

Narratives of Enlightenment:

On the Use of the “Captive Infant” Story by Recent Halakhic Authorities

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[p. 95] The era called the Enlightenment¹ marked a series of radical transformations in the ways in which citizens of the West (broadly speaking: the nations of western and central Europe and their progeny on other continents) began to imagine and to talk about their social and cultural world. One of these, the widespread secularization of society, is regarded as one of the most characteristic features of the Enlightenment and post-Enlightenment world. This is not to say that religion disappeared or became irrelevant to the peoples of the West. Rather, defined as “the process by which sectors of society and culture are removed from the domination of religious institutions and symbols,” secularization denotes the modern trend to divest religion of

1. A footnote may be a bad place for a lengthy excursus, but I need to say something about the periodization scheme of this article. By the “Enlightenment” we generally mean the intellectual movement inspired by the 18th-century *philosophes*, whom Peter Gay describes as “a loose, informal, wholly unorganized coalition of cultural critics, religious skeptics, and political reformers from Edinburgh to Naples, Paris to Berlin, Boston to Philadelphia”; *The Enlightenment: An Interpretation. The Rise of Modern Paganism* (New York: Knopf, 1966), 3. Characteristic of these thinkers was the desire to know, to pursue knowledge in an atmosphere of total freedom, and this included quite prominently freedom from the domination of religious authority. It is for this reason that we come to associate the intellectual and cultural era known as the “Enlightenment” with the social fact of secularization. I do not claim that the *roots* of secularization lie entirely in the 18th-century Enlightenment. It is clear that the secular world-view, to say nothing of the Enlightenment itself, is heavily dependent upon the transformations wrought by the Renaissance and the Reformation, the religious wars that ravaged 17th-century Europe, and the intellectual revolution fomented by such thinkers as Newton, Leibniz, Hobbes and Spinoza who preceded the formal dates of the Enlightenment. (Of course, if we date the Enlightenment as do some scholars from 1650-1750, much of the periodization difficulty disappears.) What I do claim is that the habits of thought and outlook generated in the Enlightenment period are essential to the phenomenon of secularization (see in the text at notes 2 and 3).

much of its power over intellectual and cultural life, the arts and the sciences, and the consciousness of individuals. Thus, while many in the modern West still understand themselves as “religious” in terms of their beliefs and personal practices, Western society is “secular” in that its citizens can successfully organize their lives and their world-views without any overt dependence upon religious authority.² This tendency expresses itself through a variety of changes in social behavior. Among these are religious pluralism, the tendency among the citizenry to recognize that no one establishment of religion need have a monopoly upon divine truth;³ political liberalism, the commitment to the primacy of individual choice and conscience in matters such as religion; and a noticeable decline in the level of religious observance among the members of the society.⁴

The process of secularization within the Jewish community has been explored in detail by historians.⁵ My specific focus here is upon the response of some halakhic authorities to that process: how did these rabbis, who understand their world and speak to their communities

2. Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York: Doubleday, 1967), 107-108.

3. I have oversimplified for the sake of brevity. “Religious pluralism” began, in the modern West, with the Reformation, and it took some time for Catholics and Protestants to reach the conclusion that neither side possessed such a monopoly on religious truth. The Thirty Years War brought them to the realization that some sort of religious toleration was a necessity if the state were to survive. Gradually, this realization became an affirmation of the positive value of individual conscience and freedom of religious choice. The point is that, over time, the government removed itself from the business of coercing religious behavior.

4. See Owen Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Cambridge: Cambridge University Press, 1975), 17-18.

5. The literature is vast. Let me cite the following as the tip of the iceberg: Jacob Katz, *Out of The Ghetto: The Social Background of Jewish Emancipation* (Cambridge, MA: Harvard University Press, 1973); S. Feiner and Y. Bartel, eds., *Hahaskalah legevanehah: iyunim hadashim betoldot hahaskalah uvesifrutah* (Jerusalem: Magnes Press, 2005); Moshe Pelli, *The Age of the Haskalah: Studies in Hebrew Literature of the Enlightenment in Germany* (Lanham, MD: University Press of America, 2006); Michael A. Meyer, *The Origins of the Modern Jew: Jewish Identity and European Culture in Germany, 1749-1824* (Detroit: Wayne State University Press, 1979); *idem.*, *Judaism Within Modernity: Essays on Jewish History and Religion* (Detroit: Wayne State University Press, 2001).

through the intellectual and linguistic medium of [96] halakhic discourse, apply that discourse against the backdrop of the social upheavals of the Enlightenment and the Emancipation? In this, I follow in the footsteps of the late Professor Jacob Katz, the preeminent scholar of the social history of the Jews during that period.⁶ In his *Hahalakhah bemeitzar*⁷ Katz charts the course of the ideological and religious battles in central Europe between the newly-emerging Orthodox community and its secular (or religiously reformist) opponents. He notes that the Orthodox reaction to the “deviant” religious behavior of their early- to mid-19th century co-religionists differs significantly from the stance that the leading rabbis had taken with respect to similar challenges in ancient and medieval times.⁸ The classical *halakhah*, as we shall see, defines the Jew who abandons the discipline of halakhic observance, and particularly the observance of the Sabbath and its prohibited labors, as a *mumar*, an apostate, who in some cases may be deserving of death but in any case ought to be excluded from the Jewish community.⁹ Accordingly, earlier rabbis had pronounced bans of excommunication upon those who turned away from the path of Torah law. By contrast, the halakhic authorities of 19th century Europe, who were increasingly becoming identified as a specifically Orthodox rabbinate, saw themselves as lacking the power to do the same. This difference, in Katz’s view, reflects the deep change that the Enlightenment and

6. For an appreciation of Katz’s scholarly career, see the essays collected in Jay M. Harris, ed., *The Pride of Jacob: Essays on Jacob Katz and His Work* (Cambridge, MA: Harvard University Press, 2002). In particular, I would cite the essays in that volume by David Ellenson (“Jacob Katz on the Origins and Dimensions of Dimensions of Jewish Modernity: The Centrality of the German Experience,” 97-124) and Moshe Halbertal (“Jacob Katz on Halakhah, Orthodoxy, and History,” 163-172).

7. Jacob Katz, *Hahalakhah bemeitzar: miksholim `al derekh ha’ortodoksiyah behithavutah* (Jerusalem: Magnes Press, 1992).

8. On what follows in this paragraph, see Katz, note 7, above, 14-18.

9. On the concept of apostasy in Jewish law, see Stanton Zamek, “*Even Though He Sins, He Remains A Jew*”: *The Repentance of the Returning Apostate* (Rabbinical thesis, HUC-JIR, Cincinnati, 1996); Jacob Katz, *Halakhah vekabalah* (Jerusalem: Magnes, 1984), 255-269 (especially the sources at p. 256, n. 9); and Ephraim Kanarfogel, “Rabbinic Attitudes toward Nonobservance in the Medieval Period,” in Jacob J. Schacter, ed., *Jewish Tradition and the Non-Traditional Jew* (Northvale, NJ: Jason Aronson, 1992), 3-36.

the Emancipation had brought about in the concept of Jewish identity. In an increasingly secular era, one's communal attachments are determined by factors other than religion. Thus, in their own eyes as well as in the eyes of their Gentile neighbors, Jews were Jews not necessarily by virtue of their acceptance of an official theology or ritual discipline but rather by dint of their common origins and their cultural distinctiveness. The Jews, in other words, were now a *people*, and even Orthodox rabbis found it difficult to deny a Jew his membership in the people of Israel solely on the basis of his lack of religious observance. The halakhic [97] authorities therefore had to develop new strategies for dealing with their non-observant brethren, who in many communities formed the majority of the Jewish population.

The most uncompromisingly rigid of these strategies, championed by such luminaries as R. Moshe Sofer (the Hatam Sofer), was to assume a stance of cultural and religious separation from the non-observant. If the rabbis no longer enjoyed the power to excommunicate transgressors from the Jewish polity, they would form their own exclusively Orthodox communities to accomplish the same goal in reverse.¹⁰ Other halakhists, however, adopted a more accommodating position. One of these was Rabbi Ya`akov Ettlinger of Altona,¹¹ a leading *posek* (halakhic decisor) who, despite his reputation for piety and his opposition to modernization and religious reform, declared that the non-observant Jews of his day – the second or third generation following Emancipation – should be distinguished from the *mumar* who consciously and purposefully rejects the authority of the Torah. They should instead be regarded

10. "Were their fate [*i.e.*, of the non-observant] left to our control, I would urge their expulsion from the land and that our children not be permitted to marry theirs" (*Resp. Hatam Sofer* 6:89).

11. The standard monograph is Judith Bleich, *Jacob Ettlinger, His Life and Works: The Emergence of Modern Orthodoxy in Germany* (Ph.D. thesis, New York University, 1974). See also her article "Rabbinic Responses to Nonobservance in the Modern Era," in Jacob J. Schacter, ed., *Jewish Tradition and the Non-Traditional Jew* (Northvale, NJ: Jason Aronson, 1992), particularly at 72-76.

as “infants taken captive by Gentiles.” That is, just as a Jewish child kidnaped and raised by Gentiles cannot be blamed for sins he commits as a result of his ignorance of the Torah, so the non-observant Jews of post-Emancipation Europe, who were deprived as children of training in the “true” Jewish path, are not fully responsible for their sinful behavior.

Ettlinger’s ruling opened the door to a more positive relationship between the squabbling factions of the Jewish community. By holding that the non-observant Jews of his day were not true apostates, he provided the necessary halakhic warrant for Orthodox Jews to maintain social, familial, and relationships with their non-Orthodox brethren. I stress the adjective “halakhic.” The responsum in which Ettlinger puts forth his theory presents itself in every way as a serious, sincere exercise in halakhic thinking and decision-making. It touches upon subject matters that are classically [98] halakhic, and like most *teshuvot* it features the sort of source citation and argumentation that are characteristic of rabbinical *pesak* (legal ruling). Yet not all observers perceive it in this way. Jacob Katz, in particular, dismisses Ettlinger’s “captive infant” theory as “of course, a transparent legal fiction, born out of the necessity to justify the prevailing practice in which observant Jews did not break off contact with their non-observant brethren. Indeed, they continued doing business with them, maintained family relationships with them, and even married them when opportunity presented itself.”¹² In other words, Ettlinger’s ruling is not to be taken as an example of serious halakhic thought but rather as a thin, sketchy, and rather unconvincing effort to offer some sort of legal rationalization for what Orthodox Jews, out of social and economic necessity, had to do, were already doing, and would in any event continue to do.

12. Katz, note 7, above, 16.

What follows in this essay is, in part, my response to this judgment.¹³ It begins with the observation that Katz writes here precisely as a social historian and not as a halakhist or a legal theorist. This is important because the disciplinary boundaries within which scholars pursue their inquiries do much to shape the things they see as well as the things they say. As a historian, Professor Katz sees a rabbinical ruling that, through the application of a conceptual category that cannot be taken literally (for after all, the non-observant Jews of whom Ettlinger speaks were never kidnaped as infants by their Gentile neighbors), supports a conclusion congenial to many of the Orthodox Jews who sought guidance from him. What counts for Katz is the legal result, which because it reflects powerful social realities of the time must have been dictated from the outset, rather than the process by which the *posek* pretends to derive it. This does not mean that Katz regards the study of that process as a waste of time. Historians, he writes, ought to pay careful attention to the specifically legal reasoning of a rabbi's decision in order "to discover between the lines of the *posek*'s analysis traces of those non-halakhic or extra-halakhic motives that ultimately guided his thought."¹⁴ Yet [99] here, too, Katz is thinking like a historian and a social scientist. And while there is certainly nothing wrong with that – how else, indeed, *should* a historian or a social scientist think? – this approach misses the point of halakhic writing *as* halakhic writing. To the extent that a concentration upon social fact – that is, the non-legal realities that influence the decision – leads us to look through or past the language with which the jurist verbalizes the decision and communicates it to his colleagues and his community, we will arrive at a distorted view of the jurist's role as a spokesperson of the law. Ironically, it was

13. I confess to a considerable degree of trepidation, given my deep admiration for Katz's scholarly accomplishments. Moreover, in light of his recent passing, I am especially cognizant of the Sages' counsel that one not refute the words of a great scholar after he has died (*B. Gitin* 83a, and see Rashi *ad loc.*, *s.v. ein meshivin et ha'ari*).

