

RESPONSA AND THE ART OF WRITING*

Three Examples from the *Teshuvot* of Rabbi Moshe Feinstein

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* To Dr. Walter Jacob, the very model of the scholarly rabbi, in appreciation for his leadership, creativity, and accomplishment in the writing of Reform responsa and in advancing the cause of liberal *halakhah*. He is in the deepest sense *rabi umori*, my teacher, to whom I owe a profound intellectual and professional debt of gratitude

[p. 149] *By Way of Introduction: Is There Such a Thing as “Halakhah”?*

What do we mean when we use the term “the halakhic process”? What kind of intellectual practice do we signify with those words? And what manner of individual is the *posek*, the scholar whose rulings serve to define the *halakhah*, authoritative Jewish legal teaching, for those who turn to him¹ for guidance? What scholarly commitments, what habits of mind does he bring to his work, thereby shaping his activity and his very image, in his own eyes as well as in the eyes of his community?

1. Throughout this paper, I use masculine pronouns to refer to antecedents of indeterminate gender. While I generally try to write in a more gender-inclusive style, it is a fact that most “rabbis” and “halakhic scholars,” historically speaking, have been men, and those *poskim* who function in the world of R. Moshe Feinstein are to this day exclusively male. Today, of course, the halakhic process in the liberal Jewish world is open to the active participation of female as well as male scholars, a subject about which I will have some things to say below.

One noted contemporary Orthodox legal scholar, Rabbi J. David Bleich, describes the process of halakhic thinking as one of rigorous, rational analysis.² The *posek*, he writes, never allows “subjective considerations or volitional inclinations” to influence his scholarly opinion. Decisions are to be reached “in as detached and dispassionate a manner as is humanly possible.” To be sure, since the interpretation of the sources of Jewish law is “no longer in Heaven,”³ it is “conceivable that two different individuals of equal intelligence and erudition, both possessed of equal sincerity and objectivity, may reach antithetical conclusions.” As long as both of these conclusions “are [150] derived from accepted premises and both are defended by cogent halakhic argumentation,” they are both legitimate statements of *halakhah* (provided, “it goes without saying,” that each individual is a person of unquestioned piety and religious probity). With all this room for dispute and disagreement, however, the methodology of *halakhah* is “not a matter of arbitrary choice”; the rules by which some opinions are accepted and others excluded must themselves “be applied in an objective manner.” The decisor may not “arbitrarily” rule in accordance with an individual opinion (*da`at yachid*) in the law against the weight of halakhic precedent or consensus. “He most certainly may not be swayed by the consideration that the resultant decision be popular or expedient or simply by the fact that it appeals to his own personal predilection.” The law must rather “be determined on its own merits and let the chips fall where they may.” In short, the halakhic process is one of thoroughgoing rationality, a mental operation in which intellectual detachment and impartial analysis overpower whatever desire the

2. J. David Bleich, *Contemporary Halakhic Problems* (New York: Ktav/Yeshiva, 1977), xiii-xviii.

3. Bleich cites in this context the famous *agadah* of R. Eliezer and his dispute with his colleagues over the “oven of Akhnai” (*B. Bava Metzi`a* 59b), a passage that famously stresses that halakhic decision cannot be fixed according to miracles or even according to an act of divine revelation. Once God gave His Torah at

posek may have to place his own, subjective and individual stamp upon the *halakhah*. The law is not whatever he would like it to be or even what he most fervently believes it ought to be; the law is what it in fact *is*, derived through the objective reading of the texts and sources.

