel and Shammai spoke with the voice of the living God.



The 1,700 Conservative rabbis around the world are all members of the Rabbinical Assembly (RA).⁴⁷ The RA places rabbis in congregations, publishes books, and, most importantly for the topic under consideration, administers the Committee on

⁴⁵ Quoted in Golinkin, *Halakhah for Our Time*, 25.

⁴⁶ Eliahu Hazah, quoted in Golinkin, *Halakhah for Our Time*, 27.

⁴⁷ “Mission Statement,” The Rabbinical Assembly, January 6, 2011, accessed March 2, 2017, <http://www.rabbinicalassembly.org/about-us/mission-statement>.

Jewish Law and Standards (CJLS), the group that “sets halakhic policy for Rabbinical Assembly rabbis and for the Conservative movement as a whole.”⁴⁸

In Conservative Judaism today, the “judges” who determine halakhah sit on the CJLS. The CJLS is made up of twenty-five voting-member rabbis; five non-voting representatives from the United Synagogue, an organization of Conservative synagogues; and one non-voting representative from the Cantors’ Assembly.⁴⁹ In response to questions of Jewish law, members of the CJLS can submit *teshuvot* for CJLS consideration. If six or more members of the CJLS vote for approval of a particular *teshuvah*, the *teshuvah* becomes an official halakhic position of the Conservative movement.⁵⁰ This can, of course, result in a sticky situation where *teshuvot* are approved that represent two opposing responses to a question. Members may also submit papers—concurrences, dissents, abstentions, comments—that are not voted on and do not represent the position of the CJLS.

Consideration of a hot-button issue can, as you might imagine, result in a flurry of different papers that represent every possible position and dozens of legal methods, and ultimately, any congregational rabbi can accept or deny any or all of these legal

⁴⁸ “Committee on Jewish Law and Standards,” The Rabbinical Assembly, January 31, 2011, accessed March 2, 2017, <http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards>.

⁴⁹ Ibid.

⁵⁰ Ibid.

rulings.⁵¹ The exceptions are the “Standards of Religious Practice,” which RA members are required to follow. Currently, there are four of these Standards. First, RA members must only consider matrilineality—the Jewish status of a person’s mother—when determining a person’s Jewish status; this rule rejects the Jewish status of patrilineal Jews, those born to Jewish fathers and non-Jewish mothers. Second, they must ensure that conversions include ritual immersion and, for men, circumcision.⁵² Third, they must not officiate weddings if either party has been married previously and did not receive a Jewish divorce document. And fourth, RA members may not officiate, participate in, or attend weddings between a Jew and a non-Jew. A rabbi who violates any of these rules risks expulsion from the RA.⁵³

The CJLS’s legal papers have as much authority over international members of the RA as they do over American members, which is to say that a Conservative rabbi abroad can consider a CJLS opinion when rendering their own halakhic decision.

Conservative Jews in Israel—where the movement is called *Masorti* (Heb.

⁵¹ A disclaimer appears at the top of all CJLS teshuvot notes: “The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.” See, for example, Joel Roth, “Homosexuality,” *The Rabbinical Assembly* (March 25, 1992), https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19912000/roth_homosexual.pdf.

⁵² Joel Roth and Akiba Lubow, “A Standard of Rabbinic Practice Regarding Determination of Jewish Identity,” *The Rabbinical Assembly* (May 1, 1985), <https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/20012004/31.pdf>.

⁵³ “A Code of Professional Conduct for Members of the Rabbinical Assembly” (2004), *Rabbinical Assembly*, accessed March 15, 2017, https://www.rabbinicalassembly.org/sites/default/files/assets/public/ethical_guidelines/Code%20of%20conduct-2011-public.pdf.

“traditional”)—may also receive guidance from the Masorti *Va'ad Halakhah* (“Halakhah Committee”) of the Masorti movement—though the *Va'ad Halakhah* has not published a *teshuvah* since 1998.⁵⁴ In addition, prominent Masorti rabbis have individually issued and published a large number of teshuvot.



Why focus solely on responsa issued by the CJLS and ignore *takkanot* they have issued? *Takkanot*, as described above, are pieces of new legislation, promulgated by rabbis, “necessitated by a new situation because the existing *Halakhah* has no explicit answer or instruction concerning the problem, or to change the existing law which does not answer the demands of the current situation.”⁵⁵

The CJLS has issued very few *takkanot* since its inception. Probably the most famous is its *takkanah* regarding driving on the Sabbath, though that document does not actually call itself a *takkanah*.⁵⁶ Because there are so few *takkanot*, they make a difficult area of study.

But why are there so few *takkanot*? I would propose two explanations. The first explanation has to do with the nature of halakhic authority. *Takkanot* historically could

⁵⁴ See “Members of the *Va'ad Halakhah*, 5746-5758,” *Responsa for Today*, accessed March 15, 2017, <http://www.responsafortoday.com/about/vaad.htm>. According to David Golinkin, the *Va'ad* will soon be reconvening. David Golinkin in discussion with the author, January 2017.

⁵⁵ Isaac Klein, “*Takkanot*,” in *Responsa and Halakhic Studies* (Jerusalem: Schechter Institute of Jewish Studies, 2005), 124-5.

⁵⁶ Morris Adler, Jacob Agus, and Theodore Friedman, “A Responsum on the Sabbath,” *United Synagogue Youth*, accessed April 16, 2017, <http://www.usy.org/usy2016/wp-content/uploads/2011/07/halacha-map.pdf>.

only be enacted by a central authority with “the power to legally compel the entire community.”⁵⁷ Though the CJLS may often act in the place of such a central authority, some doubt whether the CJLS has the actual authority to issue a piece of legislation which would change long-established halakhah.⁵⁸

The second explanation is far more practical. According to the rules of the CJLS, takkanot are simply more difficult to pass than teshuvot. To pass a teshuvah and adopt it as the policy of the CJLS requires only six votes in favor, which is not a majority of voting members.⁵⁹ Passage of a paper classified as a takkanah requires the approval of a majority.⁶⁰

It appears that the requirement of a majority to pass a takkanah is used politically by the CJLS. In cases where a majority of members do *not* want a particular teshuvah to pass but the teshuvah can garner the requisite six votes, the majority can vote to reclassify the teshuvah as a takkanah. Because the teshuvah had fewer than a majority of votes in favor of its passage, it will fail when reclassified as a takkanah.⁶¹

⁵⁷ Klein, “Takkanot,” 127.

⁵⁸ Diana Villa, in discussion with the author, January 2017.

⁵⁹ Gordon Tucker, “A Principled Defense of the Current Structure and Status of the CJLS,” *The Rabbinical Assembly* (Feb. 17, 1993), https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19912000/tucker_defense.pdf.

⁶⁰ Elliot N. Dorff, “The Conservative Movement’s Responses to Homosexual Relations,” *Keshet*, accessed April 16, 2017, http://keshet.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/ConservativeMovementsResponsesToHomosexualRelations_Dorff.pdf.

⁶¹ See the notes to Gordon Tucker, “דרוש וקבל שׁכר [Drosh v’Kabel S’char]: Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality,” *The Rabbinical Assembly* (December 6, 2006), https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/tucker_homosex



While there are no set standards for decision-making by the CJLS or Conservative rabbis, there are certain principles which empirically guide Conservative halakhic decision-making. In 1977, Seymour Siegel outlined what he believed to be the basic steps of Conservative halakhic decision-making:

1. Seek out the precedent. Unless there is a good reason to do otherwise, we are bound to the precedent.
2. In seeking out the precedents, we do not necessarily limit ourselves to any specific code.
3. If the precedent is deficient in meeting the needs of the people, if it is clearly foreign to the group of law-observers in the community, if it is offensive to our ethical sensitivities, or if we do not share its basic scientific, economic, and social assumptions, then the law can be modified either by outright abrogation, or by ignoring it, or by modifying it.⁶²

David Golinkin has identified six general characteristics of Conservative teshuvot. First, despite Conservative Judaism's "tradition and change" motto, "[c]hanges are not made for the sake of change, but only in order to deal with an urgent

uality.pdf, 31. The note—"This paper was declared a takkanah by a vote of twelve in favor, seven opposed and six abstaining (12-7-6, which is a majority of those present and voting, and failed by a vote of seven in favor, fourteen opposed and 4 abstaining (7-14-4)"—certainly suggests that the paper was purposefully reclassified to make its passage impossible.

⁶² Siegel, "The Meaning of Jewish Law," xxiv-xxv.

or acute problem.”⁶³ Even then, a *posek* should take as traditional an approach as possible “with some adjustment to modern situations.”⁶⁴

Second, though a rabbi often has many different halakhic positions to choose from, some more lenient and some more stringent, “Conservative rabbis usually prefer a lenient ruling to a strict one.”⁶⁵ Golinkin locates this principle in two Talmudic teachings. One interprets the verse “You shall keep My laws and My rules, by the pursuit of which man shall live” (Lev. 18:15). The Talmud adds: “And not that he should die by them.”⁶⁶ That is, the Sages understood that the purpose of the halakhah was to preserve life, not to injure it. Therefore, when given the option between a stringent ruling which would cause harm to someone and a lenient ruling which would not, “the strength of leniency [in a ruling] is preferable.”⁶⁷

Third, Golinkin highlights the differences between Orthodox responsa and Conservative responsa and their differing approaches and attitudes toward the modern social and physical sciences, including history, archaeology, text criticism, psychology, sociology, and political science.⁶⁸ While Orthodox decisors tend to be slow to admit evidence from the sciences, Conservative rabbis “feel that not only is it *permissible* to

⁶³ David Golinkin, “The Whys and Hows of Conservative *Halakhah*,” in *Responsa in a Moment*, vol. 1 (Jerusalem: Schechter Institute, 2000), 18.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Yoma 85b.

⁶⁷ Berakhot 60a.

⁶⁸ Golinkin, “The Whys and Hows,” 19.

utilize modern methods and knowledge to write responsa; it is *essential* to do so,” because accurate facts about the state of the world are necessary to making correct decisions.⁶⁹ To this end, most Conservative teshuvot contain historical surveys of the halakhah under consideration and attempt to understand when the halakhah developed and why. A decisor may be more apt to allow changes in a law that is fairly recent or derived only from custom while being more stringent on laws that are very ancient or directly from the Torah.