Professor Katz who long ago warned us not to fall into this trap. It was he who observed that rabbis are first and foremost scholars of the *halakhah* and that *halakhah* is the language that they speak, the means by which they respond to and shape their world. Thus, while the general historian can be satisfied to say that “social reality compelled the halakhists to arrive at a permissive ruling... the scholar of halakhic history must inquire as to how the concession to that reality was made coherent with halakhic thought.”¹⁵ What rabbis *do*, in other words, is not politics or social policy but *halakhah*, and *they* most certainly take their halakhic arguments with the utmost seriousness. So should we. If we hope to understand who these rabbis are and their particular role in history, we must seek to appreciate them in light of what makes them rabbis, namely their contributions as scholars and interpreters of Jewish law.

I propose, therefore, to read R. Ya`akov Ettlenger’s *teshuvah* as the sort of text it proclaims itself to be: a work of halakhic literature. I want to explore it, not as an artifact of history, but as a statement of law, parsing it with the aid of the tools of legal theory rather than those of sociology. I want, in short, to take his responsum seriously as an act of halakhic reasoning and thought. When we do so, I think that Ettlenger’s halakhic argument assumes a stature and a substance that Katz would deny it. **[100]**

Narrative and the Law.

Let me begin with the term “legal fiction,” which Katz uses to minimize the legal substance of Ettlenger’s opinion. It is difficult to blame him for this. Many legal systems rely

14. Jacob Katz, *Halakhah vekabalah* (Jerusalem: Magnes, 1984), 5.

15. Katz (note 14, above), 344-345. (The article first appeared in *Kiryat Sefer* 31 [1956], 9-16.) See as well at 213-214, where Katz critiques Heinrich Graetz’s treatment of the 16th-century ordination controversy in Safed on the grounds that the eminent historian attempts to look past or through the halakhic objections raised by the opponents of R. Ya`akov Beirab in an effort to discover their “real” motivations. That article first appeared in *Zion* 16 (1951), 28-45. On this aspect of Katz’s scholarly approach to *halakhah* see my “*Halakhah* and Translation: The Chatam Sofer on Prayer in the Vernacular,” *CCAR Journal* 51:3 (Summer, 2004), especially at 142-144.

upon fictions – *i.e.*, statements that legal writers make while knowing that they are not literally true – and this fact, in the eyes of the non-lawyer, is evidence at best of the law’s immaturity and at worst of its duplicity. Why will the law not call reality by its true name? The lawyer, on the other hand, recognizes that “fictional” language is endemic to legal discourse – “(t)he influence of the fiction extends to every department of the jurist’s activities” -- and is a necessary means by which jurists reconcile reality with the perceived constraints of the law and its conceptual world.¹⁶ Put perhaps over-simply, law is a language, and like any other language it is therefore artificial, a creation of a particular culture. The lawyer’s job is to translate the “facts” into the artificial language of the law, and this will always require the resort to devices that partake more of the world of literature than of empirical science. As one observer puts it, the legal fiction “is frequently a metaphorical way of expressing a truth.”¹⁷ Law, like language itself, cannot do without metaphor, without figures of speech and literary device. When we encounter metaphor in legal writing, we *are* therefore dealing with law, with genuine legal discourse, and not with some lawyer’s sleight-of-hand designed to disguise the truth.

The preceding remarks are informed by the insights of the “Law and Literature” movement, a loose association of academics in law schools and elsewhere whose research focuses upon the possible points of contact between these two disciplines. Although these scholars differ widely in their approaches, methodologies, and theoretical assumptions,¹⁸ many

16. See, in general, Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967). The quotation is at p. 2. I do not mean to imply that Fuller’s view of legal fiction is entirely uncritical. He does believe that certain fictions have outlived their usefulness. But that is simply another way of saying that legal fiction on some level *is* useful; it is, in other words, endemic to legal language and the enterprise of law.

17. Fuller, note 16, above, 10.

18. Indeed, those associated with Law and Literature tend to deny the existence of any unified scholarly agenda. See, for example, James Boyd White, “Law and Literature: No Manifestos,” *Mercer Law Review*

of them unite around the proposition that the activity of law is to a great extent a literary enterprise, a discourse, a mode of communication that works out its meanings [101] through written statement and argument. Accordingly, these writers posit that legal texts might usefully be studied with techniques drawn from the field of “literature”: methods to literary criticism, theories of hermeneutics and rhetoric, and the like.¹⁹ Law and Literature is thus a significant departure from the standard approaches to legal study that have concentrated upon doctrinal analysis, that is, the substance of law as opposed to its form of expression. It is also as a protest against some newer models of jurisprudence, which tend (as Professor Katz does in this case) to look through or past the language of legal discourse in search of the “real” economic and political motivations of law and legal decision. Law and Literature insists rather that legal language *is* the core of the activity called law and therefore deserves to be studied in its own right; the literary approach conceives of law “not as rules and policies but as stories, explanations, performances, linguistic exchanges.”²⁰

The word “stories” evokes one of the central themes of Law and Literature scholarship: the ubiquity of narrative in law.²¹ It is obvious to even the casual observer that much of “law”

39 (1988), 739-751. Law and Literature scholars tend to be quite critical of their colleagues’ fundamental assumptions and approaches, a fact that confirms the movement’s lack of agreed-upon methodological foundations. Compare Richard A. Posner, *Law and Literature* (Cambridge, MA: Harvard University Press, 1998), 1-7 and Richard Weisberg, *Poethics* (New York: Columbia University Press, 1992), 188-213 and 224-250.

19. In the words of Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), 3: literary scholars of law employ “the techniques and principles of literary criticism, theory and interpretation to better understand the writing, thought, and social practice that constitute legal systems.”

20. Paul Gewirtz, “Narrative and Rhetoric in the Law,” in P. Brooks and P. Gewirtz, eds., *Law’s Stories* (New Haven: Yale University Press, 1996), 2. See the very similar statement by James Boyd White, *Heracles’ Bow* (Madison: University of Wisconsin Press, 1985), x: “This is a way of looking at the law not as a set of rules or institutions or structures (as it is usually envisaged), nor as a part of our bureaucracy or government (to be thought of in terms of political science or sociology or economics), but as a kind of rhetorical and literary activity.”

21. Binder and Weisberg (note 19, above, 201-291) refer to this theme as “the Law as Narrative trope.”

consists of the telling of stories. The client presents a story to her lawyer, who transforms it into a legal narrative, that is, a form of the story that will be accepted by judges and other legal actors as a possible basis of action. The judge before whom the case is tried will then write a narrative of her own that either accepts the story as presented by the lawyer or adjusts it in accordance with the competing narrative of the opposing litigant.²² Recent scholarship, however, has suggested a deeper role for narrative in the legal experience.²³ I am referring to theories of “narratology” or “the narrative construction of reality,” that is, the perception that human beings make their normative world through the creation and telling of stories. In this view, we organize the raw data of our experience by drawing associations of cause and effect, by making assumptions of what is likely to occur if we do this or that. We claim meaning for these data by organizing them into patterns of story; “(i)n narrative, we take experience and configure it [102] in a conventional and comprehensible form.”²⁴ This insight builds upon prevalent trends in critical theory that deny the existence of objective, universal, rational foundations from which knowledge is derived and upon which reason operates.²⁵ The absence of such foundations

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22. Judge Benjamin Cardozo is a fascinating example of a judicial storyteller whose opinions are often studied for the literary art with which he presents (and shades) the facts of the case to support his decision. See Peter Brooks, “Mishtur sipurim,” *Mehkerei Mishpat* 18 (2002), 249-261; Richard Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990), 33ff and 48ff; Richard Weisberg (note 18, above), 16-34.
 23. For a more expansive treatment of the subject I compress here see Jane B. Baron, “Resistance to Stories,” *Southern California Law Review* 67 (1993), 255-285. For a general overview, see Binder and Weisberg (note 19, above), 201-291) and the essays collected in Gewirtz and Brooks (note 20, above).
 24. Steven L. Winter, “The Cognitive Dimension of the *Agon* Between Legal Power and Narrative Meaning,” *Michigan Law Review* 87 (1989), 2228.
 25. This claim lies at the foundation of modern theories of hermeneutics, of deconstruction, and the like. For a good description of “foundationalism” and “anti-foundationalism,” see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989), 342ff. The claim that “questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value” (Fish, 344) destabilizes disciplines such as history that contend to portray “the facts

implies that decision making, legal or otherwise, is best understood as a “situated” enterprise, dependent upon contexts that are shaped by prior experience, ideology, and similar influences. These contexts, in turn, are not factual givens; they are *conventions*, accepted patterns of classifying data and of directing thought, the socially constructed starting points of reasoning.²⁶ And the act of construction takes place largely in the form of the stories we tell about ourselves, about others, and about the world. Small wonder, then, that the law, which is a discourse of reasoning and arguing about the meaning of facts, rules, and texts, is replete with narrative technique.²⁷ In the words of one Israeli scholar:²⁸

Judges often choose the tool of narrative, especially when describing the facts of the case they are called upon to decide. Every factual account presented in a judicial decision, like any other narrative, involves a series of choices: the facts that will be included, the facts that will be omitted, the order in which they are placed, and their description. Similarly, the judge must choose a point of view from which the facts will be related, a character that will express them, and those points of the story in which, explicitly or implicitly, the

as they are”. The very fact that the historian *narrates* her subject, choosing which data to include and which to omit, determining the cause and effect relationships between them and privileging one set of accounts of an event over others leads some theorists to question the possibility of objectivity in the portrayal of the past. See Arthur C. Danto, *Narration and Knowledge* (New York: Columbia University Press, 1985) and Hayden White, *Metahistory* (Baltimore: Johns Hopkins University Press, 1975).

26. See Catherine Wells, “Situated Decisionmaking,” *Southern California Law Review* 63 (1990) 1727-1746, and J. M. Balkin, “Ideology as Constraint,” *Stanford Law Review* 43 (1991), 1150ff. These two articles emerge from two major movements within contemporary legal academia: Legal Pragmatism (Wells; her essay appears in a special symposium issue of the *Southern California Law Review* devoted to “The Renaissance of Pragmatism in American Legal Thought”) and Critical Legal Studies (Balkin).
27. As Clifford Geertz observes, “legal thought is constructive of social realities rather than merely reflective of them”; C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New Haven: Yale University Press, 1983), 232.
28. Shulamit Almog, “‘Galu’i Vekasu’i Belashon’: `Al Ketivatah Hashiputit shel Daliah Dorner,” *Mehkerei Mishpat* 22 (2006), 431-444; the quotation is at 439.

voice of the commentator shall intervene. The creation of judicial narratives is a work of sophistication that requires much more than the bringing together of the relevant facts.

The judicial narrative paves the way toward the normative decision, because it allows the decision to be seen as natural and as demanded by the reality that the narrative describes.

[103] Narrative works as well beyond the boundaries of specific cases. Entire institutions of the law are based upon narrative constructions such as “the reasonable person” or “the hard-luck story,” and the effects of the story lines can be traced in appellate opinions, writings that are supposed to be dry exercises in formalistic legal reasoning.²⁹ Constitutional law, which necessarily involves argument over the fundamental political values of a society, is founded in “fictions” that, however contestable, “could not be eliminated without crippling the legal enterprise.”³⁰ Even legal theory, which presents itself as abstract reasoning about jurisprudence, can be said to assume narrative visions of the world, so that each separate approach to the philosophy of law reflects perspectives about human nature that can be classified into literary categories.³¹ And in an oft-cited statement, Robert Cover memorably notes that the law of any community exists within a normative universe constructed by the narratives that “bespeak the range of the group’s commitments.”³²

29. David R. Papke, “Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions,” *Journal of Legal Education* 40 (1990), 145-159.

30. L. H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: The Pennsylvania State University Press, 1995), 8.

31. See Robin West, “Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory,” *New York University Law Review* 60 (1985), 145-211.

32. Robert Cover, “Nomos and Narrative,” *Harvard Law Review* 97 (1984) 4-68; the quotations are at 46 and 4-5.

We inhabit a *nomos* – a normative universe... The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.