There is, however, another possible understanding of the process of halakhic decision-making, one which emphasizes the more subjective side of the intellectual coin. This portrait of the *posek* is drawn for us by Rabbi Louis Jacobs,⁴ who rejects the image of the halakhist as “an academic lawyer who, when he sits down to investigate his sources dispassionately and with complete objectivity, never knows beforehand what his conclusions will be.” Although “the Halakhist obeys the rules and plays the game according to them,” using all the “acceptable legal ploys” in order to arrive at his decisions, these [151] rules and ploys do not in reality determine those decisions. Even when he begins his investigation the halakhic scholar knows full well that only one correct conclusion can be reached, “not because the sources he is about to examine will inevitably lead to that conclusion but because his general approach to Judaism compels him to come up with a conclusion that must not be at variance with Jewish ideas and ideals as he and his contemporaries or his ‘school’ sees them.” Thus, says Jacobs, one cannot draw a firm distinction between *halakhah* and *agadah*, the law and lore of Judaism, for “behind the most austere Halakhist there sits the passionate, easily moved, poetic Agadist.”

We should not portray the contrast between these two scholars as stark and total. Bleich, as we have seen, does make room in his description of the halakhic process for the “human” factors of uncertainty and disagreement. Jacobs, for his part, would probably concede that there

Sinai, it no longer belongs to Him and He no longer declares its meaning; the legal interpretation of the Torah is set by the majority opinion among the sages (*cf.* Ex. 23:2).

are any number of “easy questions” in Jewish law which the halakhist would decide on purely formal, technical halakhic grounds without need of recourse to a general religious approach or to “ideas and ideals” of Judaism. And, despite his assertion that rabbis tailor their legal reasoning to justify whatever decisions their hearts tell them to reach, he does admit that there are some intractable halakhic problems that even the most creative legal thinker and “poetic Agadist” cannot solve.⁵ Yet the general tenor of each writer’s position is clear enough, and the difference between them is nothing less than the difference between reality and the appearance of reality, between substance and illusion. Bleich presents *halakhah* as an autonomous intellectual discipline that operates by its own immanent procedures, that is independent of alternative ways of thinking and cannot be reduced to any of them. This means that the rules and principles of Jewish law act as real constraints upon the *posek*’s freedom by dictating the correct answer to any Jewish legal question. [152] That “correct” answer is emphatically *not* left to the whim, the discretion, or even the moral conscience of the individual rabbi, even should he be a “poetic Agadist” at heart. *Halakhah* differs from *agadah* in the same way that law differs from morality: “legal integrity often prevents a lawyer from finding in the law what he wishes were there.”⁶ Jacobs, meanwhile, suggests that halakhic thought and language are but a mask disguising the rabbi’s “real” religious and ethical predilections, that the rabbinic decision is in fact determined by other thought processes--philosophy, theology, psychology, etc.--than those we usually

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4. Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford: Oxford U. Press, 1984), 11-12.
 5. The chief example is that of the *mamzer*, the offspring of an incestuous or adulterous union who is forbidden to marry most other Jews; see Jacobs, 236 and 257-275.
 6. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard, 1996), 36.

identify as “halakhic.” The “immanent rules and procedures” of the *halakhah* do not constrain the *posek*’s choice, but are resources which he may manipulate so as to create a *post facto* justification of the ruling which his general sense of religious propriety demands that he render. Jacobs’ portrait of *halakhah* is therefore at once liberating and skeptical: liberating, in that it allows the decisor to arrive at that decision which in his heart of hearts he thinks is right and just; skeptical, in that *halakhah* as a matter of law has little real existence apart from the religious and ideological predilections of the rabbis who speak in its name.

At stake in our choice between these two descriptions is our measurement of the power and significance of the halakhic process itself, a process long identified as the central activity of the rabbinic mind: is it a set of substantive rules, principles, and teachings that exist in reality, that is, autonomously, independent of the will and the subjective preferences of the rabbis? Or is it simply a linguistic convention, an inherited and habitual practice by which the rabbis translate their sincerely-felt and eminently non-halakhic religious beliefs into the “acceptable legal ploys” demanded by a traditional vernacular?