Fourth, while the *Shulhan Arukh* “has attained almost canonical status among Orthodox rabbis” —at least when combined with Isserles’ *HaMappah*—Conservative rabbis view it as only one resource among many. Golinkin points out that the *Shulhan Arukh* was written nearly a half-millennium ago in a very different kind of world.⁷⁰ Because no one text, including the *Shulhan Arukh*, is alone decisive, Conservative rabbis can and should search multiple texts to find the origins of halakhot as well as alternative halakhic decisions to those included in the *Shulhan Arukh*.

Fifth, Conservative responsa evince the movement’s commitment to halakhic pluralism. Because many questions do not have simple answers, two or three or more positions may be halakhically defensible. Individual responsa may include two or more of these positions for the reader to choose from, or the CJLS may issue multiple responsa

⁶⁹ Golinkin, “The Whys and Hows,” 19.

⁷⁰ Ibid.

on the same topic, allowing the voice of pluralism to win out over the simplicity of a single answer.

Sixth, Conservative responsa show that “Conservative rabbis place great emphasis on the moral component of Judaism and the *halakhah*.”⁷¹ While the importance of purely ethical concerns varies from decisor to decisor, almost all seem to agree that ethical considerations cannot be entirely ignored, even in the face of what may seem to be total halakhic clarity.



This is not to say that all are convinced by Conservative Judaism’s “alternative view” of halakhah. While Golinkin, for example, sees halakhic flexibility as a strength of Conservative decision-making, it might just as easily be viewed as a way to “observe *halachic* traditions selectively.”⁷² How does a decisor reach halakhic conclusions within a flexible system without simply choosing the result that he or she would like and then searching for whatever scant evidence he or she might be able to adduce?

And even when the halakhic system is taken seriously by, say, the Committee on Jewish Law and Standards, some feel that this has no effect on actual Conservative Jews. Rabbi Alan J. Yuter—a rabbi who publicly disaffiliated with the Conservative movement

⁷¹ Golinkin, “The Whys and Hows,” 20.

⁷² Alan J. Yuter, “Conservative Halacha is Dead,” *Sh’ma* 15, no. 293 (May 3, 1985): 100, <http://www.bjpa.org/Publications/details.cfm?PublicationID=10437>.

in 1987, primarily due to his disagreement with the Conservative halakhic method⁷³— wrote, “Conservative Judaism promised a halachic alternative to orthodoxy, but a movement that fails to convince its adherents has broken its promise.”⁷⁴ Halakhic “fluidity,” which had been touted not just as the touchstone of Conservative Judaism but as a more “authentic” kind of halakhah, may have been intellectually satisfying to rabbis, but it did not pay attention to the “deep existential human questions that religion is meant to address.”⁷⁵ In failing to do so, it alienated the very Conservative Jews it was meant to guide.⁷⁶

Others within Conservative Judaism worry wonder “how much tradition can be abandoned before [the Conservative] movement becomes exclusively ‘change’?”⁷⁷ Perhaps the most troubling concern is voiced by Canadian Rabbi Wayne Allen, who believes that the process of the Conservative movement by which the halakhah is changed is “problematic and elusive.”⁷⁸ In Allen’s view, a certain strain of “rabbinic activism” developed in the past several decades that has begun to engage in change for change’s sake, promoting “the idea of the tradition *of* change, as if change was the only

⁷³ Alan J. Yuter, letter to Robert Gordis, August 14, 1987, <http://joshyuter.com/2013/05/23/special-features/yutopias-10th-year-anniversary/why-rabbi-dr-alan-j-yuter-resigned-from-the-rabbinical-assembly-and-left-conservative-judaism>.

⁷⁴ Yuter, “Conservative Halacha is Dead,” 101.

⁷⁵ Daniel Gordis, “Requiem for a Movement,” *Jewish Review of Books* (Winter 2014), <https://jewishreviewofbooks.com/articles/566/requiem-for-a-movement>.

⁷⁶ Ibid.

⁷⁷ Wayne Allen, “Conserving Our Judaism,” *Sh’ma* 13, no 259 (October 14, 1983): 130, accessed March 2, 2017, <http://www.bjpa.org/Publications/details.cfm?PublicationID=10293>.

⁷⁸ Ibid.

goal and the ultimate good.”⁷⁹ “Traditionalists” like himself are dedicated to decision-making that is “properly researched, logically sound, textually grounded, actually necessary, and gradually effected.” While certain positions taken by these more traditional Conservative rabbis, like the inability of women to be prayer leaders, for example, may offend “American notion[s] of absolute equality,” halakhah cannot be made to submit to American notions. Rabbis “do not vote on whether these facts [of women’s inability to perform certain roles] are good or bad. We only evaluate the texts of our tradition and base our opinion on what they teach, not on what we would like to see.”⁸⁰

Is it possibly as simple as that? Is it possible that there are really two camps within Conservative Jewish halakhah: one committed to the textual tradition and one that is committed to change for change’s sake? Or, imagined from the perspective of Allen’s liberal counterpart: one committed to meeting the needs of modernity and one stuck so deeply in its texts that it cannot even see those needs?

⁷⁹ Allen, “Conserving Our Judaism,” 130.

⁸⁰ Ibid.

4. *Halakhic Methodology and Halakhic Outcomes Distinguished*

In 2006, Rabbis Myron Geller, Robert Fine, and David Fine submitted a dissent to the CJLS titled “The Halakhah of Same-Sex Relations in a New Context.”¹ Their dissent began with a startling introduction:

There is not much disagreement about what the halakhah [regarding same-sex sexual relations] was, only whether it is now possible and necessary to decriminalize gay sexuality and allow homosexuals equal participation in our religious life from the present time forward. Some of us are restrained by the assumption that the halakhah is immutable. They see Scripture’s sexual ethic as unchallenged by the passage of time and sufficient for the contemporary Jewish community. Others, in response to a shift in their own and society’s perception of homosexuality, would reinterpret the halakhah. Given the transformation in our understanding of the subject in recent decades . . . they no longer view homosexuality as a choice or gay sexual behavior as deviant or unnatural . . .

As we deliberate on this matter we must in our view balance our obligations to the halakhic record and its method against the uncertain but insistent claim of contemporary sexual ethics. The *posek* should consider the impact of social, ethical, and scientific change in the interpretation and development of halakhah. A *teshuva* should be more than a look at sources and precedents, it must reread them in light of current circumstances, perceptions, and realities.²

¹ Myron S. Geller, Robert E. Fine, and David J. Fine, “The Halakhah of Same-Sex Relations in a New Context,” *The Rabbinical Assembly* (December 6, 2006), http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/20052010/geller_fine_fine_dissent.pdf.

² *Ibid.*, 1-2.

In the same year, Rabbi Baruch Frydman-Kohl submitted a concurrence/dissent³ regarding the same issue as the Geller, Fine, and Fine dissent, which he titled, “You have wrestled with God and human and prevailed: Homosexuality and Halakhah.”⁴ In it, he wrote that

Conservative Jews should be committed to the belief that Torah constitutes the direction of God . . . [because] the claim of divine origin for Torah is an essential aspect of our halakhic system. Even as we seek to interpret Torah, we should do so with a deep sense of reverence for God, the Torah text and the system of *mitsvot* that it generated. . . .

We determine halakhah by reliance on a tradition of precedent and of process. Moreover, the claim of a greater aggadic “narrative” is rarely articulated in a halakhic context. Even when such a claim is made, it is usually found as a support to a prior halakhic argument . . . The reluctance to give *aggadah*, philosophy, kabbalah, or narrative understandings primary significance in the determination of religious law is the recognition that (1) there are no limits to these theological claims and (2) counter-narratives are readily developed.⁵

These rabbis—smart, competent men respected by their communities and ostensibly by one another—do not just disagree on whether the Conservative halakhah of same-sex relations should be changed or reinterpreted. And despite what Wayne

³ In the paper, Rabbi Frydman-Kohl concurred with certain submitted *teshuvot* and dissented from others. Baruch Frydman-Kohl, “You have wrestled with God and human and prevailed: Homosexuality and Halakhah,” *The Rabbinical Assembly* (February 2007), http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/20052010/frydman-kohl_homosexuality.pdf.

⁴ Frydman-Kohl’s title is a reference to Genesis 32:28, in which Jacob, having wrestled with the divine being all night long, is renamed: “Your name shall no longer be Jacob, but Israel, for you have striven with God and man and have prevailed.”

⁵ Frydman-Kohl, “You have wrestled,” 2.

Allen claims, neither decision relies on a simple desire for change or repose as justification for its halakhic conclusions.

Instead, these rabbis fundamentally disagree on *how* halakhic decisions should be made. And while this disagreement may occasionally make it sound as if they are literally speaking in different languages on entirely different topics, it cannot be shrugged off merely as a left wing-right wing, progressive-conservative disagreement. Instead, we must examine it as a conflict between two different ways of thinking about Jewish law, about what the halakhah is, and about what the halakhah should do.



In this chapter, I will explore this disagreement by looking at Conservative and Masorti halakhic decisions—whether classified as official responsa or as some other kind of legal submission—regarding a specific type of Jewish problem: the “other” and specifically people who exist at the margin between “fully Jewish” and “not fully Jewish” in some way.

The question of marginality, of what to do about people who exist in the liminal space between membership in a religious community and not-membership in that community, is not a uniquely Jewish one, of course. Every religion must in some way be defined to include some people and exclude some others, whether the basis is identity, belief, or status. At very least, there will always be a distinction between followers of a certain religion and everyone else in the world. And if that distinction exists, then there

will be people on the margin, people who challenge the definitions and force religious communities to define themselves. And because of the stakes of these questions—that is, the high stakes literally of determining what a religion *is* and *isn't*, they make an excellent test case for observing religious decision-making.

In Judaism, the distinction between people of different statuses and identities can have profound religious and ritual impacts. Since perhaps the writing of the Torah, for example, Jewish thinkers have struggled with gender and the differences between men and women; where men were required to perform many commandments, women were systematically exempted or disempowered from performance of those commandments.⁶ The *mamzer*—the child of an impermissible union, typically born to a married woman by a man not her husband—has long been prohibited from marrying other Jews.⁷ The convert has been subject to special scrutiny to determine whether she is converted *enough* to be considered fully Jewish.⁸ And gays and lesbians have been vilified and excluded from most Jewish leadership positions and all Jewish marriage rituals until only very recently.⁹ A great deal of time has been spent and a great deal of ink has been

⁶ See Elizabeth Shanks Alexander, "From Whence the Phrase 'Timebound, Positive Commandments'?" *The Jewish Quarterly Review* 97, no. 3 (Summer 2007): 317-46.