[104] All of the above suggests the futility of drawing clear and distinct lines that separate the practice of law from the activity of narrative. Simply put, law itself is a story. To a great extent law *is* narrative and would be impossible without it.³³

When we recognize law's deep dependence upon the narrative imagination, we make a descriptive claim about the nature of legal discourse: "this is how the law works." We do not necessarily make a normative claim, to the effect that narrative is a good thing or a bad thing for law or lawyers. Many practitioners of what is called "narrative jurisprudence," however, do

33. See James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 2003) 32-33: "(w)henever a lawyer speaks she both tells a story and claims a meaning for it... In claiming a meaning for the story that he tells, the lawyer must make use of the existing body of cases, statutes, understandings, and rules that we call the law, which exists, before he organizes it into argument, simply as raw material for him and his adversary, full of obscurity and contradiction and uncertainty. In making his argument he revives and reorganizes – he reconstitutes – this cultural inheritance, creating a new version of it in competition with another mind."

advance beyond purely descriptive observation to the realm of prescription, which is hardly unusual in legal scholarship.³⁴ Some recommend narrative for didactic purposes, as part of the inculcation of a broader literary sensibility among legal actors. To the extent that those who study and administer the law read and ponder “good literature,” the theory goes, they will develop a literary imagination that will nourish their capacity for empathy and feeling, making law a more just and humane activity.³⁵ Others go farther, urging narrative as a replacement for many of the standard forms of legal reasoning and analysis. Traditional legal doctrine, they argue, claims objectivity but in fact privileges a single narrative perspective. Indeed, what constitutes “objectivity” in law is simply the narrative assumptions of truth held by the dominant social and political grouping in the society, assumptions that govern what is and is not accepted in legal conversation.³⁶ These assumptions appear to be objective because they are not questioned, and they work to exclude alternative narratives, particularly those that recount the experience of oppressed and marginalized minorities. The remedy is for lawyers, judges, and legal academics to “hear the call of stories,”³⁷ to use narrative as a means of questioning received definitions of “reason,” of opening legal discourse to voices that, until now, it has ignored or silenced.³⁸ Narrativist lawyers accordingly write law review articles that do not [105] read like

34. See Binder and Weisberg (note 19, above), 248: “Legal scholarship has always been prescriptive and has always addressed legal decision makers. A purely *descriptive* legal science is a chimera, at least in a pluralist democracy where the ultimate source of legal authority is always contestable.”

35. See, for example, Paul Gewirtz, “Aeschylus’ Law,” *Harvard Law Review* 101 (1988), 1043-1055, and Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995).

36. This idea features prominently in the writings produced by these scholars. For good summaries of the point, see Baron (note 23, above), 262ff, and Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative,” *Michigan Law Review* 87 (1989), 2412.

37. Kathryn Abrams, “Hearing the Call of Stories,” *California Law Review* 79 (1991), 971-1052.

38. A number of essays that model this sort of narrative jurisprudence are collected in the Symposium on Legal

traditional law review articles, essays that emphasize story and the “inner” experience of individuals over the logical syllogism and the analytical reasoning that characterize mainstream doctrinal legal scholarship.³⁹ It is “a form of countermajoritarian argument, a genre for oppositionists intent on showing up the exclusions that occur in legal business-as-usual – a way of saying, you cannot understand until you have listened to our story.”⁴⁰

These oppositional narratives, not surprisingly, have touched a nerve among mainstream legal scholars. These authors, though they concede the value of many of the claims of narrative jurisprudence, find its weakness in its lack of any evaluative mechanism. If “storytelling in law is narrative within a culture of argument,”⁴¹ it is presumably necessary to distinguish what counts as a good argument from a bad one. Yet this, say the mainstream scholars, is precisely what storytelling cannot do.⁴² A story that recounts one’s personal experience is not an example of reasoned argument. It is essentially an example of emotive and intuitive discourse, and it cannot be subjected to the test of accuracy. The fact that “this is my story” does not make my story an accurate depiction of legal reality; merely because someone deeply feels a certain thing to be true does not mean it *is* true. Storytelling is self-consciously a matter of perspective; it invariably promotes a particular point of view. And that point of view is not necessarily more “true” than or

Storytelling, *Michigan Law Review* 87 (1989), 2073ff. See as well Abrams (note 37, above); William N. Eskridge, Jr., “Gaylegal Narratives,” *Stanford Law Review* 46 (1994) 607-646; Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987), 323-399; and Mary I. Coombs, “Outsider Scholarship: The Law Review Stories,” *University of Colorado Law Review* 63 (1992), 683-716.

39. Which is not to say that the narrativists are incapable of writing good, standard legal scholarship. For a sampling of such articles, see Baron (note 23, above), 260, at n. 34.

40. Peter Brooks in Brooks and Gewirtz (note 20, above), 16.

41. Gewirtz (note 20, above), 5.

42. Mark Tushnet, “The Degradation of Constitutional Discourse,” *Georgetown Law Review* 81 (1992), 251-311; Daniel A. Farber and Suzanna Sherry, “Telling Tales Out of School: An Essay on Legal Narratives,” *Stanford Law Review* 45 (1993), 807-855; Brooks (note 40, above), 16; Posner (note 18, above), 345-357.

morally superior to other competing perspectives. A story can just as easily promote a bad outcome – indeed, the narrativists claim that the stories of the dominant culture do just that – as a good one, and when we have disposed of our “foundations” of judgment and evaluation, *any* story, like any interpretation, can make an equally valid claim to the title of “truth.” Narrativists respond that this is precisely the point: the conventional criteria of legal evaluation that mainstream scholars seek to defend are “objective” only because the background assumptions that make them seem that way have been largely unexamined. In other words, the very possibility of impartial [106] evaluation rests upon assumptions as to the nature of law and of legal reasoning that are not universally shared. The legal storytelling movement questions these assumptions and suggests that they, like the governing assumptions of those who posit a view of law that lies outside the scholarly mainstream, are ultimately grounded in stories, in narrative constructions of social reality and of legal relevance.⁴³

The foregoing brief survey hardly does justice to the conflicting positions on the subject of narrative jurisprudence. While I have no desire to try to decide which view – that of the “narrativists” or of the “mainstream scholars” – has the better of the debate, the discussion yields three points that will be crucial to my discussion of the Ettliger responsum and of some related rabbinical decisions. First, it suggests to us that story – in this case, Katz’s “legal fiction” – is as much a part of the law as are hard and fast “black-letter” rules. The very definition of “law” is the issue here, and while one need not agree with the more extreme views of the “narrativists,” it is difficult to deny the crucial role that narrative plays in legal discourse. In other words, I would not exclude a statement from the category of “law” simply because it is communicated in the

43. See Baron (note 23, above), especially at 271ff, and Gary Peller, “The Discourse of Constitutional Degradation,” *Georgetown Law Journal* 81 (1992), 313-342.

form of a story rather than a syllogism. Second, the disputes in the literature over narrative jurisprudence highlight the extent to which the ideal of legal objectivity has become a matter of deep controversy. What one side holds to be the settled meaning of the law has become, in the view of the other side, a narrative structure imposed upon the law by the dominant social and political elites. The third point is that, even if there is no objective systemic criterion by which to evaluate and to measure the truth claims of a legal narrative, it does not follow that no such standard exists. On the contrary: the adequacy of legal narrative, like the adequacy of any sort of legal statement, is judged in the crucible of rhetoric, by which I mean the persuasive discourse by which jurists construct their world. It is through this rhetoric, this language of argument, that they test, contest, and establish meaning within their legal community.⁴⁴ [107] In the rhetorical understanding of law, “proof” and “correctness” are not standards of evaluation that police the argument from the outside. They are rather internal to the legal conversation, fixed and determined by the argument itself, by the community of argument and interpretation within which the argument proceeds. In any particular case, a narrative construction of legal meaning succeeds – is seen as “correct” – not because it meets some externally imposed standard of validity but to the extent that it mobilizes a community of assent, persuading a substantial part of its intended audience to adopt its narrative as the story of their law.

Storytelling in the Responsa: The Narrative of the Captive Infant. Given that narrative is

44. I develop this theme in my “Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision,” in John C. Reeves and John Kampen, eds., *Pursuing the Text: Studies in Honor of Ben Zion Wacholder on the Occasion of his Seventieth Birthday* (Sheffield, UK: Sheffield Academic Press, 1994), 360-409, where I cite much of the relevant literature. See as well my “Taking Precedent Seriously: On *Halakhah* as a Rhetorical Practice,” in Walter Jacob and Moshe Zemer, eds., *Re-examining Progressive Halakhah* (New York: Berghahn Books, 2002), 1-70, and “Responsa and the Art of Writing: Three Examples from the *Teshuvot* of Rabbi Moshe Feinstein,” in Peter S. Knobel and Mark N. Staitman, eds., *An American Rabbinate: A Festschrift for Walter Jacob* (Pittsburgh: Rodef Shalom Press, 2000), 149-204. The latter two articles are available online at <http://huc.edu/faculty/faculty/washofsky.shtml> .

an inescapable element of law, let us consider this particular narrative motif, that of the “captive infant,” which Katz writes off as a legal fiction. Our study will show that, fiction or not, the concept possesses substance; it has long served to shape Jewish legal thought and conversation.

We first encounter “the infant held captive by Gentiles” (*tinok shenishbah levein hanokhrim*) in the Talmud,⁴⁵ where it appears as part of a hypothetical discussion concerning the *shogeg*, one who unknowingly violates a commandment. The rule is that one who inadvertently commits an act that, if done intentionally, would be punishable by *karet* must atone for that act by bringing a sin offering to the Temple.⁴⁶ “Inadvertence,” of course, can be understood in several ways. In its more usual sense, the concept applies to the case where one unintentionally performs an act that one knows is forbidden. Then there is the individual who intentionally performs a forbidden act but does not know that the Torah prohibits it. It may be that this person knew at one time that the action was forbidden but has since forgotten that fact; in such a case, there is no question that he or she is a *shogeg* and must bring a sin offering. The Talmud, [108] however, asks us to consider more extreme examples of “ignorance of the law”: the infant taken captive by Gentiles or “the proselyte who converted among the Gentiles.”⁴⁷ Neither of these persons could ever have been informed of the *mitzvot*; neither, therefore, could ever have “forgotten” what he has learned about them. Is such an individual considered a *shogeg*, a sinner (albeit an unintentional one) who must bring a sacrifice to atone for his transgression, or an *anus*, one who is coerced against his will into transgressing the law and is exempt from any

45. *B. Shabbat* 68a-b; *B. Shevu`ot* 5a; *B. Keritot* 3b.

46. *Yad, Shegagot* 1:1.

47. See *Tosafot, Shabbat* 68a, *s.v. ger*: this is the individual who was converted by a Jewish court (for otherwise, the conversion would not be valid) whose members did not inform him of the *mitzvah* in question. Since he lives by himself among the Gentiles, he has no way of knowing that his act violates a commandment.

culpability?⁴⁸ The *halakhah* apparently follows the first interpretation: such a person is a *shogeg*, and when he learns of his error he must bring a sin offering.⁴⁹ At no time, though, does the “captive infant” motif (or, for that matter, the “converted among the Gentiles” motif) ever exit the realm of the hypothetical. The Talmud never considers the case of *actual* persons taken captive as infants and raised among Gentiles, nor does it apply the formula as a metaphor to frame any other set of circumstances.

The first prominent halakhist to transform the *tinok shenishbah* into a working legal narrative was, apparently, Maimonides (d. 1204), who utilized it as a justification for the maintenance of peaceable relations between Egypt’s Rabbanite and Karaite communities.⁵⁰ The justification first appears in his commentary to the first chapter of *Mishnah Hulin*,⁵¹ where he discusses the rules concerning those Jews disqualified from serving as *shohetim*, ritual slaughterers. Among these are the apostate (*meshumad*)⁵² who worships idols or who violates the Sabbath in public, both of whom are considered “like a non-Jew in all respects.”⁵³ Also included are “heretics” (*minim*) such as the “Sadducees” and the “Boethians” who deny the existence of

48. *Oneis rahmana petareih* (“The Torah exempts the coerced person from culpability for his action”): *B. Bava Kama* 28b and *Avodah Zarah* 54a.