[153] As liberals, I suspect most of us would find Louis Jacobs’ theory a persuasive one. We do so, first of all, because we would like to think that Jewish law possesses much more flexibility and creativity than most Orthodox rabbis attribute to it. Jewish law, we affirm, demands that we uphold the highest and most humane religious values; we believe that the *poskim* could issue decisions which reflect the spirit of these values if they so chose; and we are convinced that if they do *not* so choose, this is not because the *halakhah* itself constrains them from making that choice but because their own illiberal religious values lead them in a very different direction. Moreover, trained as we are in the habits and outlooks of critical academic

scholarship, we understand Judaism as a historical phenomenon whose institutions have undergone myriad changes in response to the social, political, economic and cultural circumstances which the Jews have faced. To claim, as Bleich seems to do, that *halakhah* “works by its own rules” in isolation from these powerful historical trends is to contend that Jewish law possesses a cultural immunity from which no other Jewish intellectual activity--philosophy, mysticism, Bible commentary, *belles-lettres*--can be said to benefit. This assertion, to us, is counter-intuitive, and it is conclusively refuted by the work of Jacobs and other researchers who have documented the changing content of Jewish law from age to age.⁷ The upshot is that we find it difficult if not impossible to speak of *halakhah* as a process governed by reason alone, or even by reason chiefly. We comprehend Jewish law rather as a tool in the hands of the rabbis, the record of numerous, discrete acts of legislation by which rabbinic authorities make the necessary adjustments--sometimes lenient, sometimes stringent--to the received legal corpus so as to enable the community to prosper, to survive, to respond successfully to the needs of the times.

[154] Indeed, the fact that contemporary Orthodox halakhic decision (*pesak*) is almost uniformly stringent and “right wing” is itself testimony to the permanence of change in *halakhah*. As academic scholars, we know that Jewish law was not always rejectionist, that in former times it displayed ample ability to confront the challenges of the age and adapt itself

7. The list of authors is huge, even if we restrict it to scholars of the post-talmudic *halakhah*, that is, of Jewish law *after* its most “classical” and creative period. A few of the leading works, however, can be mentioned, beginning with those of our colleagues Moshe Zemer (*Halakhah shefuyah* [Tel Aviv: Dvir, 1993]) and David Ellenson (*Tradition in Transition: Orthodoxy, Halakhah, and the Boundaries of Modern Jewish Identity* [Lanham, MD: University Press of America, 1989]). Among other scholars, Jacob Katz surely leads the field; see his collected studies in *Halakhah vekabalah* (Jerusalem: Magnes, 1984), as well as his monographs *Masoret umashber* (Jerusalem: Bialik, 1958); *Exclusiveness and Tolerance* (Oxford: Oxford U. Press, 1961); and *Hahalakhah bameitzar* (Jerusalem: Magnes, 1992). Yisrael Ta-Shema and Haym Soloveitchik have also devoted much of their research to the influence of social and intellectual history upon the *halakhah*. For an appreciation of the writings of these and other scholars in the field, see Mark

positively to them. The emergence of a self-consciously “orthodox” Judaism in the early nineteenth-century produced a trend toward *pesak* that either sanctified the religious status quo or granted preference to the most stringent legal alternatives. We explain this “charedization” of *halakhah* in various ways: as a defensive posture against secularism and religious reform;⁸ as a reaction to the loss of Jewish political and juridical autonomy;⁹ as a result of the transformation of the halakhic “audience” from the entire Jewish community into a more rigidly-defined sect composed of the rabbis and the relatively small circle of their unconditionally-observant followers.¹⁰ Orthodox observers, too, account for the changing direction and substance of *pesak* by pointing to fundamental transformations in the sociology of their own community.¹¹ The most significant of these is the tendency in contemporary Orthodoxy to recognize the *gedoley hador*, the great “Torah sages”, as possessing supreme halakhic authority. The rise of the *gedolim*, who are usually the heads of leading *yeshivot*, has been accompanied by the parallel decline in the

Washofsky, “Medieval Halakhic Literature and the Reform Rabbi: A Neglected Relationship,” *CCAR Journal*, Fall, 1993, 61-74.