⁷ See Netty C. Gross, "Fighting the Curse," *The Jerusalem Report* (Aug. 13, 2001): 24; Michal Schecter, "Mamzerim: Don't Ask, Don't Tell," *Kol Hamevaser* (July 4, 2014), <http://www.kolhamevaser.com/2014/07/mamzerim-dont-ask-dont-tell/>.

⁸ See, for example, the discussion in Gershon Gorenberg, "How Do You Prove You're a Jew?" *The New York Times* (March 2, 2008), <http://www.nytimes.com/2008/03/02/magazine/02jewishness-t.html>.

⁹ See Dinah M. Mendes, "Is There a New Judaism for Gender Identity?" *Moment*, accessed April 15, 2017, <http://www.momentmag.com/is-there-a-new-judaism-for-gender-identity/>.

spilled in the last quarter century or so in trying to address these historic precedents and determine their applicability to our modern era.

These questions ultimately ask: How big is the Jewish tent? How wide can we open the doors to those historically excluded from full participation in Jewish life before the distinction between Jewish and not-Jewish becomes so porous as to be meaningless? These issues are important, because ultimately they decide what being Jewish means, and therefore what Judaism itself means.

In his introduction to a compilation of his own responsa, David Golinkin wrote that the topic of the status of women in halakhah “expresses, perhaps more than any other, the tension which exists between *halakhah* and modernity. . . . [I]t has been discussed extensively specifically within the Conservative/Masorti movement, which strives to bridge the gap between tradition and change.”¹⁰ While he was writing about the limited topic of women in halakhah, he might just as easily have been writing about the role of the “Jewish other” generally. So much has been written on these topics—in the United States, Canada, and Israel—because the push of halakhah and the pull of modernity are so strong rabbis seem to feel like there is often no good answer to questions that they have no choice but to answer.



¹⁰ David Golinkin, “Nine Approaches to the Status of Women in Jewish Law in the Twentieth Century,” in *The Status of Women in Jewish Law: Responsa* (Jerusalem: Schechter Institute, 2012), 30.

In his introduction to *The Status of Women in Jewish Law*, Golinkin outlines what he sees as nine approaches used in responsa on the topic of women's participation in Judaism. These approaches range from "[o]pposition to *any* change in Judaism,"¹¹ to willingness to accept at least some changes based on *hora'at sha'ah*, so as "not to drive women away from Judaism,"¹² to "[t]he equality of women is a lofty ethical imperative and we must change the *halakhah* via *takkanot* even if there is no basis for this in the sources."¹³ The precise categorization Golinkin uses are certainly interesting, but ultimately not specifically useful here. However, what *is* useful is to note that *none* of the approaches Golinkin lists is described as, "Well, that's the way the law has always been, so what are we to do?" That is to say, Golinkin does not have a category of responsa which stick so close to the *halakhah* as we have inherited it today that they completely ignore extra-legal matters: their own feelings about what is right or wrong, Jewish ethics as they understand them, or the moral and ethical pressures of the modern world. Even the most "conservative" of these approaches, the ones which oppose any change to the law, go so far as to "state[] that even if something is halakhically permitted, it should be prohibited for other reasons," reasons which must by definition be extra-legal.¹⁴



¹¹ Golinkin, "Nine Approaches," 32.

¹² *Ibid.*, 37.

¹³ *Ibid.*, 43.

¹⁴ *Ibid.*, 32.

While there are many approaches to questions of the other in Jewish modernity, for simplification's sake responsa and other halakhic decisions can be approximately located on two different axes. First, the way in which a decision is made—that is, its halakhic methodology—may be viewed as “conservative” or “liberal,” terms I do not particularly like and which I will explain at greater length below. Second, the decision that the *posek* arrives at may similarly be viewed as “conservative” or “liberal.” Thus, we might understand a universe of decisions that looks something like this, where any decision can be plotted according to its methodology *and* its outcome.

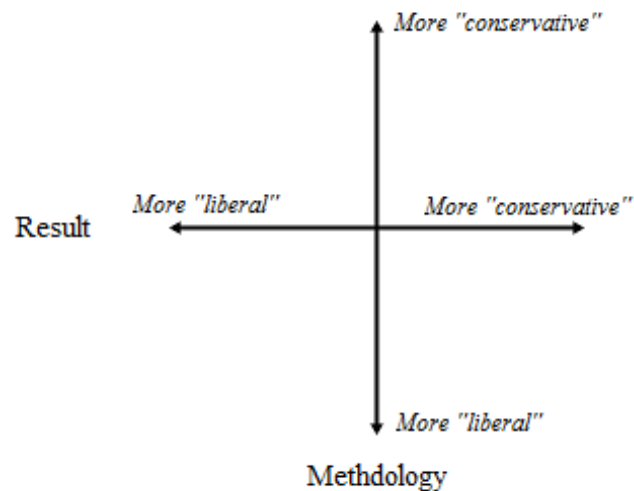


Figure 1. Halakhic Methodology versus Result.

That responsa can be mapped as a function of their methodology and their outcome appears to be true. Surely, there are two basic methodological “poles.” At one, the decisor, not unlike a computer, views the law as a set of sums which might bring him to the right result: Input the right facts and the legal result will be clear. At the other

pole, the decisor ignores the law all together and decides entirely on his own opinion. In the same way, no one could deny that there are two “poles” when it comes to results. At one, the result preserves the law exactly as written, without any deviation, and, at the other, the result completely overrides the law as written.

There is a pervasive myth, however, that appears at least implicitly in much discussion of halakhic decision-making. This myth says that “conservative” methodology necessarily leads to “conservative” outcomes and that “liberal” methodology necessarily leads to “liberal” outcomes. That is, there is a myth that any decision can be placed somewhere along this red line:

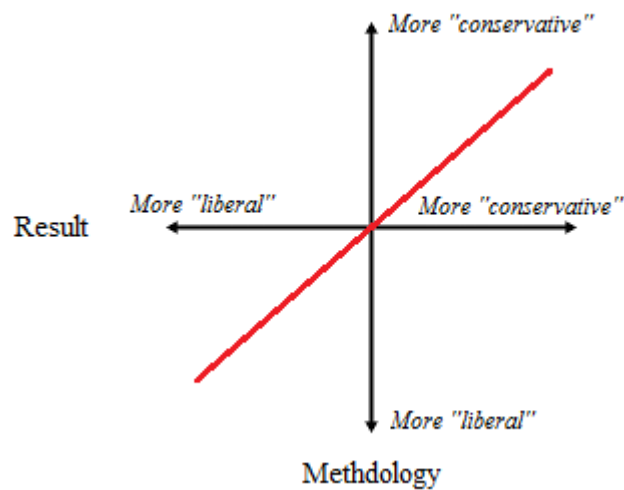


Figure 2. Halakhic Methodology versus Result, Theoretically Acceptable Outcomes

It is important to dispel this myth at the outset. Throughout this chapter, we will encounter decisions that fall nowhere near that red line. Our main focus will be on the methodology employed and the decisor’s meta-halakhic reasoning—that is, how the

decisor him- or herself describes how he or she chose a methodology, how the decisor defends that methodology, and how the decisor views alternative methodologies used by others. It is critical therefore not to conflate halakhic results with halakhic methodology.

As noted above, “conservative” and “liberal” are poor descriptors for the two opposing types of methodology. In his 2006 paper “דרוש וקבל שכר” [Drosh v’Kabel S’char]: Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality,” Rabbi Gordon Tucker proposes that we call the strict, four-corners-of-the-law approach “positivist.”¹⁵ Legal positivism, in the simplest sense, “is the thesis that the existence and content of [a] law depend on social facts and not on its merits.”¹⁶ In essence, legal positivism says that what we understand to be the law *is* the law. Just because an alternative might be more sensible, moral, or efficient does not make it the law; just because a law, accepted as such by society, is nonsensible, immoral, or inefficient does not automatically remove it from the law books. In a similar way, we might call “liberal” methodologies “naturalist,” because they conform in a very general sense to theories of

¹⁵ Tucker, “דרוש וקבל שכר” [Drosh v’Kabel S’char]: Halakhic and Metahalakhic Arguments,” 11. The title of Tucker’s paper comes from the Talmud, Sanhedrin 71a, where the Sages note that the figure of the “rebellious child,” who the Bible condemns to death, “never was and never will be.” Why then were the laws of the rebellious child included in the Torah? So that a person might study them and thereby gain reward (*drosh v’kabel s’char*). See Joshua Heller, “The Trouble with the Rebellious Child,” *Jewish Theological Seminary* (Aug. 17, 2002), <http://www.jtsa.edu/the-trouble-with-the-rebellious-child>.

¹⁶ Leslie Green, “Legal Positivism,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2009), <https://plato.stanford.edu/entries/legal-positivism>.

natural law. Theories of natural law allow to varying extents information from outside the four corners of the law to creep in and effect legal outcomes.

I appreciate Tucker's use of the term "positivist" because I think it does good work in describing a certain type of "conservative" methodology. The problem arises when we search for a label that might encompass all of the *non-positivist* methodologies, something against which we can contrast positivist methodology. Natural law does not *really* describe all methods that are not positivist.