49. *Yad, Shegagot* 2:6; Meiri, *Beit Habechirah, Shabbat* 68a. This opinion follows that of Rav and Shmuel in the Talmud (*B. Shabbat* 68a), rather than that of R. Yochanan and R. Lakish who exempt the “captive infant” from culpability. For an explanation of this puzzling ruling (for the *halakhah* usually follows R. Yochanan over Rav), see *Kesef Mishneh to Yad ad loc.* And compare Maimonides’ theoretical conclusion here with his application of the *tinok shenishbah* metaphor to the Karaites, below.

50. See, in general, Ya’akov Shapira, “Hityahasut hahalakhah laKara’im,” *Mehkerei Mishpat* 19 (2002), 285-361. On Maimonides in particular see Ya’akov Blidstein, “Hagishah laKara’im bemishnat haRambam,” *Tehumin* 8 (1988), 501-510; reprinted in Ya’akov Blidstein, *Iyunim Bemahashavat Hahalakhah Veha’agadah* (Be’er-Sheva: Ben Gurion University Press, 2004), 165-176.

51. In the edition of R. Yosef Kafah, pp. 116-117. The *tinok shenishbah* passage does not appear in the traditional printed editions of the commentary. Kafah (p. 117, n. 33) surmises that Rambam himself added it to the commentary “at the end of his life.”

52. See Kafah, p. 116, n. 17: the word *meshumad* appears in all the manuscripts of the commentary and is altered to *mumar* in the printed edition.

the Oral Torah. Those who founded these cults are deserving of death.⁵⁴ “But,” adds Rambam, “those who were born to them and educated in their ways are considered to be coerced (*ke’anusim*), and their status is that of a captive infant, since all of their sins are committed unintentionally (*beshegahah*).” He repeats this theme in his *Code*, [109] where he declares that the one who denies the existence of the Oral Torah is an *apkoros* (heretic) but that this designation applies only

to the one who denies the Oral Torah on the basis of his own thought and reason, who is the first to behave in this silly and arrogant way, like Tzadok and Boethius and their original followers. But the children and the descendants of these errant ones, whose ancestors led them astray, who were born among the Karaites and were raised according to their opinions, are like the captive infant (*ketinok shenishbah*) who was taken and raised by them. For this reason they are not careful to observe the *mitzvot*, for they are like one who is coerced (*ke’anus*).⁵⁵ Even though they may have heard later that they are Jews and have seen Jews practice their religion, they (the Karaites) are still regarded as coerced, for they were raised in that heresy... It is therefore a good thing to draw them to repentance with words of peace, so that they return to the practice of Torah.⁵⁶

These statements embody Maimonides’ conciliatory policy toward the Karaites of his

53. *B. Hulin* 5a. And see *Yad, Shabbat* 30:15.

54. Rambam makes this point explicitly in *Yad, Mamrim* 3:2, immediately prior to his discussion of the status of the descendants of such heretics.

55. Note here that Rambam departs from the accepted halakhic position that the “captive infant” is a *shogeg* rather than an *anus* (note 49, above).

56. *Yad, Mamrim* 3:1-3.

day, in the hope that they might be enticed to return to the true faith. Our concern here, though, is the way in which he justifies that policy as a matter of law. That justification rests entirely upon the “captive infant” motif, which Rambam transforms (in brief outline) into a narrative history of the Karaite community. In his telling, that community originated in the rebellious acts of stiff-necked and deceitful men who consciously threw off the yoke of the two-fold Torah and thereby betrayed the covenant of Sinai.⁵⁷ Under Jewish law such persons are heretics and are deserving of death.⁵⁸ Yet we do not apply this harsh verdict to the Karaites of “today,” who are not held fully responsible for their continued heresy, since they have been raised in the erroneous Karaite doctrine and therefore lack the intellectual foundation to discern the truth of the Rabbanite tradition. They resemble, therefore, the captive infant of whom the Talmud speaks. Yet they are not *precisely* that same captive infant, for in two important respects Rambam substantially reinterprets the metaphor that he has inherited from the Rabbis. First, [110] where the *tinok shenishbah* motif functions in the Talmud as a purely hypothetical device to explore the status of a single individual, in Maimonides’ hands it becomes the narrative of an existing community, a group of human beings whose Jewish status is of vital interest to the Jews who live alongside them. From the theoretical discussion in the Talmud, in other words, Maimonides deduces some far-reaching practical legal consequences. Second, Rambam’s version of the captive infant story conflates the two conflicting interpretations of that motif in the Talmud: does one who was a

57. The story appears in more detail in Rambam’s *Commentary* to *M. Avot* 1:3. The Karaites, in his view, are the direct ideological descendants of Tzadok and Boethius, two students of Antigonos of Sokho who denied the authenticity of the Oral Torah and only pretended to maintain their fidelity to the Written Torah; had they not maintained that pretense, they would have had no hope of attracting followers to their new heresy.

58. See Rambam’s *Commentary* to *M. Hulin* (ed. Kafah, 117), along with Kafah’s note 28. Rambam makes a distinction between Tzadok and Boethius on the one hand and those heretics whose error involves their beliefs about God (*i.e.*, God’s unity, incorporeality, and providence; see *Yad, Teshuvah* 3:7). The founders of Karaism are not classified with the latter group; nonetheless, they are *minim* and have thus committed a capital offense.

captive infant commit his sin out of error, in which case he bears some guilt for his action, or out of the coercion of outside forces, in which case he is exempt from all guilt? The standard *halakhah*, as we have seen, follows the first interpretation, as even Maimonides attests,⁵⁹ but here, in his narrative rendition of the Karaites story, the *tinok shenishbah* is “like one who is coerced,” which is certainly a more lenient and sympathetic characterization of his religious status. In these two respects, Rambam has rewritten the narrative of the captive infant, advancing it significantly beyond the “original intent” of its Rabbinic creators. That narrative, far from being a “soft” literary embellishment upon or substitute for a “hard” technical legal argument, is in fact the argument, the absolutely necessary legal basis for Rambam’s policy of conciliation and respect toward the Karaites. In the absence of this narrative construction of Karaite history, he would be unable to offer a halakhic justification for the moderate and accommodating conclusions he puts forth in his *Commentary*, his *Code*, and his responsa.⁶⁰ Narrative, in other words, forms the indispensable core of Rambam’s halakhic argument; without this story, his legal analysis would make no sense. “Legal fiction” it may be (I would prefer to call it the narrative extension of a legal metaphor), but its fictional quality does not in any way lessen its legal force.

As suggested above, however, no legal narrative is self-authenticating. A story, even when told by a jurist of giant reputation, [111] is “true” only to the extent that is rhetorically

59. See note 46, above.

60. See, in general, see *Resp. HaRambam*, ed. Blau, nos. 449 and 465. In the former, we get a look at how this conciliatory policy worked with respect to the same particular, concrete halakhic issue that will concern us below: may Karaites be counted in a *minyan*? He answers in the negative, not because the Karaites are *minim* or *apikorsim* and therefore deserve to be excluded from the Jewish community, but because their rejection of the Oral Torah includes a rejection of the midrashic basis for the requirement of a *minyan* in the first place (*B. Megilah* 23b and parallels). This approach solidifies the equation of the Karaites with the Samaritans, who under Talmudic law are not considered part of the community but yet are not subject to all the strictures placed upon the heretic.

successful, that is, if it strikes its readers as persuasive. And in this case, some important readers of Rambam's words were not persuaded. One of these was R. David ibn Zimra (d. 1573), or Radbaz, also a notable Egyptian *posek*. In his commentary to the *Mishneh Torah*, included in the standard printed editions, he has this to say about Rambam's story:

The subject of the "captive infant" is discussed in tractate *Shabbat*. It would appear that Rambam wrote as he did in order to offer a legal defense (*lelamed zekhut*) for the Karaites. But those who live in our time are deserving of death (*i.e.*, they are true heretics), for every day we attempt to persuade them to repent and to accept the Oral Torah, and they repay us with scorn and contempt. They are not to be judged as "coerced" (*anusim*) but rather as intentional deniers of the Oral Torah.⁶¹

Radbaz engages here in the time-honored legal tactic called "distinguishing the precedent."⁶² An authoritative ruling has already declared that the Karaites are not heretics, and Radbaz for his part honors that decision. He does not, in other words, seek to disprove it (which would involve him in a head-on confrontation with a great predecessor) but simply to show that it does not apply to *today's* Karaites, for much, it seems, has changed during the past four hundred years. Where Maimonides describes "his" Karaites as innocent victims of their arrogant forebears, whose rebellion left their descendants bereft of a proper religious upbringing, R. David portrays the Karaites of his time in very different terms.

61. R. David ibn Zimra (Radbaz), commentary to *Yad, Mamrim* 3:3. Compare R. Yosef Karo's more diplomatic words (*Kesef Mishneh ad loc.*): "this is Rambam's own opinion, which he also states in his *Commentary to Mishnah Hulin*."

62. See, in general, Rupert Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1977), 176ff.

The Karaites who live among us in these days display none of the redeeming qualities of which Rambam and others have spoken.⁶³ Indeed, their behavior grows worse every day. They do not circumcise in accordance with *halakhah*, for they do not practice *peri`ah*⁶⁴ and do not use our *mohelim* to [112] circumcise. They do not welcome (Rabbinite) Torah scholars into their homes; on the contrary, they flee from the Sages as though from a snake and insult their dignity. For their recent authorities, Aaron⁶⁵ and his colleagues, have enticed them to sinfulness and guilt. They do not pray at all according to our custom; they do not recite the *Tefilah*. Indeed, I have seen the *sidur* of the aforementioned Aaron – may his name be blotted out – and their entire ritual is deviant.⁶⁶

The critical distinction between Radbaz's portrayal of the Karaites and that of Maimonides lies essentially in its assignment of blame. R. David writes that the Karaites have been "enticed" into transgression, using a Hebrew verb – *hisi'u* – that carries the meaning of "persuade" or "advise." It was bad advice, to be sure, but the Karaites have accepted it in the same way that any mature, responsible adult is liable to accept bad advice. They have erred, in other words, but they bear

63. Radbaz refers here to *Resp. Rambam*, ed. Blau, no. 449, where Maimonides relies on a ruling by Rav Hai Gaon.

64. *M. Shabbat* 19:6; *Yad, Milah* 2:4.

65. Aaron b. Yosef Harofe, d. 1320.

66. *Resp. Radbaz* 2:796, which is an extensive analysis of the Karaite problem with respect, primarily, to marriage. The seemingly ironic conclusion of this negative *teshuvah* is that Rabbinites are permitted to marry Karaites. The latter are not tainted by the suspicion of *mamzerut*, even though their divorces are not conducted according to rabbinic law. This is because, as heretics, they are not valid witnesses, so their marriages does not possess the sort of halakhic validity that would require a valid divorce.

full responsibility for their poor judgment.⁶⁷ To act on bad advice does not imply that one is “coerced” into taking the action, which is precisely how Rambam describes the Karaites of his time. In his view, one who was raised by sinners may now be living as an adult in the midst of the Jewish community, but her choices and decisions in matters of religious life and observance cannot be equated to those of a mature adult, fully responsible for her actions. Radbaz has a very different “take” on the Karaites, on the level of their religious knowledge and sophistication, and (accordingly) on the degree to which they are to be held accountable for their behavior. They are heretics, just as their ancestors were heretics. We seek to draw them back to the truth, but their resistance to our efforts is the result not of their history but of their own obstinacy.⁶⁸

We cannot account for the significant differences between these two positions in terms of their divergent fact patterns. Both *poskim* confront a sect of Jews whose religious behavior meets the halakhic definition of heresy. Both must determine the Jewish legal [113] status not of the founders of that sect but of its present-day adherents. The different rulings stem instead from two very different histories of the sect. Each of these histories is a narrative construction that explains and gives meaning to the religious lifestyles of the Karaites who live in that *posek*'s time and place. Rambam depicts the Karaites as “captive infants,” largely helpless to overcome the deleterious effects of their heritage, religious education, and communal culture. Radbaz refuses to apply the *tinok shenishbah* motif in his telling of the Karaites' tale. His story includes no extenuating circumstances that would soften our attitude toward them. In both cases – and for our purposes this is the central point – the halakhic decision is totally dependent upon that

67. See, for example, *Exodus Rabah* 11:6, where the soothsayers advised (*hisi'u eitza*) Pharaoh to murder all the male Hebrew infants. The guilt lies with Pharaoh, even though he was acting on evil advice.