8. Solomon B. Freehof, *Modern Reform Responsa* (Cincinnati: Hebrew Union College Press, 1971), Introduction, 1-13. This is actually a theme propounded by Freehof in the introductions to his various responsa volumes.
9. Menachem Elon, *Jewish Law* (Philadelphia: Jewish Publication Society of America, 1994), 1576-1584. Freehof (note 8, above) makes a similar point.
10. Jacob Katz, *Le'umiut yehudit: masot umechkarim* (Jerusalem: World Zionist Organization, 1983), 188-190, and *Goy shel shabbat* (Jerusalem: Merkaz Zalman Shazar, 1984), 180ff.
11. An interesting, if tentative essay in this regard is Chaim I. Waxman, “Toward a Sociology of *Pesak*,” in Moshe Z. Sokol, ed., *Rabbinic Authority and Personal Autonomy* (Northvale, NJ: Jason Aronson, 1992), 217-237. (The volume is a publication of the Orthodox Forum, a project of the Rabbi Isaac Elchanan Theological Seminary of Yeshiva University.) Waxman notes that the social conditions that dominate *yeshiva* communities and distinguish them from those of the “modern” Orthodox encourage a preference toward stringency in all matters of religious observance.

status of the community rabbinate as the ultimate authority over questions of Jewish law.¹² The contrast between these two types of rabbinic leadership could hardly be more striking. The traditional rabbi was appointed by the community's secular leadership and functioned in a "judicial" fashion, as the head of the local *beit din* and as the interpreter of the legal texts and precedents which governed the public and religious lives of his people. The *gedolim*, on the other hand, are generally described as uncommonly saintly men who occupy [155] an almost superhuman plane. They are not elected to their office; rather, they are

selected by a sure and subtle process which knows its leaders and places them in the forefront of a generation. Call it mystical, call it non-rational: it is both. But somehow the genius of *K'lall Yisroel* has been able to distinguish between a true *Gadol B'Yisroel* and an ordinary scholar. The *Gadol* not only knows Torah: his life is Torah, his every word, even his ordinary conversation, is Torah, so that he is in a very real sense the repository of Torah on earth... (endowed with the) capacity for the intuitive flash of insight which discovers reality not as it appears to be but as it is: reality in the light of Torah.¹³

If one can declare that "*Gedolei Yisrael* possess a special endowment or capacity to penetrate objective reality" and that "this endowment is a form of *ruah ha-kodesh* as it were, bordering, if only remotely, on the periphery of prophecy," then it but stands to reason that "*Gedolei Yisrael* inherently ought to be the final and sole arbiters of all aspects of Jewish

12. On the rise of the *gedoley hador* and the decline of the community rabbinate, see Lawrence Kaplan, "Daas Torah: A Modern Conception of Rabbinic Authority," in Moshe Sokol, ed., *Rabbinic Authority and Personal Autonomy* (Northvale, NJ: Jason Aronson, 1992), 1-60; Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28:4 (1994), 64-130; R. Immanuel Jakobovits, "Rabbanim verashey yeshivah," in Y. Izner, ed., *Ish `al Ha`eidah* (Jerusalem: Ministry of Education and Culture, 1973), 373-382; Waxman, 233-234.

communal policy and questions of *hashkafah*... even knowledgeable rabbis who may differ with the *gedolim* on a particular issue must submit to the superior wisdom of the *gedolim*.”¹⁴ The submission of the Orthodox community to the judgment of these sages on “all aspects of Jewish communal policy” lies at the heart of the institution of *da`at torah*, the authoritative pronouncement of “the Torah position” on a wide array of social, cultural, and political questions that do not lie within the boundaries of *halakhah* as these are usually conceived. The origins of *da`at torah* as a contemporary Orthodox religious practice are a matter of debate among historians.¹⁵ Similarly, while some Orthodox scholars note this transformation in the style of rabbinic leadership with regret,¹⁶ others view it in a much more positive light.¹⁷ What no one