Fortunately, the world of Jewish law already provides us with the necessary terminology to describe the different types of halakhic methodology. The Talmud is generally understood to comprise two bodies of material: the halakhah and the aggadah. Halakhah is generally understood to include those legal rules that distinguish between permissible or forbidden behaviors. Aggadah "investigates and interprets the meaning, the values, and the ideas which underlie the specific distinctions which govern religious life."¹⁷ In *God in Search of Man*, Abraham Joshua Heschel, one of Conservative Judaism's most celebrated theologians and philosophers, wrote that

Halacha represents the strength to shape one's life according to a fixed pattern; it is a life-giving force. Agada is the expression of man's ceaseless striving which often defies all limitations. Halacha is the rationalization and schematization of living; it defines, specifies, sets measure and limit, placing life into an exact system. Agada deals with man's ineffable relations to God, to other men, and to the world. Halacha deals with

¹⁷ "Aggadah or Haggadah." *Encyclopedia Judaica*, accessed March 16, 2017, <http://www.jewishvirtuallibrary.org/aggadah-or-haggadah-jewish-virtual-library> (emphasis removed).

details, with each commandment separately; agada with the whole of life, with the totality of religious life. Halacha deals with the law; agada with the meaning of the law. Halacha deals with subjects that can be expressed literally; agada introduces us to a realm which lies beyond the range of expression. Halacha teaches us how to perform common acts; agada tells us how to participate in the eternal drama. Halacha gives us knowledge; agada gives us aspiration.¹⁸

We do not need to use the language of secular legal theory to explain halakhic decision-making, which almost necessarily will have only partial explanatory power in the world of religious law. Therefore, instead of “conservative” and “liberal” methodologies, which take their names from politics, and instead of “positivist” and “naturalist,” which take their names from legal philosophy, I propose that we instead consider “systematic” and “aggadic” methodologies.¹⁹ While the word “systematic” does not map identically onto halakhah as Heschel describes it, and while I would prefer to call this methodology “halakhic,” “systematic” offers the benefit of being far less confusing, as “halakhic” has become a broad term that can refer to the entire practice of Jewish law.

And because the specific issues I am considering—gender, *mamzerut*, conversion, homosexuality—“conservative” and “liberal” do not capture clearly the two result poles.

¹⁸ Abraham Joshua Heschel, *God in Search of Man: A Philosophy of Judaism* (New York: Farrar, Straus and Giroux, 1976), 336.

¹⁹ It is important to note at the outset, though, that I do not use “aggadic” in as sweeping a way as, say, Edward Feld. Where Feld’s “aggadic Judaism” encourages individual Jews to make halakhic questions for themselves, to “find the spiritual meaning in [the] essence [of Jewish ritual] and . . . tr[an]sform it to fashion the details of the religious action out of this aggadah.” That is, Feld rejects the decision-making power of rabbis and encourages each Jew to bring their own aggadah to making decisions about Jewish ritual. In this paper, I use “aggadic” in a much more limited sense. Edward Feld, “Towards an Aggadic Judaism,” in *The Unfolding Tradition: Philosophies of Jewish Law*, ed. Elliot N. Dorff (New York: Aviv Press, 2005), 211.

These political terms invite us to consider only whether a decision would be considered “conservative” or “liberal” in the modern American political context. In some cases, a decision that is radically progressive vis-à-vis Jewish law could appear to be stodgily conservative vis-à-vis American politics.

I am more interested in the extent to which a *teshuvah* preserves the halakhic status quo or alters it, the extent to which traditional barriers to full Jewish participation are maintained or demolished. “Traditional,” as opposed to “conservative,” better captures the idea that certain results continue traditional definitions and exclusions. And, echoing the Conservative Jewish slogan “tradition and change,” I will use “progressive” in place of “liberal,” to better capture this orientation of change and modernity.

Thus, instead of our earlier illustrations, we see instead that there is a universe of Conservative responsa with four quadrants.

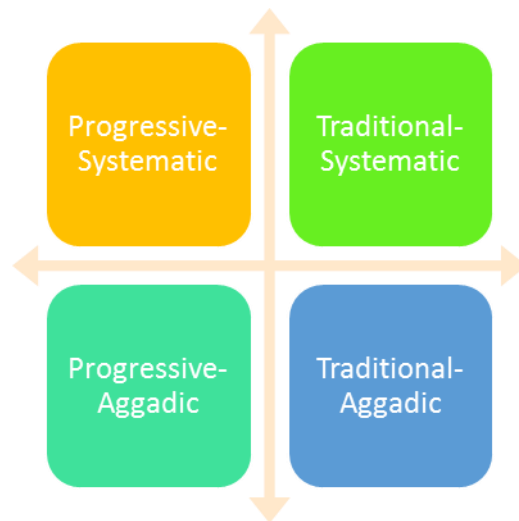


Figure 3. Halakhic Methodology versus Result, Imagined as Quadrants

“Systematic” and “aggadic” may not be perfect terms to describe the poles of Conservative Jewish methodology, but they should suffice for the following discussion. By systematic, I mean a legal methodology that, at its most pure, “seeks to understand Jewish law as a deductive system . . . with foundational definitions and axioms, and everything else—or almost everything else—following deductively from these.”²⁰ This kind of system is “self-contained, and so if one accepts its premises and if a conclusion is validly deduced from those, then that conclusion follows with 100% certainty.”²¹ In this kind of legal methodology, the origin of a halakhic prohibition or requirement is not important or even relevant. Extralegal factors—which in this method might include “moral, social, economic, [or] political” facts or concerns—may be admitted to the

²⁰ Elliot N. Dorff, *The Unfolding Tradition* (New York: Aviv Press, 2005), 212.

²¹ *Ibid.*

decision-making process in some limited sense, but will never be decisive.²² Instead, extralegal factors can “help rabbis think about their decision so that they might, for example, put more weight on a given stream of halakhic thinking rather than another when both appear within Jewish legal sources.”²³

Aggadic, as I use it here, means Jewish legal decision-making that allows for the far greater influence of extralegal sources. This methodology rejects, for a variety of reasons, the idea that one can “speak of . . . *the halakhah* as if it formed one clearly circumscribed, monolithic, internally consistent system.”²⁴ The aggadic decisor, for example, must consider the origin of a law; if the reason for the law has disappeared, continuing to follow the law may amount to nothing but “slavish subservience to the past.”²⁵ Ultimately, the aggadic decisor believes the “rationale for present-day loyalty to the [halakhah] is that it preserves values, among them those of justice and equity. Where it patently does the opposite it can have no claim on the allegiance of the Jew.”²⁶ So the aggadic decisor must identify not only the relevant laws and commandments but must determine from whence they came and whether they continue to uphold in the modern day the values the decisor believes are authentically Jewish. The only way to make these decisions is to admit a variety of extralegal material.

²² Dorff, *The Unfolding Tradition*, 214.

²³ *Ibid.*, 217.

²⁴ Neil Gillman, quoted in *Unfolding Tradition*, 253.

²⁵ Louis Jacobs, “The Theological Approach,” in *Unfolding Tradition*, 300.

²⁶ *Ibid.*, 301.

Now, back to the myth—one that perhaps originates in American law. Is it necessarily true that only “traditional-systematic” and “progressive-aggadic” positions are possible?



I will start with a pair of decisions on the same issue that fall into this mythic orientation. The first is Joel Roth’s 2006 *teshuvah* titled “Homosexuality Revisited,” which is a traditional-systematic decision. The second is the Geller, Fine, and Fine dissent “The Halakhah of Same-Sex Relations in a New Context,” from which I have already introduced an excerpt. Both papers address the question of whether the Conservative movement should change its stance on homosexuality, for example by ordaining LGBTQ²⁷ rabbis and cantors or by allowing rabbis to perform same-sex marriages or commitment ceremonies.

The question of homosexuality in the Conservative movement begins primarily with a 1992 consensus statement. This consensus statement, issued by the CJLS, barred rabbis from performing commitment ceremonies for gays and lesbians, prohibited rabbinical and cantorial schools from “admit[ting] avowed homosexuals,” and gave

²⁷ LGBTQ (Lesbian, Gay, Bisexual, Trans, Queer) is an acronym used as a short-hand for all identifications and orientations which fall outside of heterosexuality. Ultimately, I “recognize[] the importance and multiplicity of self-identification . . . and hope[] that the reader will accept the constraints [of space and language] in relation to being fully inclusive” inherent in any written endeavor like this one. Sheila Quinn, ed., *An Activist’s Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (ARC International, 2010), 11, http://issuu.com/lgbtexcellencecentre/docs/activists_guide_english_nov_14_2010.

local rabbis the right to determine whether LGBTQ congregation members should be able to “function as teachers or youth leaders” or be eligible for synagogue honors.²⁸ The consensus statement governed the Conservative movement for more than a decade. In 2006, the issue whether and how to include LGBTQ Jews in the Conservative movement was raised again and a flurry of papers were submitted to the CJLS.

In “Homosexuality Revisited,” Roth reaffirms his support of the 1992 consensus statement and adds new arguments to another responsa he had submitted in 1992. He begins by noting that in the period between 1992 and 2006 “neither the halakhah, nor the science, nor the morality have changed What has changed, of course, is the degree of public ferment.”²⁹ This “ferment” — which might otherwise be characterized as a dramatic change in public opinion and societal expectations— does not, however, have any effect on Roth’s decision.

Roth begins his systematic analysis by returning to the Torah. In Leviticus 18:22 and 20:13, God says, “Do not lie with a male as one lies with a woman; it is an abhorrence.” Roth believes that these verses clearly prohibit same-sex sexual activities. His opponents, however, reinterpret these verses to limit their application and do not read them as broad prohibitions on gay and lesbian sex. Roth notes sourly that the

²⁸ “Consensus Statement on Homosexuality,” *The Rabbinical Assembly* (March 25, 1992), http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19912000/consensus_homosexual.pdf.

²⁹ Joel Roth, “Homosexuality Revisited,” *The Rabbinical Assembly* (December 6, 2006), http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/20052010/roth_revisit_ed.pdf, 1.

“advantage” of reinterpreting these verses to limit their effect “is that [doing so] allows . . . [his opponents] to affirm an ongoing commitment to the authority of the Torah and the Sages, and to affirm that their intent is to reconstruct the will of the Torah and the Sages, which has been so misunderstood.”³⁰ Roth suggests that his opponents reinterpret Leviticus not because they believe in their interpretations but because they want to disingenuously manipulate the Torah and pretend to adhere to traditional halakhic decision-making. The problem is not, Roth suggests, merely using an alternate theory of interpretation to understand Scripture; Jewish history is full of such alternate interpretations. However, “[f]or a decisor of halakhah to latch onto some theory of modern scholarship and utilize it as a basis for rendering a far-reaching decision, especially one which permits what has long been considered forbidden, is risky at best and foolhardy at worst.”³¹

Why is this so dangerous? “Even if one assumes that the results of modern scholarship constitute a potentially valid datum in halakhic decision-making,” Roth writes, “an assumption which may well be false . . . one must at least make certain that the thesis has left the realm of theory and entered the realm of fact. It takes a very long time for that to happen . . . In fact, it may never really happen.”³² Roth is concerned that a passing intellectual fad will be brought to bear on the halakhic process, a process

³⁰ Roth, “Homosexuality Revisited,” 2.