68. It should be noted here that Radbaz does apply the *tinok shenishbah* metaphor to the Jews of Ethiopia; see *Resp Radbaz* 7:5.

narrative construction. Without his version of the story, neither authority would have a basis upon which to argue his legal conclusions. And like any story, neither of these accounts can be tested for its objective accuracy. In neither case does the *posek* offer “proof” for the correctness of his story in any formal, methodological sense of that term. Each of them simply *tells* the story, offering through that telling his own interpretive framework with which to make sense of the facts. Each of them trusts that his readers will accept that story as the correct portrayal of the realities of their time, so that the specific halakhic decision – how *do* we relate to the Karaites? – will strike them as understandable, proper, and coherent with those facts.

R. Ya`akov Ettlinger and the Captive Infant Narrative. We see, therefore, that long before the Enlightenment, the “legal fiction” of the *tinok shenishbah* had played a significant role in halakhic discussion of the phenomenon of widespread religious non-observance. Whether the use of that motif was persuasive is, of course, another matter; not all *poskim* accepted it, and not all chose to use it to justify a lenient or accommodating stance toward the Karaites or any other group of transgressors. Yet some of them, as we have seen, did just that.⁶⁹ Ettlinger’s responsum, therefore, simply [114] reenacts a long-standing halakhic debate, even though the social context of that debate has shifted from the Rabbinite-Karaite controversy to questions arising from interactions between the newly-defined “Orthodox” sect and the non-observant Jews who surround them in an increasingly secular age.

Ettlinger’s opinion, composed in the fall of 1860, responds to a query from his in-law

69. With respect to the Karaites see, for example, R. Yosef Karo, *Beit Yosef to Tur, Orach Hayim* 385, *Resp. Mabit* 1:37, *Resp. R. Eliyahu Mizrahi* nos. 57-58, and *Resp. Binyamin Ze’ev*, no. 406. Concerning the descendants of Jews who converted to Christianity see *Resp. Maharil* no. 207. *Resp. R. Eliyahu Mizrahi*, no. 48, and *Resp. Halakhot Ketanot* (R. Ya`akov Hagiz, 17th-century Istanbul) 2:92.

Rabbi Shemaryahu Zuckerman.⁷⁰ It is Zuckerman's position that wine "touched" (*i.e.*, poured) by a non-observant Jew is forbidden for consumption. He bases his ruling upon the Talmudic statement that equates the Jew who publicly violates the laws forbidding labor on the Sabbath (*mehalel Shabbat befarhesya*) with the one who worships idols: he is "an apostate who rejects the entire Torah."⁷¹ Just as the wine belonging to a Jew is forbidden for consumption should a non-Jew come into contact with it, logic dictates that the same rule should apply to the case of the Shabbat violator, who after all is "like a Gentile."⁷² Moreover, Zuckerman can offer a precedent for this position: at least one authority has forbidden the wine of Karaites on similar grounds.⁷³ On the other hand, that precedent does not necessarily determine the law for us, since some authorities rule that wine "touched" by Karaites is *not* forbidden.⁷⁴ Zuckerman has therefore asked Ettlinger for his opinion on the matter.

Ettlinger begins by conceding Zuckerman's major point: the *halakhah* does consider those who violate the Sabbath in public to be "like Gentiles," and the wine they pour should therefore be forbidden to us. After all, even those authorities who permit the consumption of

70. *Resp. Binyan Tsiyon Hahadashot*, no. 23.

71. *B. Hulin* 5a; *Yad, Shabbat* 30:15; *Shulhan Arukh Yoreh De`ah* 2:5.

72. For the sake of brevity, my exposition grossly oversimplifies the complexities of the ritual institution of "Gentile wine"; see *Shulhan Arukh Yoreh De`ah* 123. This is also not the place for a lengthy discussion of the subtleties indicated by the words "like a Gentile" (my emphasis). Suffice it to say that the predominant view in the *halakhah* holds that the apostate Jew, even one who has formally converted to another religion, is still a Jew, albeit one who deserves severe communal penalties such as excommunication. In this case, the Shabbat violator is still a Jew, but he is *like* a Gentile in that his contact with wine belonging to another Jew renders that wine forbidden for Jewish consumption.

73. The authority is R. Moshe Trani (16th-century, Safed), *Resp. Mabit* 1:38. Trani cites the statement in the *Sifra, Emor, parashah* 9, that "one who violates the festivals is like one who violates the Sabbath." Given that the Karaites do not recognize the Rabbinic institution of the second festival day in the Diaspora, they are to be considered as "violators of the festivals" and, therefore, of the Shabbat.

74. See *Nekudot Hakesef* (of R. Shabetai Kohen, author of *Siftei Kohen*) to *Shulhan Arukh Yoreh De`ah* 124, who cites R. Shelomo Luria (16th century, Poland). Luria writes that the Karaites do not "violate the festivals" in the true sense of that term, since their "violation" lies primarily in their disagreements with us concerning the festival calendar and not the labors that are forbidden on festivals. Thus, they are not to be

“Karaites wine” would certainly forbid the wine poured by Shabbat violators. Zuckerman’s stance is therefore halakhically correct. But, adds Ettlinger, it is “correct” only as a matter of theory (*me`ikar hadin*), as a conclusion arrived at by the operation of pure legal logic. As a matter of practice, however, Ettlinger hesitates: he is not so sure that the “the non-observant Jews of our own time” (*posh`ei yisrael [115] bizemaneinu*), even though they clearly and openly perform acts of forbidden labor on Shabbat, ought to be classified under the halakhic category of *mehalel Shabbat befarhesya*. The problem, as he sees it, is that the non-observant Jews of modernity are completely unaware that they are transgressing against the Torah. “On account of our many sins,” he writes, “the infection (*i.e.*, of non-observance and Judaic ignorance – MW) has spread to the majority of the population, so that most of them think that acts that violate the Sabbath are in fact permissible.” The Jewish legal category that fits them more accurately is that of the *omer mutar*, the person who mistakenly believes that a forbidden thing or action is permitted. Such a person, unlike the Talmud’s *mehalel Shabbat befarhesya*, cannot be considered an “apostate,” since he or she has not intentionally decided to sin.⁷⁵

There is, moreover, an even deeper reason why today’s Sabbath-violating Jews do not fit the classic halakhic category of *mumar*.

Some of these Jews attend Shabbat services, recite the *kiddush*, and then perform labors forbidden under Toraitic or Rabbinic law. Now the *halakhah* regards the Sabbath violator as an apostate only because the one who denies the existence of Shabbat also denies the act of creation and existence of the Creator. Yet this does not apply to one who

75. equated with transgressors against Shabbat, and there is no reason to prohibit their wine. On all this, see *Encyclopaedia Talmudit* 1:314ff.

acknowledges the Creator and the creation through prayer and *kiddush*.

The connection between the observance of Shabbat and the belief in God as Creator of the universe is an old theme in Jewish doctrinal writing. The commentators and theologians cite this connection to explain why, out of all possible sins, it is the violation of the Sabbath that is equated with the worship of other gods and that renders an individual “an apostate against the entire Torah”: to deny Shabbat is to deny the reality of divine creation, which is to say the [116] denial of the existence of the Creator Himself.⁷⁶ In this context, to say that the *mehalel Shabbat befarhesya* is “like a Gentile” makes perfect sense, since by disregarding the Sabbath and its prohibitions he denies both God and the fact of Creation. This designation, however, no longer makes sense, because the social and intellectual context in which the Jews live has changed radically. Today’s non-observant Jews may ignore the halakhic prohibitions against labor on the Sabbath, but this does not indicate that they “deny” the Sabbath as a religious institution or, for that matter, the existence of God. On the contrary: they “remember” Shabbat even though they do not “observe” it,⁷⁷ participating with evident sincerity in the ritual and liturgical aspects of the

76. This had much to do with the insistence among the medieval theologians that a Jew must accept the doctrine of *creatio ex nihilo* (*hidush ha`olam*), a belief that strongly indicates the existence of God, rather than the Aristotelian conception of the eternity of the physical universe. See, among others, Maimonides, *Guide of the Perplexed* 2:31 and 3:32; Nahmanides to Exodus 20:7; *Sefer Hahinukh*, *mitzvah* 32; *Hidushey HaRitva*, *Shabbat* 119b; *Magid Mishneh*, *Yad*, *Shabbat* 30:15; R. Yosef Albo, *Sefer Ha`ikarim* 3:26.

77. This follows the classic Rabbinic distinction between the differing versions of this *mitzvah* in the two renditions of the Decalogue. In Exodus 20:8, we read “Remember (*zakhor*) the Sabbath day,” while in Deuteronomy 5:12 the text is “Observe (*shamor*) the Sabbath day.” That *zakhor* refers to the ritual (“thou shalt”) aspects of Shabbat practice while *shamor* covers the prohibitions against labor (“thou shalt not”) is indicated in *B. Berakhot*, 20b, in the discussion of why women are Toraitically obligated to recite *kiddush* even though it is the sort of positive time-bound obligation, from which they are normally exempt: since women are already included in the category of *shamor* (they are prohibited from working on the Sabbath), they are also obligated to “remember” the Sabbath by verbally declaring it to be holy. Perhaps the best presentation of the *zakhor/shamor* distinction is the commentary of Nahmanides to Exodus 20:7.

day, thereby recognizing God as Creator. Such Jews do not match the profile of the apostate who spurns Judaism and “rejects the entire Torah.”

The above arguments speak to the case of the “original” sinners, those swept up in the first stages of the “infection” of non-observance. Ettlenger now applies them as a *kal vahomer* (*a fortiori*) argument regarding the descendants of those sinners, the generations “who have neither seen nor heard the laws of Shabbat.” Those generations “clearly resemble the Karaites who are not accounted as apostates, even though they violate the Sabbath, because they are simply following their ancestral custom.”⁷⁸ They are like the captive infant raised among the Gentiles.” Indeed, the non-observant Jews of today enjoy a more privileged status than do the Karaites, for while the latter differ with the Rabbinite tradition on essential elements of Jewish practice (Ettlenger mentions the dispute over the circumcision procedure and the fact that the Karaites do not follow the Rabbanite laws of marriage and divorce), “most of the transgressors of our time have not rejected these observances.”

Ettlenger concludes his responsum by returning to his point of departure, the position enunciated by Zuckerman with which he agrees in principle. Since, as he has acknowledged, the classical [117] *halakhah* (*ikar hadin*) judges the Shabbat violator to be an apostate, it follows that “those who act stringently and regard the wine of these transgressors as ‘Gentile wine’ are to be commended.”⁷⁹ Yet the reasoning he has just outlined allows him to add that “those who rule

78. The phrase is *minhag avoteihem beyadeihem*, which would remind Ettlenger’s Talmudically-educated readership of the statement by R. Yohanan (*B. Hulin* 13b) that “Gentiles living outside the land of Israel are not truly idolaters; rather, they are simply following their ancestral custom.” This statement becomes a tool with which medieval halakhists can “purify” the Gentiles of their time from the stain of paganism: these Gentiles maintain the habitual behavior patterns of their forebears but do not *intentionally* choose to practice idolatry (Rashi, *Yevamot* 23a, *s.v. ella lerabanan*; *Hil. Harosh, Avodah Zarah* 1:1; *Resp. Rivash* no. 394). Ettlenger applies the same thought pattern here.

79. This is predicated on the theory that one who chooses to follow the more stringent of two permitted options has reached a higher or more demanding level of religious observance; see *B. Berakhot* 22a.

leniently do have halakhic support for their viewpoint.” That is, *today’s* Shabbat violator may *not* be an apostate, so that one may drink wine poured by the non-observant Jew “so long as it is not obvious that he knows the laws of Shabbat and has nonetheless decided to violate them presumptuously and in public.”