13. Emanuel Feldman, in Reuven P. Bulka, ed., *Dimensions of Orthodox Judaism* (New York: Ktav, 1983), 334-335.
14. Bernard Weinberger in *Jewish Observer* 1:2 (October 1963), 11.
15. Some trace it to the growing influence of the chasidic ideology upon the mitnagdic world. The chasidic style of rabbinic leadership champions the belief in the centrality of the *tzadik* as the unquestioned religious authority in all walks of life; today, the role and spiritual authority of the “Lithuanian-style” *rosh yeshivah*, who has largely replaced the community rabbi as the religious leader of the non-chasidic Orthodox world, have come to resemble those of the chasidic *rebbe*. See Kaplan, 48-49, and Soloveitchik, 94ff. Gershon C. Bacon (“Da`at torah vechavaley mashiach,” *Tarbitz* 52 [1983] 497-508) links the phenomenon more directly to the emergence of the Agudat Yisrael as a political party, an institutional advocate for a rejectionist Orthodoxy. In this view, the concept of *da`at torah*, based upon the unerring judgment of the *gedoley hador*, enabled the Agudah to fulfill its ideological commitment to, in the words of R. Chaim Ozer Grodzinsky, “solve all the problems of the day in the spirit of Torah and tradition.”
16. See Jakobovits, 374-375: while the community rabbi issues halakhic rulings on the basis of an intimate knowledge of the community and its problems, the *yeshivah* head by his nature is relatively isolated from the day-to-day world of the average observant Jew. The latter’s legal decisions, accordingly, reflect a theoretical approach to Jewish law rather than a respect for established *minhag* (legal custom), the traditions by which the community lives.
17. See R. Simchah Eilberg’s laudatory description of an approach to observance that he terms “Benei Berakism”, in *Hapardes* 38:3 (Kislev, 5724): a *yeshivah* student educated in the spirit of the Chazon Ish quite properly searches out the more or most stringent options to observance, so that *chumra* (stringency) quickly becomes the norm rather than an “option” *per se*. Feldman (at 335) denies the charge (raised by Oscar Z. Fasman in an article in Bulka, 317-330) that the *gedoley hador* are out-of-touch with community concerns or “subjective” in their decision-making. On the contrary: men blessed with the charismatic

denies, however, is that the power to declare the *halakhah* for Orthodox [156] Jewry rests today with a small group of charismatic leaders, products of a very particular kind of environment, who have issued a very particular kind of *pesak*, one which tends almost exclusively in the direction of *chumra*, religious stringency, and away from the more lenient alternatives that exist in the legal sources.

All this evidence, of course, supports Louis Jacobs' portrayal of the halakhic process. If *halakhah* has exhibited substantial change and development over the centuries, then one can hardly contend that Jewish law is a static reality, a collection of pre-existing and eternally stable truths waiting to be uncovered through the operation of dispassionate reason. And if the direction of *pesak* is set by the social and cultural context in which the *poskim* operate, then we cannot describe Jewish law as possessing a fixed and determinate content. To put it in more specifically legal terminology, there is no "one right answer" to interesting halakhic questions.¹⁸ If rabbis could decide the *halakhah* differently, then the decisions they do render result from choices they make between available alternatives and not from constraints imposed on them by the iron logic of the law. By "choice," I do not mean individual whim. Halakhic choice is a communal matter, sculpted and shaped by the social context in which the *gedolim* have grown to adulthood, studied Torah, developed their self-image and exercise their intellectual and spiritual leadership. The point is that the factors which control halakhic choice are not specifically halakhic factors but

(Platonic?) ability to perceive truth as it is, rather than its pale reflection, *by definition* cannot suffer from these faults.

18. As Nachmanides wrote some seven hundred years ago, absolute certainty is the property of mathematics and *not* of "talmudic science." See his introduction to *Sefer Milchamot Hashem*, printed immediately before the Alfasi in the Romm/Vilna editions of tractate *Berakhot*.

rather this very social context, the forces of history and culture, the “ideas and ideals” of Judaism as viewed by the “school” to which the *posek* belongs.