³¹ Ibid.

³² Ibid.

which he sees as being firmly rooted in the (sometimes very distant) past. This we might call our first identifier of the systematic methodology: skepticism of modernity. That is, the systematic theory far prefers certainty that comes from the test of time to the uncertainty inherent in modernity. Who knows, he asks, what we will believe is true or good in the future?

Instead of using modern theoretical approaches, “all responsible halakhists know [that] what matters most is not the Torah itself, but the Torah as seen through the eyes of the Sages, who are its authentic authoritative interpreters.”³³ That is “[e]ven if it were true,” Roth writes, that the writers of the Torah had had one understanding of same-sex sexual activity, “what would matter halakhically is what the Rabbis perceived.” Here, then, is the second identifier of the systematic decision: endowment of primary interpretational power in the Talmudic Sages, leaving little or no interpretive role for the modern *posek*.

A third identifier lies implicit in Roth’s argument. Yes, modern *poskim* are deprived of any interpretive power. But what is more important, the Sages are endowed with such great interpretive power that it *does not matter* why the Torah says what it says. *Even if* we now emphatically disagree with the reason a commandment was included in the Torah—that is, when a commandment appears to be based on a misapprehension of science, on a desire to distinguish the Jews from their neighbors, or

³³ Roth, “Homosexuality Revisited,” 3.

on pure ugly animus against some group or another—*even if* we disagree with these motives, they do not matter. All that matters is how the Sages formulated the law and the way they communicated the law to us.

Roth makes a special note about “decisors [who] have predispositions to reach specific conclusions in specific cases.”³⁴ This is not inherently dangerous, “[b]ut, there must be a difference between having a predisposition and being able to reach the desired conclusion in a defensible way. . . . I claim that a good poseik is one who is sufficiently dispassionate to be able to tell whether his predispositions have blinded him to the indefensibility of his arguments.”³⁵ Perhaps this is the fourth characteristic of systematic decisions: a commitment to dispassion in decision-making, because to admit into the process one’s passions is to invite in irrationality. Passions cannot ever be the basis for proper decision-making; at best, they can appear in only a very subsidiary role to dispassionate legal analysis.

After he determines that the word of the Sages must prevail, Roth proceeds to define precisely what actions the Sages prohibit. Other decisions on the topic of LGBTQ sexual relations, if they contain a prohibition on same-sex sexual activity, limit that prohibition to only anal sex. Roth, on the other hand, more broadly prohibits same-sex sexual activity based on Maimonides’ *Mishneh Torah* and his commentary on the

³⁴ Roth, “Homosexuality Revisited,” 6.

³⁵ *Ibid.*

Mishnah, which, according to Roth, show that “it is not only intercourse which is biblically forbidden— all sexual behavior is also forbidden with those with whom intercourse is forbidden, and the prohibition is biblical, not rabbinic.”³⁶ Note that Roth’s argument that the prohibition is biblical does not actually reference the Torah; rather, he establishes as truth Maimonides’ statement that the prohibition is biblical. If Maimonides says something is biblical, then it is biblical, and we need not refer back to the Torah to confirm it. While he writes that Nachmanides appears to disagree with the contention that broad prohibition of same-sex sexual behavior outside of intercourse is d’oraita, he believes there are too many authorities on the d’oraita side of the argument that they should be followed.

Indeed, what would happen if we were to assume that the prohibition was actually d’rabbanan? In the face of Maimonides, *Sefer ha-Turim*, and the *Shulḥan Arukh*, who decided that the prohibition was d’oraita, Roth says that it

would take a daring (probably foolhardy) decisor . . . to affirm with certainty that they are incorrect, absolutely and without question. A responsible *poseik* would at least have to admit that we have here a case of doubt . . . A responsible *poseik* also recognizes that the decision which he renders becomes, at least *de jure*, the will of God. Could there be any clearer reason to apply the principle [that if there is a doubt as to whether a rule is d’oraita, we assume that it is d’oraita]? At a minimum, even one who strongly believes that he understands Ramban [Nachmanides] correctly . . . out to admit that the matter is hardly resolved, and that his conviction concerning the position of the Ramban is sufficiently tenuous as to warrant considering the possibility that he may be wrong. And, if

³⁶ Roth, “Homosexuality Revisited,” 14.

that be the case, halakhic methodology demands of the *poseik* to apply the principle [stated above].³⁷

Here, Roth provides a great deal of information about systematic methodology as he understands it. First, the systematic process results in statements that are, at least in practice, the word of God; that is, the resulting halakhic decisions will be followed as if they are from the Torah, and therefore as if they are the word of God, regardless of whether one believes that the halakhic process is *actually* divine. Second, the rules of rabbinic hermeneutics are critically important and should guide the modern *posek's* decision-making.

Third, the *posek* should be very, very cautious when making a decision that defies the great weight of precedent and, in fact, to do so makes a *posek* a fool. Later, Roth writes that “[t]here is no more sound halakhic methodology than to interpret texts of the halakhic tradition, when possible, in a way that leaves them intact and that does not compel one to reject one of them as non-authoritative.”³⁸ His systematic methodology does not leave much room for nuance, for example, the nuanced position that a great *posek* of the past made a decision that was correct in his day but incorrect in ours. Indeed, nuance poses a threat to systematic methodology: A code-based system only works if we are always sure of the code and need but plug in the facts in order to get an

³⁷ Roth, “Homosexuality Revisited,” 16.

³⁸ *Ibid.*, 19.

answer. If the law itself is allowed to become amorphous or indeterminate, the system cannot produce results.

Finally, Roth turns to the arguments of his opponents' that are based on values, ethics, or morality. "Every decisor of Jewish law," Roth writes, "seeks to find a way to render a decision which does not cause pain, hurt, or anguish to those for whom it is rendered."³⁹ While he knows that this *teshuvah* will cause pain, hurt, and anguish for many people, "[t]he fact that a decision causes pain does not mean that the decision is immoral." That is, a "moral law can have a negative consequence on the lives of people, but we make the judgment that the reasonableness and morality of the law outweigh the hurt done to the individual in such cases."⁴⁰ He criticizes those who "have decided the question of the law's morality solely on the basis of its consequences."⁴¹ Roth accepts as a given that the halakhah constitutes a *moral system*, and therefore all results when it is legitimately applied are moral, regardless of whether particular outcomes of its application cause pain or anguish, even to a great number of people.



Geller, Fine, and Fine's "Halakhah of Same-Sex Relations in a New Context" is as paradigmatically aggadic as Roth's decision is systematic. From the very beginning, the decision rejects "the assumption that the halakhah is immutable," and instead insists

³⁹ Roth, "Homosexuality Revisited," 27.

⁴⁰ Ibid.

⁴¹ Ibid.

that “[t]he *posek* should consider the impact of social, ethical, and scientific change in the interpretation and development of halakhah.”⁴² These factors—social, ethical, scientific, as well as economic, political, and moral—are what I will here call *aggadah*.

Like Roth, Geller, Fine, and Fine begin with Leviticus’s prohibition on lying with a man as one would lie with a woman. They freely admit that these verses prohibit same-sex sexual relations and that the prohibition was preserved in a great number of halakhic writings, including the Talmud, the *Sifra*, and works by Maimonides. They immediately acknowledge, however, that “[r]ationales for the prohibitions of same gender sexual relations are varied,” and go on to list a handful.⁴³ For them, the reason for the law is apparently nearly as important as what the law itself says.

Next, Geller, Fine, and Fine consider several of the papers submitted when the question of homosexuality was raised in 1992. In considering Roth’s earlier paper—called simply “Homosexuality”—Geller, Fine, and Fine note that Roth had acknowledged that there may be no adequate rationale for the prohibition on same-sex sexual behavior, and that therefore no argument that undermined the *reason* for the law could be successful in changing it. Geller, Fine, and Fine write that it “seems strange to us that Rabbi Roth empowered the text with unalterable control over our practice when text interpretation is the very basis of Jewish law and the halakhic system.”⁴⁴ Even

⁴² Geller, Fine, and Fine, “The Halakhah of Same-Sex Relations,” 1-2.

⁴³ *Ibid.*, 4.

⁴⁴ *Ibid.*, 8.

though these rabbis use a very different methodology to reach their answers, they too believe that the text and interpretation thereof is the central component of halakhic decision-making.

However, according to this aggadic methodology, the text cannot alone answer questions of halakhah. The aggadic method of Geller, Fine, and Fine views “halakhah as a historically based religious/legal system that reflects the values, ethics and circumstances of the Jewish people at any particular period and whose evolving judgments, including those recorded in Scripture, are expressions of Jewish ideals in a given place and time.”⁴⁵ Halakhah, according to this method, *must* be contextual; indeed, outside of its proper context in place and time the halakhah cannot have meaning, so deeply is it informed by its sociotemporal location. And if Scripture is susceptible to this kind of contextual analysis, how much the more must the Talmud and other sources of halakhah be similarly susceptible?

Geller, Fine, and Fine continue their decision by accepting that Leviticus does appear to ban same-sex sexual relations. More important to them is *why* Leviticus includes this prohibition. After considering a number of different possible rationales for the prohibition, Geller, Fine, and Fine conclude that “[t]he *meaning* of the Torah was to prohibit male-male anal intercourse. Its rationale, however, was to protect against non-

⁴⁵ Geller, Fine, and Fine, “The Halakhah of Same-Sex Relations,” 9.

procreative relations or non-marriageable unions.”⁴⁶ Then, they consider the word *to’evah*, often translated as “abomination,” in its Scriptural contexts and decide that the term does not necessarily indicate something inherently abhorrent, but rather something that is “culturally or religiously determined.”⁴⁷ They then look to halakhic history to find examples where certain behaviors crossed the *to’evah* boundary, behaviors that were one considered *to’evah* but are no longer or vice versa.

If the sociotemporal context of same-sex sexual relations has changed, then, there may be good reason to remove them from the category of *to’evah*, even if they were explicitly put into that category by the Torah. Geller, Fine, and Fine then review scientific information on whether homosexuality is a chosen behavior or an innate characteristic and whether the LGBTQ person can be “converted” to heterosexuality through therapy. They conclude that the weight of scientific evidence is on the side of homosexuality being an innate characteristic not vulnerable to therapeutic conversion. Not only has the scientific consensus changed since the days of homosexuality as a dangerous disease, but popular opinion among Jews has also changed. Geller, Fine, and Fine write that “a remarkable change has taken place in the attitude of the Jewish community towards gays in recent times and this must cause an evolution in the

⁴⁶ Geller, Fine, and Fine, “The Halakhah of Same-Sex Relations,” 11.