Having outlined the argument in R. Ya`akov Ettlinger’s *responsum*, we are in a better position to evaluate Professor Katz’s charge that it is essentially a “legal fiction.” By this, as I have indicated, I understand Katz to mean that the *responsum* is more accurately to be read as an essay in social policy than as an act of halakhic analysis. “Legal fiction” implies that the *responsum’s* halakhic citations and discussion function primarily to lend it an air of legal legitimacy (to make it “sound” like law) and thus to disguise the “real” factors – social, cultural, and economic – that motivate its conclusion. Although I disagree with this claim, there are at least two good reasons why the reader might find it persuasive. The decision, first of all, is a transparently convenient one. As Katz presents him, Ettlinger was an Orthodox moderate and realist who recognized that observant Jews did not wish to isolate themselves from their non-observant brethren who already constituted the majority of the Jewish community. Moreover, and unlike authorities of more extreme views such as the Hatam Sofer, he had no ideological objections to this stance of coexistence and accommodation. What he needed, therefore, was a halakhic theory that would justify this stance, and this ruling most certainly serves that purpose. The second reason is that, in terms of its substance, Ettlinger’s halakhic theory is innovative and controversial. For example, I am unaware of any authority prior to Ettlinger who argues that one who “remembers” the Sabbath while openly violating its prohibitions is not truly a *mehalel* [118] *Shabbat befarhesya*; as we shall see, at least one of Ettlinger’s critics makes this very point. In addition, the designation of today’s non-observant Jews as “captive infants” is hardly self-

evident. As our discussion of the differing approaches of Rambam and Radbaz toward the Karaites indicates, there is simply no way to “prove” that any particular community of real, flesh-and-blood Jews fits the specifications of the abstract Talmudic concept *tinok shenishbah*. Ettliger is entitled to apply that concept to the non-observant Jews of his day, but no other authority is required to accept that description as anything more than Ettliger’s personal opinion. To put this another way, the opinion’s legal reasoning is tenuous, a fact that offers further evidence of its “fictionality”: that is, Ettliger *invents* the argument in order to support a ruling he believes is “right” despite its lack of real halakhic justification.

Nonetheless, I argue against this assessment, and my argument rests upon three major points. The first is that the history of Jewish law is replete with examples of creative theories (*hidushei halakhah*) in support of decisions that “deviate” from precedent and from the “plain sense” of the authoritative texts. It was, in fact, Jacob Katz himself who frequently drew our attention to this elemental truth.⁸⁰ Katz devoted numerous studies to what he called “the limits of halakhic flexibility,” the extent to which particular ritual prohibitions might (or might not) be set aside when the pressure of social, economic, and intellectual conditions made such lenient rulings desirable. Those limits, in his view, are constantly tested by the tension between “the *halakhah* in action,” the set of rules, rituals, and other behaviors that characterize the religious behavior of the community, and “the *halakhah* in the texts,” the literary sources written and read by halakhic authorities as part of their study of Torah and their search for its correct interpretation. When the “living” *halakhah* diverges significantly from “textual” *halakhah*, the

80. Many of these studies are collected in his *Halakhah vekabalah* (note 14, above). My discussion of his approach is drawn from the introduction to the volume, 1-6. The studies cover, among other topics: the question of *halakhah* and mysticism as potential rivals in the educational curriculum; the tendency to prefer *halitzah* to levirate marriage; the custom in northern Europe to pray *ma`ariv* (the evening service) prior to nightfall; the ordination controversy in 16th-century Safed; the Jewish status of Jews who convert to

posek's task is either to demand a change in that deviant behavior or to presume that the behavior is actually correct and that it reflects an [119] older, perhaps forgotten halakhic tradition. In this latter case, the halakhist seeks a theoretical justification to explain the behavior, to reduce or eliminate the gap between what the texts seem to say and what the people are actually doing. To do this, he must recast the apparently plain sense of the texts by means of innovative, unprecedented interpretations of them. Katz recounts innovations by such eminent medieval authorities as R. Ya`akov Tam (Rabbeinu Tam, 12th century France),⁸¹ whose willingness to push the limits of halakhic flexibility to the breaking point led him to decisions that were not infrequently controversial.⁸² And as we have seen, Maimonides introduces a creative reading of the concept of *tinok shenishbah* that is crucial to his effort to support an accommodating stance toward the Karaites. In other words, innovative (“fictional”?) readings of the legal sources have always been part and parcel of the halakhic process, and it is at the very least questionable whether the *halakhah* could have survived over fifteen centuries as the living religious-legal system of the Jews had its sages not been able to utilize such readings in order to respond to the challenge of changing times. If Professor Katz minimizes the halakhic authenticity of R. Ya`akov Ettlinger’s ruling concerning a challenge posed by *his* changing times, this is likely

Christianity.

81. See, for example, the effort by Rabbeinu Tam to justify the practice in his community to recite the evening *Shema* prior to nightfall (Katz, note 14, above, 182-185). This practice contradicted the clear halakhic standard established in *M. Berakhot* 1:1 (*Yad, Keri`at Shema* 1:9; *Shulhan Arukh Orach Hayim* 235:1). See *Sefer Hayashar Lerabbeinu Tam, helek hahidushim* (ed Schlesinger; Jerusalem, 1959), 422, and (in abbreviated form) *Tosafot, Berakhot 2a, s.v. me`eimatai*.
82. As Professor Yisrael Ta-Shema notes, Rabbeinu Tam “defined the Tosafist method and ‘gave it wings’. He also serves as the most extreme example of the innovative potential of that method. He innovated (*hidesh*) many *halakhot* and introduced many changes, some of them revolutionary, into accepted practice”; *Hasifrut Haparshanit Latalmud, Helek I: 1000-1200* (Jerusalem: Magnes, 2000), 77. Ta-Shema surveys (76-81) the opinions of scholars concerning the extent of Rabbeinu Tam’s creative contribution to the *halakhah*, and he argues, successfully I think, that the classic focal point of the research – *i.e.*, did Rabbeinu Tam consciously set out to be an “innovator,” or was he just aiming for the correct interpretation of the texts? – is largely irrelevant. Creativity in response to social and economic challenges, even if not produced

because, as a social historian, Katz's primary goal is the search for those "extra-halakhic" factors that influenced the ruling. My primary goal, by contrast, has been to study the nature and substance of these halakhic arguments as it were from the "inside." to inquire as to how they work as law, how they function in the construction of an ongoing legal discourse. I wish to understand these texts, in other words, in the way they ask to be understood: as *halakhah*, as a language and rhetoric of legal analysis and justification, rather than merely as indicators pointing to factors that lie outside that language. And in that language, the creative or innovative –or, for that matter, "fictional" – interpretation of the sources is as much at home as is the so-called mainstream interpretation.

[120] Second, R. Ya`akov Ettliger is not the only halakhist to apply the "captive infant" metaphor to the non-observant Jews of modernity. On the contrary: whether due to the precedential influence of Ettliger's ruling or due to their direct reliance upon Maimonides' position toward the Karaites, a number of other 19th- and 20th-century *poskim* invoke the metaphor as well. R. David Zvi Hoffmann (d. 1921) cites Ettliger's ruling to support a decision allowing an Orthodox congregation to count Shabbat violators in its *minyan*.⁸³ Hoffmann, of course, was a noted academic scholar and the rector of the Hildesheimer rabbinical seminary in Berlin; he displayed "modernist" Orthodox leanings, and his responsa are known for their tendency toward leniency and accommodation to social change.⁸⁴ Yet Ettliger's *pesak* is cited approvingly by such authorities as R. Haim Yitzhak Medini of Jerusalem (d. 1906), who was

intentionally, is still creativity.
83. R. David Zvi Hoffmann, *Resp. Melamed Leho`il 1, Orah Hayim*, no. 29.

84. See Mordekhai Breuer, "'Al Darkhei Hapesikah shel Rabbanei Germaniah Be`idan Ha'emantzipatziah,'" *Sinai* 100 (1987), 166-186, especially at 169.

hardly a “modern” Orthodox figure.⁸⁵ R. Shalom Mordekhai Schwadron (d. 1911), an eminent Galician authority not normally associated with sympathy toward the Enlightenment, writes that the children of Shabbat violators are “like infants held captive among the Gentiles, much as Rambam describes the Karaites”; therefore, the son of one of the public sinners should be circumcised even on the Sabbath, should that be the eighth day of the child’s life.⁸⁶ R. Avraham Bornstein (d. 1910) writes that “so long as a non-observant Jew can be compared to a *tinok shenishbah*, he is not a *mumar*.”⁸⁷ R. Yitzhak Ya`akov Weiss (d. 1989), who served for many years as the chief halakhic authority for the *eidah haredit* (the “ultra-Orthodox” community) in Jerusalem, cites the *tinok shenishbah* metaphor, which he attributes to “the outstanding sages of recent times” (*gedolei ha’aharonim*), to permit an Orthodox *yeshivah* to accept donations from those who violate Shabbat in public.⁸⁸ Another leading contemporary Orthodox halakhist, R. Ovadyah Yosef, cites Ettlinger’s argument as one of a number of reasons to permit a non-observant *kohen* (one of priestly descent) to recite the priestly benediction for the community.⁸⁹ One 19th-century *posek* reportedly declared that the “Jews of America” (all of them, it would seem) fall into the category of *tinok shenishbah* and [121] hence are not to be defined as apostates.⁹⁰ We should not conclude from this list that *all* halakhic authorities since the days of

85. R. Haim Yitzhak Medini, *Sedei Hemed*, section *mem*, no. 86.

86. R. Shalom Mordekhai Schwadron, *Resp. Maharsham* 2:156.

87. R. Avraham Bornstein, *Resp. Avnei Nezer, Even Ha`ezer*, no. 223.

88. R. Yitzhak Ya`akov Weiss, *Resp. Minhat Yitzhak* 6:100. Among the “outstanding sages of recent times” we might include R. Haim Ozer Grodzinsky, the “Ahi`ezer,” who supports Ettlinger’s decision in his *Igerot I, Dibvrei Halakhah*, no. 60 (cited by R. Eliezer Yehudah Waldenberg, *Resp. Tzitz Eliezer* 13:14, sec. 4). See also *Resp. Ahi`ezer* 3:25, where Grodzinsky cites Ettlinger’s ruling with approval, though he does not mention the term *tinok shenishbah*. Finally, R. Yitzhak Shmelkes of Galicia (d. 1906) also quotes from Ettlinger in positive terms; see *Resp. Beit Yitzhak, Yoreh De`ah*, part 2, *Kuntres Aharon*, no. 23.

89. R. Ovadyah Yosef, *Resp. Yabi`a Omer* 7, *Orah Hayim*, no. 15.

90. See Hoffmann (note 83, above), who reports this second-hand in the name of R. Shaul Natanson of Galicia

Ettlinger have accepted *tinok shenishbah* as the proper legal designation for contemporary non-observant Jews. Such, as we shall see, is definitely not the case. These citations do suffice, however, to establish that the “captive infant” metaphor was a functioning element of halakhic discourse during the period of the Emancipation and its aftermath. Analysts who observe the halakhic process from a self-consciously external perspective are entitled, to be sure, to dismiss the metaphor as a “legal fiction,” but as I have indicated, legal fictions are *legal* as well as fictional; they play an essential role in legal conversation, and it is difficult to see how jurists could get along in their absence. At any rate, when we consider the *halakhah* from an internal perspective, from the point of view of those who participate in the process and shape its conclusions, the *tinok shenishbah* enjoys a long pedigree and continues to serve as a category of practical legal analysis.