Yet if we liberals find ourselves sympathetic with the position of Louis Jacobs, we cannot simply dispense with David Bleich. For if Bleich’s view of *pesak* does not comport with the “big picture” history [157] and sociology provide, it is nonetheless reinforced by arguments both practical and theoretical. The practical argument stems quite literally from the *practice* of rabbinic decision-making. While Jacobs asserts that halakhic decision is not constrained by purely halakhic rules, those who engage in this activity, who issue rulings and write codes and responsa say otherwise. That is to say, when they speak of their work they report that although they considered alternatives to their ultimate decision, they were constrained *by reasons of halakhah* from choosing those alternatives. They tell us, in other words, that they are engaged in legal thought, a process possessing its own inherent integrity and governed by particularly *legal* rules, rather than an exercise in philosophy, theology, or ethics. As halakhists, these scholars must be presumed to recognize a legal process when they see one, and their descriptions of it are by all appearances sincere. Thus, unless we wish to dismiss these estimable rabbis as being either naive or duplicitous, there is no reason why we should not take them at their word and accept as valid their own account of their own experience.

The theoretical argument has to do with the dominant role of law, of *halakhah*, in Judaism. We know that we cannot explain the phenomenon called Judaism without placing *halakhah* and halakhic thinking at its center. The Jewish legal tradition has comprised the bulk of the literary output and intellectual activity of the Jewish mind for nearly twenty centuries. *Halakhah*, in other words, is basically what the rabbis have been doing since talmudic times; it is

the very language of Jewish religion, that aspect of Jewish religion which is the most *particularly* Jewish, the constitutive rhetoric by which Jews have conducted their most basic arguments and constructed their religious universe. To draw the radically skeptical conclusion that the rabbis have “in fact” been doing something else, that the law which emerges from all these books and rulings has no autonomous existence, that [158] what really determines halakhic decision is not law at all but rather ideology and “religious values” is to declare that what we know to be the central Jewish literary and religious experience is nothing but a snare and a delusion.

I doubt that we really believe in such a declaration. The very point of *halakhah* has always been the conviction that when rabbis say “this is the law,” they are referring to a reality that is not of their own creation, to a tradition of text and practice that stretches far back beyond their own place and time. When rabbis issue halakhic rulings, therefore, they are making a claim for *legitimacy*: that is, that this ruling is a correct interpretation of the sources that the halakhic community accepts as authoritative. The halakhic decision, in other words, must be constrained by the halakhic sources, and its validity must be measured and tested against them. To say that *halakhah* is nothing more than the will of the rabbis is to give up on the concept of legal legitimacy. If rabbis may decide according to *any* factors they find relevant, if the *halakhah* is by definition whatever the rabbis say it is, the legal sources no longer serve as a constraint upon legal decision. The rabbi becomes the legislator, the creator of new legal norms, rather than the judge, the interpreter of those norms which already exist. Yet this is not what Jews mean when they say that a decision is or must be made “according to *halakhah*,” which implies that a ruling is not the source of its own legitimacy and that such legitimacy must be judged against a legal standard to which both *posek* and community are bound.

We liberals, for our part, also believe in the concept of halakhic legitimacy. For if we accept the notion that halakhic decision is nothing more than the subjective value preferences of the rabbis, disguised in legal language, then we must admit that liberal *halakhah*, too, [159] is nothing more than *our* value choices, our own subjectivities masked in the same deceptive way. But when we engage in our halakhic thinking, we do not imagine that we are performing some manner of intellectual sleight-of-hand. It seems to us, rather, that the halakhic process *is* a process, a practice possessing a unique substance that distinguishes it from other kinds of thought, a substance made up of rules and principles which can be interpreted in many different ways but which are not infinitely manipulable. *Halakhah* is a distinct subject matter, worthy of study in its own right and not merely as a subset of religious thought in general. At the same time, we know too much to accept at face value the claim that halakhic decision is but the end result of the operation of legal logic and rational objectivity. I think we believe that somehow each of these descriptions, that of Bleich as well as that of Jacobs, is both accurate and incomplete, that each captures in large part the nature of *pesak* but that neither in and of itself offers a sufficient explanation. A proper theory of *halakhah*, one which is intended to account for the Jewish legal process as it really is, must therefore do justice to both points of view.