⁴⁷ *Ibid.*, 12.

halakhah.”⁴⁸ Such changes do not only create an opportunity for change but, in fact, *force* that change to occur.

Thus, they conclude that “the Torah prohibition of same-gender male or female sexual relations as תועבה [*to’evah*], abhorrent acts, are not consistent with our current knowledge almost universally accepted in the scientific community . . . The תועבה designation and subsequent halakhic prohibitions no longer reflect the [secular] legal treatment of gays . . . and do not represent the perception of them in most of the Jewish community.”⁴⁹ Geller, Fine, and Fine recognize that their decision-making methodology is not the one most widely accepted in halakhah and must know that their position will be strengthened by putting their method in halakhic context.

They first “agree that the text of the Torah is unchangeable, but the meaning that the text holds, its halakhic meaning, is explained by the rabbis.”⁵⁰ This starting point is identical to Roth’s systematic method. They acknowledge that the change they are proposing—altering the legal status of same-sex sexual relations—is a significant change, although one they believe is within the power of the rabbis given a major change in cultural context. Then, they pose the question of “whether we, as modern-day rabbis, have the authority to offer our own readings or limitations of the Torah if they

⁴⁸ Geller, Fine, and Fine, “The Halakhah of Same-Sex Relations,” 14.

⁴⁹ *Ibid.*, 15.

⁵⁰ *Ibid.*

are at variance with the precedented interpretations of the Sages.”⁵¹ Essentially, this is a question about whether the systematic method is the only authentic, authorized method of halakhic decision-making.

Geller, Fine, and Fine answer with a resounding “no,” affirming a place for aggadic methodology in the halakhic process. Even Roth must acknowledge that sometimes a compelling enough reason may arise to justify ignoring precedent, they note. Then, they locate in the Talmud numerous examples of the Sages themselves limiting the applicability of biblical law and note that none of these sometimes-major changes were considered *takkanot*, legislation. Instead, these changes were considered to be a part of the natural process of interpretation, “deriv[ing] their authenticity from the interpretive powers of the Rabbis to reread and rework an earlier understanding of the text in their effort to hear God’s voice in their time.”⁵²



These two decisions lay out what I would call paradigmatic examples of systematic and aggadic methodology. They also seem to reinforce the idea that systematic methodology necessarily leads to traditional outcomes while aggadic methodology leads to progressive outcomes. In this section, I will consider two responsa that challenge this idea: Wayne Allen’s responsa “Women Leading the Preliminary

⁵¹ Geller, Fine, and Fine, “The Halakhah of Same-Sex Relations,” 16.

⁵² *Ibid.*, 17.

Morning Service,” written in 2002; and David Golinkin’s “Women in the *Minyan* and as *Shelihat Tzibbur*,” written in 1997. While Golinkin’s responsa considers a broader range of issues than Allen’s, their topics are closely enough aligned to make a useful pair.

In “Women Leading the Preliminary Morning Service,” Allen considers the question of whether women are permitted to lead the portions of the morning prayer service called *Pesukei d’Zimra* (Verses of Praise) and *Birkhot haShachar* (the Morning Blessings). Allen begins by considering the history of these two sections in order to get to what he believes is the central question: “Whether or not the preliminary service is an obligatory accretion to the morning service and a communal norm.”⁵³ If these sections are obligatory, Allen says, they cannot be led by a woman, but if they are not obligatory, a woman could be the leader.

According to Allen’s analysis, this gender-based distinction is based on differing obligations between men and women. Because the prayer leader is responsible for fulfilling the obligations of those in the congregation who cannot do so for themselves, Allen says that the prayer leader “must bear the same responsibility” as the congregant.⁵⁴ However, “[s]ince women do not share the same obligations for prayer with men, they cannot serve as prayer leaders.”⁵⁵ This is Allen’s perfunctory conclusion, drawn after citing a number of sources—including the Talmud and works by

⁵³ Wayne Allen, “Women Leading the Preliminary Morning Service (2002),” in *Perspectives on Jewish Law and Contemporary Issues* (Jerusalem: Schechter Institute, 2009), 15.

⁵⁴ *Ibid.*, 16.

⁵⁵ *Ibid.*

Maimonides, Alfasi, and Karo, among others—but without analyzing those sources. And why are women not equally obligated? They are exempted from these obligations, Allen says, “only . . . because of a legal restraint encoded in our traditional sources, derived from the Torah, and not disputed by any classical authority.”⁵⁶ While women may have equal “competence, skill, or musical ability,” the deeply historical roots of the constraint simply cannot be overcome by any extralegal information about what women are actually like.⁵⁷

In order to determine whether *Pesukei d’Zimra* and *Birkhot haShachar* are obligatory portions of the morning service, Allen looks to traditional sources like the *Shulhan Arukh* and Jacob ben Asher’s *Sefer ha-Turim*. Though there are no clear answers in these sources, Allen uses them as a source of analogy: if these preliminary sections are treated in these venerable sources in the same way as the bulk of the morning service, then the writers of those sources must have believed that the preliminary portions were an obligatory and fully integrated part of the morning service.

Allen also brings two contrary sources to bear on the question. He notes that Rabbi Israel Meir Kagan (Poland, 1839-1933, also called the *Ḥafetz Ḥaim*) concluded in the *Mishnah Berurah* (“*Clarified Teachings*”)—a commentary on part of the *Shulhan Arukh*—that women were equally obligated to recite *Birkhot haShachar*.⁵⁸ Moreover, he

⁵⁶ Allen, “Women Leading,” 16.

⁵⁷ *Ibid.*, 16.

⁵⁸ *Ibid.*, 18.

says that the “possibility that the preliminary service is not at all part of the formal morning service is raised by the Tosafists,” who wrote medieval commentaries on the Talmud.⁵⁹ However, because “customs come in a variety of forms and it is not clear what form the Tosafists have in mind” when describing *Pesukei d’Zimra* as a “customary mood-setter,” Allen concludes that “the Tosafists are ambiguous at best.”⁶⁰

Ultimately, Allen concludes that because the weight of the authorities hold that the preliminary sections are indeed part of the morning service, women cannot lead *Pesukei d’Zimra* or *Birkhot haShachar*. “However,” he writes at the very end of his responsa, “the opinion of the *Mishnah Berurah* cannot be ignored . . . Hence, in times of need, when competent and suitable male prayer leaders are not available, competent and suitable women may lead the preliminary service.”⁶¹ He does not explain how the power of the *Mishnah Berurah* can overcome the weight of so much evidence to the contrary, nor how the *Mishnah Berurah*’s blanket conclusion that women are obligated to recite *Birkhot haShachar* is only operative when no capable man is present. If the question is one of obligation, are women only obligated when men are not present?

While Allen’s responsa is more succinct than the Roth responsa discussed above, it still bears the markers of a strongly systematic decision. Nowhere does Allen question the reason for the restriction of women’s obligation regarding prayer, even though he

⁵⁹ Allen, “Women Leading,” 18.

⁶⁰ *Ibid.*, 18.

⁶¹ *Ibid.*, 19.

implies that it is not due to any disability on the part of actual women. The existence of the restriction is all that matters, and its certainty is buffeted by its long history.

However, so strong is Allen's commitment to the decisions of past *poskim* that he not only acknowledges the contrary opinion of the Ḥafetz Ḥaim but even incorporates it into an illogical postscript to his responsa, one that, in fact, undermines the very logic of the responsa itself.

In "Women in the Minyan and as *Shelihot Tzibbur*," David Golinkin addresses several questions: Are women obligated to pray, and in particular are they obligated to pray the Amidah, a specifically mandated prayer, three times a day? Can they be counted in a minyan—the quorum of ten required for certain ritual acts and prayers? May they serve as prayer leaders for services like *shacharit* (the morning service), *minḥah* (the afternoon service), or *mussaf* (the additional service on the Sabbath)?⁶²

Like Allen, Golinkin begins with the question of a woman's obligation. Unlike Allen, however, Golinkin does not assume that a woman is not obligated. Instead, he starts with the Mishnah, the earliest source available on the topic, considering that the Torah itself has nothing specific to say about a woman's obligation to pray. The Mishnah, while exempting women—along with slaves and minors—from the obligation to recite certain prayers and to wear *tefillin*—a particular Jewish ritual item worn on the

⁶² David Golinkin, "Women in the *Minyan* and as *Shelihot Tzibbur*," in *The Status of Women in Jewish Law: Responsa*, 91.

head and arm—does obligate women to pray the Amidah. The problem arises in the Talmud. In the four extant complete early manuscripts of the Talmud tractate *Berakhot*—which comments on this portion of the Mishnah—there are three slightly different responses to the Mishnah, although none of them overturns the requirement that women pray the Amidah.

Golinkin’s careful analysis of each source is a hallmark of his responsa, which almost uniformly begin with a detailed tracing of the historical development of a particular law or custom. After looking at the Mishnah and the Talmud, Golinkin moves to Maimonides and a number of other early commentators. After that, he examines historical evidence of the actual prayer practices of women, noting that “most of these sources inform us about women’s prayer matter-of-factly, in ignorance of its legal bearing, and in Jewish law such evidence is considered reliable.”⁶³ That is, not only does Golinkin adduce a substantial number of examples from the Talmud and from historical sources from around the Jewish world, he also justifies the admission of this information by offering a halakhic rule of evidence.

What Golinkin often looks for in his responsa—and what he does here—is look for a turning point, the moment when a stringent law was made more lenient or a lenient law more stringent.⁶⁴ In this case, he needs to find when the Mishnaic obligation

⁶³ Golinkin, “Women in the Minyan,” 98.

⁶⁴ David Golinkin, in discussion with the author, January 2017.

of women to pray was transformed into an exemption. He finds it, in this case, in a 17th-century commentary to the *Shulḥan Arukh* written by a Polish rabbi named Abraham Gumbiner (c. 1635-1682). Golinkin sees Gumbiner's apparent exemption of women—"it is possible that the Sages did not obligate [women] to do more than" say a quick prayer in the morning, Gumbiner writes—not as an attempt to explicate the Mishnah or the Talmud but rather to "justify the practice of 'most women' in Poland in his time who prayed a short petition every morning and no more."⁶⁵ Golinkin then notes that even Gumbiner seems to disagree with this dismissal of women's obligation, as Gumbiner cites Nachmanides, who thought, as did most *poskim* before him, that women were indeed obligated—at least by rabbinic enactment—to pray three times a day.