Third, I would argue that the *tinok shenishbah* metaphor as Ettlinger uses it here is halakhically legitimate precisely (and perhaps ironically) because a number of *poskim* explicitly reject it. One of these is R. Hayim Elazar Shapira (d. 1937), the *rebbe* of the Munkacz dynasty, who mounts perhaps the most direct assault upon the theoretical basis of Ettlinger’s *pesak*. There is no such thing, he notes, as a “half-way” observance of Shabbat. A Jew who works on the Sabbath is still a *mehalel Shabbat* even if he recites the *tefilah* and the *kiddush* before performing the forbidden labors. It may be, as Ettlinger claims, that this Jew acknowledges God as the creator of the universe, but by working on Shabbat he denies God’s own cessation from creative activity on that day. Nor can we seriously imagine that the children of these Shabbat violators are to be exonerated from responsibility for their sins as “captive infants.” That metaphor may have

(d. 1875). He provides no citation, and I have been unable to locate the statement in Natanson’s *Resp. Sho’el Umeshiv*.

fit the Karaites, who according to Shapira lived “far away from Jewish towns” and therefore had no way of learning proper Jewish [122] religious behavior (*minhagei yisrael*). It does not apply to the non-observant Jews of modernity, who of course live among us and cannot claim ignorance of the Torah and the *halakhah*.⁹¹ R. Yitzhak Halevy Herzog, the chief Ashkenazic rabbi of Israel from 1936 until his death in 1959, disqualifies two witnesses to a “wedding ceremony” that was staged in jest (*kidushei sehok*) on the grounds that they are not religiously observant. “I am quite hesitant,” he writes, to accept these witnesses on the grounds that, as “captive infants,” they are not to be disqualified as intentional sinners (*resha'im*). After all, “here in the land of Israel these persons are surely aware of our strenuous efforts to prevent the desecration of the holy Sabbath”; that is, their non-observance cannot be the result of ignorance of the true standard of Torah and *halakhah*.⁹² Similarly, R. Moshe Feinstein disqualifies a non-observant witness to a wedding, dismissing the contention that he ought to be accepted because he is a “captive infant.” On the contrary, says Feinstein, even if we declare him to be a *tinok shenishbah*, such a person by definition does not believe in the Torah and in the doctrine of reward and punishment. He is therefore either unaware of or indifferent to the prohibition against false testimony and as such cannot be trusted to serve as a witness. In fact, however, “we should not define these individuals as ‘captive infants,’ inasmuch as they see observant Jews all around them. As R. David ibn Zimra teaches us, the *tinok shenishbah* is a rare, almost non-existent thing.”⁹³ Again, the point is that the non-observant Jews of our time can hardly claim that they

91. R. Hayim Elazar Shapira, *Resp. Minhat Elazar* 1:74. See, in general, Avi Sagi and Zvi Zohar, *Ma`agalei Zehut Yehudit Basifrut Hahilkhatit* (Tel Aviv: Hakibbutz Hameuchad, 2000), 93-94.

92. R. Yitzhak Halevy Herzog, *Resp. Heikhal Yitzhak, Even Ha`ezer* 2:26.

93. R. Moshe Feinstein, *Resp. Igerot Moshe, Even Ha`ezer* 4:59. Note that this ruling is based upon a narrative of its own, namely that the non-observant Jew, precisely because he does not accept the Torah in its entirety (*i.e.*, as the Orthodox rabbinate interprets it), is as likely to transgress against the Torah’s ethical precepts as he is to violate its ritual laws. Not all *poskim* adopt this narrative account of the modern non-

are unaware of what the Torah demands of us. In a 1993 responsum, R. Shmuel Halevy Vosner of Benei Berak puts the objection this way:⁹⁴

When the Talmud (*B. Shabbat* 68a) defines the *tinok shenishbah* as “one who is coerced,” this is true only so long as he does not know he is a Jew... Once he learns, however, that he is a child of the people of Israel, he is considered a Jew in all respects. Thus, he is an apostate, albeit an apostate out of weakness (*mumar lete'avon*) rather than out of [123] intention and spite (*mumar lehakh'is*)... Thus, with respect to the secular Jews (*hiloni'im*) of our time, although we might define their behavior as “coerced” on account their bad education, do they not know that there is such a thing as the Torah?

Wosner, like Shapira, Herzog, and Feinstein, holds that the term *tinok shenishbah* describes a person almost totally ignorant of Judaism, who knows nothing or next to nothing about the obligations of Jewish observance. The label simply cannot apply to the non-observant Jews in our community who, although they may have been raised in a non-observant home environment, are hardly unaware of the “real” Judaism practiced by the Orthodox Jews all around them. Wosner does regard such persons as “apostates out of weakness” rather than “apostates out of spite,” and this is an important concession; the *halakhah* seeks to accommodate the human foibles of the *mumar lete'avon*⁹⁵ while it equates the *mumar lehakh'is* with an idol worshiper.⁹⁶

Orthodox Jew; see Chief Rabbinate of Israel, *Osef Piskei Din* (1950), 337-338 and, for analysis, Menahem Elon, *Miba'ayot Hahalakhah Vehamishpat Bemedinat Yisrael* (Jerusalem: Hebrew University, Institute for Contemporary Judaism, 1973), 22ff.

94. R. Shmuel Halevy Vosner, *Resp. Shevet Halevy* 9:198.

95. *B. Avodah Zarah* 26b and Rashi *ad loc.*, s.v. *letei'avon*. See *Shulhan Arukh Yoreh De'ah* 2:1-4 and *Siftei Kohen ad loc.*, n. 4: the *mumar letei'avon* is “one who would not eat forbidden meat if permitted meat were

Still, they are apostates. To call them “captive infants” is to exonerate them of all blame for their actions, and this is to stretch the concept beyond reasonable bounds.

Although these authorities disagree with Ettliger, their disagreement in no way suggests that they view his invocation of the *tinok shenishbah* as, in Katz’s phrase, “a transparent legal fiction, born out of the necessity to justify the prevailing practice”⁹⁷ among mainstream Orthodox Jews. On the contrary: they agree with him that *tinok shenishbah* is a valid legal metaphor, a figurative device that can at times legitimately determine the status of Jews who have fallen away from the path of observance. The question dividing them is whether *this* is one of those times: do *these* Jews, those who have thrown off the yoke of the commandments in the wake of the Enlightenment and Emancipation, qualify as a case of *tinok shenishbah*? As such, the argument between the two sides is essentially a reprise of the conflicting assessments of the Karaites by [124] Rambam and Radbaz. Just as in that earlier case, the differing views proceed from two alternative narrative constructions of the raw historical data. Ettliger and those who follow him tell the story of a cultural revolution. In this account, the Enlightenment has shattered an idyllic past in which Jews were educated in the ways of Torah and tradition and grew up understanding just what God expected of them. That world has been turned upside down. Masses of Jews, perhaps the majority, are now ignorant of many of the basic details of halakhic observance. Worse, the secularizing forces of modernity have shattered the values and assumptions that undergirded the traditional Jewish society, so that these Jews lack the means by which to process and evaluate such information that they do possess. They experience Judaism

available.” Thus, while it is always forbidden to eat meat slaughtered by a Gentile, that which has been slaughtered by a *mumar letei’ avon* may be eaten if the slaughtering was done under very close supervision.

96. *Shulhan Arukh Yoreh De`ah* 2:5.

97. Note 12, above.

as a welter of conflicting interpretations, a chaotic hodgepodge in which Orthodoxy strikes them not as the obviously correct understanding of Judaism but as simply one approach among a number of competing and, in their eyes, equally valid alternatives. That they can attend Shabbat services and recite *kiddush* while simultaneously violating the prohibitions against work proclaims the depth of their confusion: they mean well, but they are incapable of perceiving the essential contradiction in their patterns of behavior. They are “captive infants” just as Rambam declared the Karaites to be because, without the requisite intellectual foundation that would enable them to distinguish the true interpretation from those that are false, they cannot be held responsible for making the wrong choice. Those who dissent from Ettlenger’s view tell an alternative story that differs from the above narrative in one crucial detail. In this alternative story, the Enlightenment continues to exert its destructive force upon standards of religious observance, but it does not render the Jewish masses totally blind to the truth of Torah. The masses, that is, are well aware that Orthodoxy – a lifestyle characterized by halakhic observance as defined by the leading *poskim* and as lived by a specific, recognizable community of pious Jews – is the true and correct expression of Judaism. They recognize therefore that their own lifestyle is one of *nonobservance*, and they [125] have made a conscious decision to adopt this nonobservant lifestyle as their own. To be sure, a conscious decision may result from a complex web of factors, and we may not wish to interpret it as a principled choice to reject Judaism in its entirety. Indeed, the fact that many of these Jews will continue to observe some of the *mitzvot*, such as synagogue attendance and the recitation of *kiddush*, can be taken as evidence that they are apostates “out of weakness” rather than apostates “out of spite.” Still, for whatever reason they have chosen to abandon the fullness of Jewish observance. We must take that choice seriously, for these social forces of modernity that have led them to this choice do not entirely

overwhelm the faculty of reason. The non-observant Jews of today are not captive infants, waifs amid forces, absolved from responsibility for their decisions. They know what they are doing, and thus they must accept the logical halakhic consequences that flow from their actions.

To summarize: the *tinok shenishbah* may be a “legal fiction,” but it is the sort of fiction that is eminently legal: a metaphor, an act of figurative speech that expresses a substantive legal reality. First appearing in the Talmud as a purely abstract conception, it has been utilized ever since the time of Maimonides to describe large communities of “wayward” Jews who, in the opinion of some *poskim*, are not to be declared apostates despite their non-observant lifestyle. If some authorities refuse to apply this concept to the non-observant Jews of their day, this does not indicate their rejection of it as a legitimate halakhic category but rather their conviction that the category does not fit the contemporary reality. The argument, to invoke Professor Katz’s description of his own research objective, concerns “the limits of halakhic flexibility”: are the boundaries of the “captive infant” concept sufficiently flexible so as to cover those Jews who, though raised in a non-observant environment, are nonetheless well aware of Orthodox Judaism, its faith and its lifestyle? Some *poskim* say “yes,” and others say “no.” Either answer rests ultimately upon a narrative construction, the story that a [126] particular halakhist tells in order to ascribe meaning to the events of his time.

On the Evaluation of Narrative. As a matter of descriptive legal analysis, this is about as far as one can go. A *posek* tells his story, and another tells a different one; there exists no systemic rule or meta-principle in the *halakhah* to determine that the one narrative construction of the historical data is “correct” while the other is “incorrect.” In the case under consideration, no descriptive analysis – that is, an analysis that proceeds from the perspective of an outside observer – can determine with any certainty whether the non-observant Jews of our time truly

meet the criteria of *tinok shenishbah*.⁹⁸ All we can say is that the claim has been asserted by some and contested by others and that each claim is potentially correct because it has the capacity to persuade its intended readership that it is the best available interpretation of Jewish law on the subject.

Recall, however, that some Law and Literature scholars insist that there is a way to proceed beyond the purely descriptive level of inquiry toward a deeper, more normative evaluation. Their goal was primarily an ideological one, to critique the underlying narratives of the legal culture from the perspective of the outsider. I wonder, however, whether it might be possible to evaluate the writings of *poskim* on more specifically literary grounds. After all, if law can be conceived of in some way as akin to literature, then surely it can be critiqued in the way we criticize literature. A literary critique of the use of narrative in halakhic writing, therefore, would not rest content with simply cataloging the stories that halakhists tell. Rather, just as we recognize that the existence of multiple narrative constructions in the law does not imply that all of them are equally good, legal scholarship must assume the task of judgment: “what stories *should* we tell?”⁹⁹ By “judgment” I do not mean the activity of the jurists [127] themselves as they seek to determine the “right” and the “wrong” conclusions. I am thinking instead of a more craft-based standard of evaluation, that which James Boyd White, one of the leading lights of the Law and Literature movement, calls “the criticism of the judicial opinion.”¹⁰⁰ White contends

98. I should add here that the question of narrative “correctness” cannot be answered by social scientists, historians, or the practitioners of other disciplines. This is a legal question that must be resolved through the application of legal discourse. That is to say it is a *rhetorical* matter: we are asking not about the factual accuracy of either narrative construction but rather which of them can persuade the majority of the legal audience to adopt it as their own view of the law.

99. LaRue, (note 30,above), 121-153 [emphasis mine – MW].

100. See White, *Heracles’ Bow* (note 20, above), 46-48 and 117-138.

that it is possible to judge an opinion favorably *as literature* – that is, to rank it as an exemplar of the genre – even if one disagrees with its result or ruling. This is because an opinion is essentially a *performance*, a realization of the art form of judicial writing, and like all art forms it is to be evaluated according to the standards of excellence that characterize its particular craft.

White defines that quality of excellence as a matter of judicial “character”:¹⁰¹

The ideal would be a judge who put his or her fundamental attitudes and methods to the test of sincere engagement with arguments the other way. We could ask, does this judge see the case before him as the occasion for printing out an ideology, for displaying technical skill, or as presenting a real difficulty, calling for real thought? The ideal judge would show that he had listened to the side he voted against and that he felt the pull of the argument both ways... In this sense, the judge’s most important work is the definition of his own voice, the character he makes for himself as he works through a case.