By Way of Comparison: Is There Such a Thing as "Law"?

A debate quite similar to the one I have described is carried on today in the fields of Anglo-American jurisprudence and legal theory. There, as in *halakhah*, scholars question whether and to what extent law is an autonomous intellectual discipline, whether questions of law can be said to have correct legal answers or whether those answers are in fact determined by

the political and social predilections of judges and other legal officials. As is the case with *halakhah*, it may not matter to most citizens of a political community that the law of their regime is either “autonomous” or not “autonomous”; the law is the law, which they are required to obey regardless of how the [160] theoretical question is answered. But as is also the case with *halakhah*, issues of theory are of central importance to the community’s understanding of itself and of the nature of the process by which it determines the norms of social behavior and communal life.

On one side of the debate in legal theory stand those thinkers and scholars devoted to the concept of *the rule of law*, which affirms that law enjoys a real and independent existence and that the answers to legal questions are derivable and must be derived through the operation of a specifically legal method. Law, in this view, is a self-sufficient discourse which yields its own conclusions and which is not dependent upon any other form of thought or theorizing. As one observer puts it:¹⁹

The law wishes to have a formal existence. That means, first of all, that the law does not wish to be absorbed by, or declared subordinate to, some other--nonlegal--structure of concern; the law wishes, in a word, to be distinct, not something else.

If law is a distinct manner of discourse, it resists any attempt to explain legal issues and concepts by means of other manners of discourse, such as politics or morality. It accomplishes its task through a process often called *formalism*, the statement of a question in the proper legal form: that is to say, once any question is translated into correct and appropriate legal language, its answer will be more or less automatically generated by the formal procedure of the legal

19. Stanley Fish, “The Law Wishes to Have a Formal Existence,” in Austin Sarat and Thomas R. Kearns, *The Fate of Law* (Ann Arbor: U. of Michigan Press, 1994), 159ff. While Fish is most definitely *not* a legal formalist, this is the best brief and least polemical description of legal formalism that I have seen.

system “free of all ethical-political value judgments.”²⁰ Therefore, “formalism reflects the law’s most abiding aspiration: to be an immanently intelligible normative practice.”²¹ Not all Rule of Law theorists state their case so unequivocally. While some do seem to define law as a kind of transcendental entity, governed by conceptual thought and [161] procedures and unaffected by its social and economic context, others concede that legal actors are not immune to the workings of the outside world and that law cannot be reduced to the pure logic of the syllogism. Yet all Rule of Law theorists are united in seeing law as an inherently *rational* enterprise which “elaborates itself from within.”²² Legal meaning resides in legal text and is not to be imposed upon the text from without. The judge enjoys no discretion to rule according to conscience, considerations of public policy, political conviction, or any other “outside” agenda. Rather, judicial decision (and legal truth in general) is determined by the formal process of legal reasoning, which sets limits upon the judge’s freedom to act as he or she sees fit. This process, if not identical to mathematics and formal logic, is nonetheless objective. Legal reasoning is that set of rules and procedures which the legal community applies in the act of decision-making as the means of discerning *legal* correctness.²³ The decision of a judge or another legal actor is

20. Hans Kelsen, *The Pure Theory of Law*, tr. Max Knight (Berkeley: U. of California Press, 1967), 192.

21. Ernest J. Weinrib, “The Jurisprudence of Legal Formalism,” *Harvard Journal of Law and Public Policy* 16 (1993), 592. See also Ernest J. Weinrib, “Legal Formalism: On the Immanent Rationality of Law,” *Yale Law Journal* 97 (1988), 949ff.

22. Ernest J. Weinrib, “The Jurisprudence of Legal Formalism,” *Harvard Journal of Law and Public Policy* 16 (1993), 594.