When Golinkin considers the question of whether women may be counted in a minyan, he again returns first to the Mishnah, which is the source that first requires a minimum of ten to perform certain "*devarim shebikedushah*," "matters of holiness."⁶⁶ While neither the Mishnah nor the Talmud prohibit us from counting women among the ten, Golinkin writes that "[s]ome *poskim* have tried to exclude women from the *minyan* by emphasizing the words '*benei Yisrael*' = 'the **sons** of Israel,'" as opposed to the **daughters** of Israel, in Leviticus 22:32."⁶⁷ Golinkin rejects this interpretation for two reasons: first, the entire Torah is written in male language and therefore nothing in

⁶⁵ Golinkin, "Women in the *Minyan*," 105.

⁶⁶ *Ibid.*, 108.

⁶⁷ *Ibid.*, 109 (emphasis in original).

particular can be gleaned from any one instance of a masculine being used instead of a feminine, and second, “we cannot invent our own *midrashim*.”⁶⁸ Instead, Golinkin turns to ancient *midrashim* which support counting women in the minyan.

Finally, Golinkin must wrestle with the question of whether women may serve as prayer leaders. Again, he begins with the Mishnah’s requirement that only a person obligated may fulfill a mitzvah on behalf of others. Since he has already concluded that women are as obligated as men are to pray, he quickly concludes that women are permitted to serve as *shelihot tzibbur*.

Golinkin obviously knows that even this carefully written and considered opinion goes against the tide of modern decisions coming from traditional *poskim*. Therefore, he addresses several possible critiques of his analysis. The first of these critiques is that in his responsa Golinkin rules against the *Shulhan Arukh*, to which Golinkin replies that “the Geonim and Maimonides already established the principle that the Talmud Bavli is the highest authority on *halakhic* issues,”⁶⁹ and thus “many important *poskim* established that it is possible to rule according to the Bavli even if the ruling is against the Geonim or the major *poskim* such as the Rif, Maimonides, and the *Shulhan Arukh*.”⁷⁰ Then, he quotes the great of Conservative Judaism Solomon Schechter, who said that “however great the literary value of a code may be, it does not invest it

⁶⁸ Golinkin, “Women in the *Minyan*,” 109.

⁶⁹ *Ibid.*, 112.

⁷⁰ *Ibid.*, 113.

with the attribute of infallibility, nor does it exempt the student or the Rabbi who makes us of it from the duty of examining each paragraph on its own merits.”⁷¹

More challenging is the argument that the prohibition on women serving as *shelihot tzibbur* has a long practical history in that we know that women did not serve in this capacity in the past. How do we jettison such an established custom? Golinkin quotes Deuteronomy 17:8-11, which empowers of officials “in charge at the time” to answer questions of law. Then he says, echoing another of his writings I quoted earlier:

Moses and Rabbi Akiva and Maimonides and Rabbi Yosef Karo cannot solve the problems of **our day** because **our** problems were not **their** problems. In every generation, we must grapple with *halakhic* problems according to the circumstances and conditions of that generation, or, to use the Talmudic idiom: “Every generation and its expositors, every generation and its Sages, every generation and its scribes” (*Avodah Zarah* 5a). The basic sources remain the same, but every generation of judges or rabbis must interpret them according to the conditions of his time and place. If we arrive at a different answer, it doesn’t mean that our ancestors made a **mistake**, but that they and we arrived at different conclusions according to the conditions “at the time.”⁷²

He goes on to say that “the beauty of the Torah is that the *peshat*” —or plain meaning of a Scriptural text— “changes from generation to generation, as each commentator looks at the sources through the filter of his time and place.”⁷³ Though we can *understand* why the *Shulhan Arukh* would have ruled that women do not count in the minyan, it “is our duty as *poskim* to reexamine the sources in light of the reality of our

⁷¹ Golinkin, “Women in the *Minyan*,” 114.

⁷² *Ibid.*, 115.

⁷³ *Ibid.*, 116.

day. Of course, this does not mean that we can allow everything. But counting women in the *minyan* today is as **natural** today as it was **unnatural**” when the *Shulḥan Arukh* was written.⁷⁴

This responsa displays many of the hallmarks of a systematic decision. Golinkin notes that “the Talmud Bavli . . . constitutes the highest authority for any *halakhic* issue.”⁷⁵ He also shows deep commitment to the decisions and legal reasoning of the earliest commentators to the Talmud. In addition, he limits the interpretive power of the modern *posek*, as when he insists that we cannot simply invent new *midrashim* to explain an interpretation, because the power to write such *midrash* was given only to those Sages who wrote the ancient *midrashim*. Even Golinkin’s justification for a certain degree of modern innovation—even innovation in the form of returning to an ancient ruling—is deeply rooted in the tradition itself, and he never mentions ideas of justice or equality to justify his decision.

Ultimately, Golinkin rules that women are obligated to pray three times daily, that they are to be counted in the minyan, and that they can serve as prayer leaders. This outcome is undoubtedly progressive because it vastly increases the ability of women to participate fully in roles they were traditionally denied. However, this progressive result

⁷⁴ Golinkin, “Women in the *Minyan*,” 116.

⁷⁵ *Ibid.*, 109.

was reached using an impeccably systematic method, proving that the systematic approach can result in as progressive decision as the most aggadic methodology.



We now know that the systematic method can result in progressive outcomes. All that remains to be seen is whether aggadic methodology can also produce traditional results. To answer this question, I will again consider a pair of responsa, this time on the validity of allowing a person to convert if her non-Jewish spouse chooses not to convert: Rabbi Ben Zion Bergman's 1993 "The Case of the Unconverted Spouse," and Rabbi Monique Susskind Goldberg's 2004 "May I Convert If My Husband Does Not Convert?"

Bergman's responsa begins with the status quo. In 1956, the CJLS had apparently—though without providing a rationale—approved of conversions for people married to non-Jews, and a responsa written by Rabbi Roth which reached the opposite result had failed to gain approval in 1985.⁷⁶ The difficulty of the question is, in some ways, that there is no straightforward answer in the halakhah, likely due to the fact that throughout history Jews largely lived in insular communities where the conversion of a person already married to a non-Jew would have been more than unusual.

The question, then, must be answered in the context of intermarriage generally. Intermarriage, it should be noted, is forbidden *d'oraita*, in the Torah: Deuteronomy 7:3

⁷⁶ Ben Zion Bergman, "The Case of the Unconverted Spouse," *The Rabbinical Assembly* (February 17, 1993), http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19912000/bergman_unconverted.pdf, 127.

declares, “*v’lo hitchaten bam*,” “You should not intermarry with them.” Even the most aggadic *posek* cannot simply brush off a clearly-worded biblical injunction. Instead, they must find a way to weaken the foundation of the injunction or its applicability to a given situation.

Here, Bergman begins by writing that “[o]ne can argue that to transgress the Biblical injunction [in Deuteronomy 7:3] . . . requires a positive act of marriage . . . In the present situation, there is no *act* of intermarriage,” and so “[i]f a conversion results in an intermarried status . . . [it] has come about indirectly.”⁷⁷

The question, then, changes from one of intermarriage to one of unpleasant but indirect consequences. Bergman marshals Talmudic evidence that one may sometimes do an act unintentionally or indirectly that would be prohibited if done intentionally or directly. But, one might ask, do these authorities hold when the negative consequence is inevitable, as the Talmud holds? Bergman replies that “in the case of the converting spouse the intermarried status is not an *absolute* inevitability,” since the couple may divorce or the non-Jewish spouse may eventually decide to convert as well.⁷⁸

The fact that Bergman uses so many traditional sources to arrive at his ultimate answer—that such a conversion is permissible—may cause his responsa to look systematic. However, he does not say that these sources demand the result at which he

⁷⁷ Bergman, “The Case of the Unconverted Spouse,” 128.

⁷⁸ *Ibid.*, 129.

arrives; rather, he writes only that there is “ample room to argue that converting someone who intends to remain married to the unconverted gentile spouse is not violative of the halakhah.”⁷⁹ This merely provides him the halakhic space to reach the argument that truly moves him and seems to motivate his decision-making.

“Over and above the halakhic argument,” Bergman writes, “I feel even more strongly that forbidding such a conversion would be detrimental to the interests of the Jewish people . . . and would reflect failure to respond reasonably to the sociological reality.”⁸⁰ To reject the convert already married to a non-Jewish spouse, Bergman says, would create an unreasonable conflict with previous decisions of the CJLS; while Conservative rabbis may not perform intermarriages, the Jewish member of such marriages may continue to be a participating member of a Conservative synagogue. To allow such participation by a Jewish person who actively chose to intermarry but to forbid the conversion of a person already married to a non-Jew would be, in Bergman’s opinion, “to treat the innocent more severely than the sinner.”⁸¹

Perhaps more importantly, the Conservative movement has actively taken account of the sociological reality that the Conservative movement and the number of active Jews generally has been shrinking. To that end, Conservative Judaism has “consciously embraced a policy of קירוב [*kiruv*]—of encouraging conversion to Judaism,”

⁷⁹ Bergman, “The Case of the Unconverted Spouse,” 130.

⁸⁰ Ibid.

⁸¹ Ibid.

even to the end of accepting converts for whom the major motivation to convert is to marry a Jew.⁸² In the case under consideration, however, there is no such motive and thus it is clear that the convert is coming forward out of a real conviction about becoming Jewish. “To deny” this convert “is counter-productive to the best interests of the Jewish people since we would possibly be refusing the best and most sincere convert who could be the greatest asset and a source of strength to the Jewish community.”⁸³

If the Conservative movement discourages intermarriage, Bergman says, it is because very often this leads to the loss of a Jew and his or her children—who may be less likely to be or stay Jewish due to their mixed family. In the case of a convert married to a non-Jew, however, “the conversion results in a gain—of the convert and possible numerous descendants.” Under those circumstances, “the only proper response to the sociological pressures that militate against Jewish identity and Jewish survival is to welcome all sources of additional Jewish strength and vitality.”⁸⁴ While Bergman found a space within halakhah to make his decision, it was the sociological reality that really drove his decision.