We cannot understand a poem or another piece of literary writing by paraphrasing reducing it to its “main idea”; we must inquire as to how the idea “is given meaning by the text” and to how the reader experiences “the life of the text itself.” Just so, if law “is a way of creating a rhetorical community over time,” if “it works by establishing roles and relations and voices, positions from which one may speak, and giving us as speakers the materials and methods of [128] a discourse,” then an opinion is a “good” one to the extent that it strengthens that discourse, allowing the community to come together in sincere argument over the ideals to which it is committed.¹⁰²

It is always difficult to translate the values of one culture into the language of another. In

101. *Ibid.*, 47.

102. *Ibid.*, 117, 98.

particular, the secular, democratic legal tradition that James Boyd White represents reflects a set of cultural assumptions that the *halakhah*, rooted in ancient and medieval Jewish texts, does not share. Yet I would contend that there is enough similarity between the systems to make comparisons and borrowings useful, as long as we do so with the proper caution.¹⁰³ Thus, I think when White defines the law as “a language, a set of resources for expression and social action... a literary (life), a life both of reading the compositions of others (especially those authoritative compositions that declare the law) and of making compositions of one’s own,”¹⁰⁴ he could just as well be describing the *halakhah*. The same could be said for the observations of Peter Brooks that “discourse reorganizes stories to give them a certain inflection and intention, a point, perhaps even an effect on their hearers... (N)arrative discourse is never innocent but always presentational, a way of working on story events that is also a way of working on the listener or the reader”;¹⁰⁵ these words could easily apply to the *halakhah*. Halakhic writing and halakhic storytelling are literary acts that deserve to be studied *as* literary acts, as texts addressed to communities of readers, seeking to persuade them, to influence them, and to call upon them to become a particular sort of community. “Evaluation,” therefore, means that when we encounter narrative structures and sub-structures in halakhic writing, we should bear in mind that these stories are examples of artifice, the creation of a literary author, and that we should ask just what

103. Some legal scholars have recently suggested that Jewish law, as a coherent legal system that nonetheless tolerates and even encourages a high degree of interpretive pluralism, offers a helpful comparison to American legal theorists who struggle with similar issues. For a survey, see Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” *Harvard Law Review* 106 (1993), 813-894. Stone’s view is that the differences between an essentially religious legal tradition and the secular foundations of American law outweigh the helpfulness of the comparison. I am not as convinced, but that is an argument for another time.

104. White, *Heracles’ Bow* (note 20, above), 77.

105. Peter Brooks, “The Law as Narrative and Rhetoric,” in P. Brooks and P. Gewirtz, *Law’s Stories* (note 20, above), 17.

sort of change that the particular author seeks to work in the text – and in its readers – by means of this particular story.

[129] How might these criteria apply to our present subject? The first thing we would do is to ask what a given example of halakhic writing, in this case the ruling of R. Ya`akov Ettlinger, does with the language of halakhic discourse in which it functions. I would suggest that Ettlinger's *teshuvah* does meet White's definition of a "good" opinion because it offers a case study in the full range of rhetorical mastery; as an "artist," that is, White turns in a halakhic performance clearly worthy of the reader's respect. I say this because his opinion is simultaneously a radical *hidush*, a transformation of the received texts into new patterns of meaning, and yet profoundly conservative. On the radical side, Ettlinger creates a new definition of the *mehalel Shabbat befarhesya* that spares the masses of well-meaning but non-observant Jews from the taint of apostasy. Compared to this breath-taking departure from halakhic precedent, the resort to the *tinok shenishbah* metaphor is the essence of moderation, given that Maimonides *et al.* have used the same metaphor for the same purpose for many centuries. The conservatism of the responsum displays itself in its careful laying-out of the opposing position, that of R. Shemaryahu Zuickerman. Ettlinger in fact concedes that his correspondent's more stringent view has much to recommend it; he does not dismiss it out of hand but rather takes pains to preserve the "other voice" within the collective halakhic discourse. His *teshuvah* models therefore the sort of respectful dialogue that is the hallmark of healthy legal argument. To the extent that students of *halakhah* value vigorous, healthy argument and open discussion,¹⁰⁶ they can regard this decision as a "good" one even though they may disagree with the substance of his

106. See, in general, Mark Washofsky, "Abortion and the Halakhic Conversation: A Liberal Perspective," in Walter Jacob and Moshe Zemer, eds., *The Fetus and Fertility in Jewish Law* (Pittsburgh: Rodef Shalom Press, 1995).

ruling.

As for the question of narrative, we should remember that the stories Orthodox rabbis choose to tell about their non-observant brethren reveal just as much about their conception of themselves as a community. Ettlenger's opponents refuse to apply the designation *tinok shenishbah* in the contemporary social reality. The story they tell, therefore, is the classic Talmudic tale of heresy: the [130] contemporary Jews who have abandoned the path of full ritual observance are "apostates against the entire Torah." They are conscious sinners, just as those who have transgressed the *miztvot* have always been sinners. Since they refuse to repent, the standard halakhic response (since execution is no longer practiced) would be to excommunicate them. As this remedy is hardly feasible in an age when non-observance has become so widespread, the only proper recourse for the faithful is that of self-exclusion: the withdrawal by Orthodox Jews into rigidly separate and sectarian enclaves in which contact with the heretics can be reduced to an absolute minimum. Ettlenger's story, by contrast, calls upon the Orthodox community to accept a different vision of itself. To be sure, by describing the non-observant Jews as "captive infants" he does not mean to endorse their conduct, but he does mean that a radical transformation has taken place in the condition of Jewish life. In this new era, just as in the days of the Karaites, masses of Jews believe that they can behave in a heterodox manner – that is, in a manner that does not meet with the approval of the Orthodox authorities – without imagining themselves as sinners or apostates. They do so, like the *tinok shenishbah*, as a result of their upbringing, their education, and their participation in a cultural milieu that is, in their eyes, as complete and at least as intellectually satisfying as the doctrine and lifestyle of the traditional society had been for their parents and grandparents. Ettlenger does not condone this situation of

“Jewish pluralism,” but like Maimonides before him he calls upon his community to recognize its existence and to learn to live with it. To put this another way, when *tinok shenishbah* ceases to be an abstract concept, when it describes not a particular individual but a large proportion or even a majority of the Jewish community, it signifies the breakdown not only of traditional Jewish society but also of the religious discourse that bound that society together and gave it purpose and meaning. In the absence of this discourse, this agreed-upon language of Judaic value and authority, halakhists no longer possess the rhetorical tools needed to persuade the non-observant that Orthodoxy is the one and only [131] correct interpretation of Judaism. Under these circumstances, it is arguably senseless to brand those who have moved away from observance as “apostates,” a term that after all implies consciousness that one has transgressed against an accepted and authoritative standard of behavior. And if the large, non-observant segment of Jewry is not to be condemned as heretical, there is little or no need to call upon the Orthodox community to separate from it. The choice of story, of narrative construct, therefore, is crucial: one story justifies a stance of separatism and sectarian isolation, while the other would help explain how the Orthodox community might remain involved within the general Jewish community structure and intensely engaged with Jews whose approach to Judaism might otherwise be seen as heretical. In choosing their narratives, therefore, the proponents of both sides portray a particular kind of Orthodox community, each characterized by its own very different conception of what it means to be a community of observant Jews in modern times. More than that: each author presents an image of *himself* as a particular kind of rabbi, community leader, and custodian of the literary tradition of Jewish law.

Some Concluding, Extremely Unscientific Notes on Liberal Halakhic Practice.

Narratives therefore do not stand outside social authority – they are part of it. So the value of the narrative criticism of law lies not in invoking some abstract idea of narrative to challenge law, but in examining, critiquing, and revising the particular narratives embedded in law, and the identities and institutions these narratives enable.¹⁰⁷

I have argued that narrative is an inescapable component of legal and halakhic process. This narrative tendency is ubiquitous in the *halakhah* as well as in law generally; legal decision is inextricably bound up with storytelling and, indeed, could hardly take [132] place in its absence. This, as we have seen, is certainly the case with the halakhic response to the Enlightenment, emancipation, and secularization. The rulings of the *poskim* would hardly make sense apart from the stories they tell about these social-cultural phenomena and of the Jews caught up in them. From this, it follows that narrative *is* law, that it has as much claim to the status of “law” as do the black-letter rules and principles that jurists and rabbis customarily cite as part of their discourse. It is fruitless, in other words, to distinguish between “law” and “narrative” as though the latter is a mere “legal fiction” or as though the two are two separate and mutually-exclusive entities.¹⁰⁸

I have also tried to argue that the task of evaluation is a proper focus of the literary study of the law and the *halakhah*. By this, again, I do not mean primarily the evaluation of the substance of a particular ruling (“do I like what this judge or *posek* says?”) but a judgment of a piece of writing as an example of legal performance. The author of a judicial opinion or a

107. Binder and Weisberg (note 19, above), 23.

108. For an extended argument on this point see Mark Washofsky, “Halachah, Aggadah, and Reform Jewish Bioethics: A Response,” *CCAR Journal* 53:3 (Summer, 2006), 81-106.

responsum creates a particular kind of community through the text the she creates, and the stories he tells work their effects not only upon the textual materials that he interprets and applies but also upon the audience to whom he addresses them. Of course, whether that sort of community and those sorts of effects are “good” is a normative judgment and dependent upon culture-based perspectives; the Hatam Sofer favored a different communal structure for Orthodox Judaism than that contemplated by R. Ya`akov Ettlinger, just as today’s *haredim* have different ideas about the ideal Orthodox community than those that prevail among the “modern” or “centrist” Orthodox. Normative judgment is not an objective thing. But then, *legal* judgment is not an objective thing, either. And if legal and halakhic decisions are going to depend quite critically upon “subjective” influences such as the stories that jurists tell, the least we can do as students of the law is to be aware of those influences and to consider what is at stake in the making of one choice or the telling of one story over another.

[133] It is perhaps easier for a liberal Jew like me to undertake this effort at the literary analysis, let alone the evaluation, of halakhic writing than it would be for an Orthodox Jew. The latter, who may contemplate the *gedolei hador* (the leading halakhic authorities of his time) with not a little bit of fear and trembling,¹⁰⁹ may understandably express some resistance to the suggestion that the activity of halakhic decision, the ultimate objective, methodological enterprise,¹¹⁰ is suffused with something as “creative” or subjective as the telling of stories. Yet I think that, with some effort at detachment, even the faithful Orthodox Jew can be comfortable with saying that, though the *posek* speaks divine truths, he must nonetheless write them down in

109. For a stunningly over-the-top and (apparently) deadly serious description of “*Gadol B’Yisroel*” as a charismatic and nearly mystical figure, see Emanuel Feldman, “Trends in the American Yeshivot: A Rejoinder,” in Reuven P. Bulka, *Dimensions of Orthodox Judaism* (New York: Ktav, 1983), at 334-335.

110. A powerful statement to this effect is J. David Bleich’s “Introduction: The Methodology of *Halakhah*,” in his *Contemporary Halakhic Problems, Volume I* (New York: Ktav/Yeshiva, 1977), xiii-xviii. For a response, see Mark Washofsky, “Respona and the Art of Writing” (note 44, above).

the form of a literary composition. Thus, when we examine such a composition we can observe that, as any other writer, he is engaged in the making of meaning through literary art. To study the rhetorical and literary devices that the halakhic author employs in order to put his point across need not lessen one's appreciation of the substance of his conclusion.

On the other hand, we liberals sometimes display a similar faith in our own objective rationality, as though our devotion to the modern, critical study of Jewish sources and traditions demystifies the process of their interpretation and guarantees that it will rise to the level of scientific accuracy. I am deeply skeptical of that faith, at least in part because I detect elements of narrative construction in virtually every theological publication of the Reform movement¹¹¹ (and I cannot be the only one who does). I see them as well in the halakhic responsa written by liberal rabbis (including, by way of full disclosure, me). Indeed, if as I have argued law and narrative are inseparably intertwined, how could it be otherwise? We liberals, too, are story-telling creatures; we, too, make meaning from our sources by way of narrative construction. That is not something to deny or to ignore, but to investigate. Our awareness of the narratives in the legal [134] writings of others ought to heighten our sensitivity to the stories that we ourselves tell as we search out the significance of the texts of Jewish law for our own religious lives.

111. For an example, see Mark Washofsky, "Reinforcing our Jewish Identity: Issues of Personal Status," *CCAR Yearbook* 104 (1994), pp. 51-57.