Rabbi Susskind Goldberg does not come to the same conclusion as Rabbi Bergman. In fact, Susskind Goldberg does not even mention any sociological facts or concerns in her responsa on this topic. However, Susskind Goldberg does not reach her

⁸² Bergman, “The Case of the Unconverted Spouse,” 130.

⁸³ Ibid.

⁸⁴ Ibid.

conclusions by considering the halakhah alone. Instead, she has an alternate set of aggadic concerns that drive her decision-making.

Susskind Goldberg begins by noting that the halakhic conversion procedures—examination, circumcision, immersion—are only “the first step in becoming a Jew.”⁸⁵ The “day-to-day” life of the Jewish person includes observing a range of mitzvot that may change the way one lives her life. “Even if your husband supports your spiritual path,” Susskind Goldberg asks the potential convert who posed the question to her, “can you ask him to change his life style?”⁸⁶ She notes several ways in which the potential convert’s husband would be affected and wonders how the potential convert would “impose a traditional way of life on [her] family if [her] husband does not convert.”⁸⁷

Only then does Susskind Goldberg mention a halakhah—noting that by converting, the potential convert would “creat[e] an interfaith marriage which is forbidden by Jewish Law.”⁸⁸ She then references the CJLS decision from 1993 and writes that not all members of the CJLS agreed with Bergman’s reasoning.

Ultimately, Susskind Goldberg concludes that “a rabbi should not agree to convert a person whose spouse does not convert, because the convert will not be able to live a full Jewish life, and will be transgressing during all his/her married life by having

⁸⁵ Monique Susskind Goldberg, “May I Convert If My Husband Does Not Convert?” in *Ask the Rabbi: Women Rabbis Respond to Modern Halakhic Questions*, ed. David Golinkin and Israel Warman (Jerusalem: Schechter Institute, 2010), 34.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

sexual relations with a non-Jew.”⁸⁹ This conclusion is interesting for two reasons. First, the connection between the prohibition of interfaith marriages—the only halakhic citation given—and an apparent prohibition on having sex with non-Jews is not entirely clear. Would it then be acceptable to stay married to the non-Jew so long as the couple were celibate?

Second, the motivation for Susskind Goldberg’s decision seems clear: being married to a Jew and creating an entirely Jewish household is a *necessary* part of Jewish life. Unless the convert can live a “full Jewish life,” the convert should not be permitted to convert. This is not obviously a halakhic decision—no precedent is adduced supporting the idea that the ability to live something less than an ideally Jewish life is necessarily a bar to conversion—but appears to be motivated by a personal feeling of the author about what a Jewish life really is supposed to look like.

⁸⁹ Susskind Goldberg, “May I Convert,” 35.

4. *Conclusions*

At the end of his responsa “Homosexuality Revisited,” Rabbi Roth makes an impassioned plea for the systematic method. He faced a committee split not only on the outcome—that is, what traditional prohibitions on same-sex sexual activity would be preserved and therefore what role LGBTQ Jews would be able to play in the movement—but, in fact, split on the very method they should use to arrive at an answer.

Roth, a great believer in the systematic method, saw a number of his colleagues succumbing to the allure of the aggadic method. He believed that if the results of that method were accepted, there would be a real question of whether the CJLS could “continue to be seen as a halakhic decision-making body.” While he acknowledged room for pluralism, “some decisions are outside [pluralism’s] boundaries.” How do we know when such boundaries have been crossed? Roth says that we will know if a decision relies on a “method . . . unrecognizable to the writers of the preceding chapters” of halakhah.¹ “There can be no doubt,” Roth writes, “that normatively speaking the halakhic tradition is the given, and theology is required to fall into place behind it.”² Theology—which, he says, provides the narrative, or aggadah, which “makes the halakhic tradition intellectually persuasive and emotionally acceptable—however, cannot lead the halakhah.

¹ Roth, “Homosexuality Revisited,” 29.

² *Ibid.*, 30.

The aggadic method, Roth says, will literally be the downfall of the entire halakhic system. If members of the CJLS rely on the aggadic method to make decisions, he says, they “are no longer legitimate halakhists, we undermine our authority as the interpreters of God’s will, and we render the Law Committee halakhically irrelevant.”³ And, in fact, after the highly aggadic decision of Rabbis Dorff, Nevins, and Reisner was accepted along with Roth’s own, Roth left the CJLS after nearly thirty years.⁴

We have already seen quite clearly that both Roth’s systematic method and the alternate aggadic method can result in decisions both traditional and progressive. So Roth’s concerns cannot be based on the idea that non-systematic decision-making will ultimately result in a progressive Judaism unrecognizable to systematic decision-makers. Roth’s concern, therefore, must be that, whatever the outcome, decisions made by a non-systematic process are *a priori* invalid, because only the systematic methodology is legitimately and authentically Jewish.

At the beginning of his book *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law*, Louis Jacob writes that the

legal side of Judaism—far from being entirely self-sufficient and self-authenticating, is influenced by the attitudes, conscious or unconscious, of its practitioners toward the wider demands and ideals of Judaism and

³ Ibid., 29.

⁴ Laurie Goodstein, “Conservative Jews Allow Gay Rabbis and Unions,” *New York Times*, Dec. 7, 2006, <http://www.nytimes.com/2006/12/07/us/07jews.html>.

by the social, economic, theological, and political conditions that occur when the ostensibly purely legal norms and methodology are developed.⁵

While “the Halakhists appear to operate as if theirs were an exact science . . . a deeper understanding of the Halakhic process demonstrates . . . that the Halakhists were by no means disembodied intelligences, working with an on bloodless abstractions.”⁶ Eliezer Berkovits similarly notes that “Halakha and Aggada are intrinsically interrelated.”⁷ Even the strictest *posek* cannot come to an issue devoid of preexisting feelings about what the right or acceptable outcome should be, “not because the sources he is about to examine will inevitably lead to that conclusion but because his general approach to Judaism compels him to come up with a conclusion that must not be at variance with Jewish ideas and ideals he and his contemporaries or his ‘school’ sees them.”⁸

For that reason, “[a]ny neat distinction between Halakhah and Aggadah . . . is untenable. Behind the most austere Halakhist there sits the passionate, easily moved, poetic Aggadist.”⁹ And, one might also say, behind the most passionate, poetic Aggadist, there is a scholar of Jewish law who feels bound to the austere, precedential

⁵ Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford: Oxford University Press, 1984), 9.

⁶ *Ibid.*

⁷ Berkovits, *Not In Heaven*, 1.

⁸ Jacobs, *A Tree of Life*, 11.

⁹ *Ibid.*

method so firmly rooted in Jewish tradition. Every decision is—must be?—based in a method both systematic and aggadic.¹⁰

More interesting, perhaps, is that whether the method is more systematic or more aggadic does not reveal its results. That preconceived answer, the decision that is “right” or “acceptable” to an individual decision-maker, sometimes that answer can be stronger than even the most convincing systematic argument to the contrary. The feelings and the passions of the *posek* will almost inevitably draw her down this path or that, will make possible for her what would be impossible for someone else.

Methodology alone will never tell us what the answer will be, and perhaps no decision will ever tell us what the “objectively right” answer is, but only what this *posek* or that believed was the rightest, most acceptable, most *Jewish* answer.

Is this a flaw in the system? Does this mean that we derive nothing of use from halakhic decisions? A Talmudic tale may shed light. A number of Sages were discussing the ritual cleanliness of a particular oven called the Oven of Akhnai. Rabbi Eliezer, according to the Talmud, “brought forth every imaginable argument,” to prove that the oven was actually clean, “but [the other Sages] did not accept them” and declared it unclean.¹¹

¹⁰ Or, in other words, must be based both in the *nomos* and the narrative Robert Cover described in his groundbreaking 1983 article. See Cover, “Nomos and Narrative.”

¹¹ Jeremy D. Sher, “The Oven of Akhnai,” *ThisIsJudaism.net*, accessed March 17, 2017, <http://thisisjudaism.net/wp-content/uploads/2014/09/The-Oven-of-Akhnai.pdf>.

Said [Rabbi Eliezer] to them: “if the halachah agrees with me, let this carob-tree prove it!” Thereupon, the carob-tree was torn a hundred cubits out of its place . . .

“No proof can be brought from a carob-tree,” they retorted.

Again he said to them: “If the halachah agrees with me, let the stream of water prove it!” Whereupon the stream of water flowed backwards—

“No proof can be brought from a stream of water,” they rejoined.

Again he urged: “If the halachah agrees with me, let the walls of the schoolhouse prove it,” whereupon the walls inclined to fall.

But R. Joshua rebuked them, saying: “When scholars are engaged in a halachic dispute, what [right] have ye to interfere?” Hence they did not fall, in honor of R. Joshua, nor did they resume the upright, in honor of R. Eliezer; and they are still standing thus inclined.

Again he said to them: “If the halachah agrees with me, let it be proved from Heaven!”

Whereupon a Heavenly Voice cried out: “Why do ye dispute with R. Eliezar, seeing that in all matters the halachah agrees with him!”

But R. Joshua [the head of the academy] arose and exclaimed, “It is not in heaven!”

What did he mean by this?—Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou has long since written in the Torah at Mount Sinai, After the majority must one incline.¹²

This Talmudic aggadah is certainly delightful, with its carob-trees and streams of water, with Rabbi Eliezer’s increasingly outrageous requests and the wonderfully dry

¹² Ibid.

retorts of Rabbi Joshua. But it also illustrates the principle that we have been discussing: the Torah may have been given at Sinai—that is, the law may have been given directly by God—but once He released it into the world, He relinquished control of it to human beings. Sometimes, these human beings may be driven by intense passions, like our Eliezer. Sometimes, dry logic will be their touchstone, like the dour Joshua. But in any case, they will be human, and humans are not capable of being just one thing or the other, just systematic or just aggadic. We will forever be *both* Eliezer and Joshua, living in the tension between, our walls thus inclined.

The Talmudic story is not quite finished, however. What would a lawgiver think, to see his law subject to the logic *and* the passion of humankind?

R. Nathan met Elijah and asked him: “What did the Holy One, blessed be He, do in that hour [observing the argument between Eliezer and Joshua]?”

“He laughed [with joy],” [Elijah] responded, “saying, ‘My children have defeated Me! My children have defeated Me!’”

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