23. Owen Fiss, “Objectivity and Interpretation,” *Stanford Law Review* 34 (1982), 739ff.

legitimate, therefore, because it is an objectively *legal* conclusion, disciplined by specifically legal rules.²⁴

The Rule of Law approach has historically based itself upon the philosophical heritage of the Enlightenment, particularly its belief in the capacity of reason itself to discover fundamental truth. This belief does not mean that all judges will agree on all legal questions, since they obviously do not and never have. It does imply, however, that jurists hold that a single “right answer” does exist to every legal question and that this answer can be derived through rational means. Disagreements over the right answer can be attributed to judicial error or to inevitable differences in perspective. Judges must interpret the law, after all, to fill its lacunae, to answer those legal questions which the texts themselves do not explicitly address. But legal interpretation is a species of *legal* thought, disciplined by the law’s systemic rules and directed toward the discovery of those meanings inherent in the [162] texts. Judges adjudicate and do not legislate. Unlike legislators, who create law in order to address some particular purpose of social or political policy, judges derive their answers through the application of “neutral principles”²⁵ of analysis which transcend the particular decision and which insure the coherence of law as a whole, that each of its components “fits” within the overall structure of its rationality.

The other side of this debate is taken by scholars who deny the objective existence of legal rules and principles and are accordingly skeptical of the formalist notion that correct legal decisions can be derived through logical means. In this view, the “legal” arguments by which

24. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 136: without definable rules, law possesses no authority; in the absence of rules, there is nothing to distinguish the decision of a private person from that of a court.

25. Upon this notion, Herbert Wechsler based his critique of “unprincipled” if popular judicial decisions; see “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review* 73 (1959), 1ff.

jurists explain and justify their actions are but a cover for judgments that are primarily political and social in nature. In the United States, the origin of this sort of “rule-skepticism” is generally traced to the influence of the noted Supreme Court Justice Oliver Wendell Holmes, Jr. In his scholarly writings and judicial decisions, Holmes put forth the view that “the life of the law is not logic but experience,”²⁶ that “general principles do not decide concrete cases,”²⁷ and that “the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.”²⁸ In other words, in legal reality, decisions are generated by the social context in which jurists work, by considerations of public policy, by history and by the accumulated experience of the legal community. The behavior of legal officials is in fact all that the law is. Logic is of but secondary importance, and it does not succeed in turning law into a formal and rational science.

The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²⁹

[163] These pragmatic sentiments³⁰ became a rallying cry for the academic movement known as Legal Realism, which flourished in elite American law schools during the early

26. Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), 5.

27. *Lochner v. New York*, 198 U.S. at 76 (Holmes, J., dissenting).

28. “The Path of the Law,” in Oliver Wendell Holmes, Jr., *Collected Legal Papers* (New York: Pantheon Books, 1982), 200.

29. Holmes, *The Common Law*, 1.

30. It is generally recognized that Holmes’ views were shaped by the reigning pragmatist philosophy of his time; see Thomas C. Grey, “Holmes and Legal Pragmatism,” *Stanford Law Review* 41 (1989), 787ff.

decades of the twentieth century.³¹ Although the Realists disputed each other on a number of issues, they were united in the view that legal decision cannot be understood apart from the political and other value judgments of legal actors and that “law” properly conceived should be studied according to the methodologies of social science. Attention should be turned away from formal logic and doctrine and toward an investigation of those “real” factors which determine “the rules.”

To assume a “realistic” posture is to suggest that the ideal of the Rule of Law is largely a myth. The “rules” and “principles” upon which legal meaning is constructed are based ultimately upon political, ideological, or social value judgments.³² Law is therefore indeterminate: legal reasoning cannot *on its own* arrive at uncontroversial answers to legal questions, because as an essentially social practice, governed by a founding ideology, law’s roots lie deeply embedded in extralegal soil. This theme was disturbing to those legal scholars dedicated to the proposition that law is a self-sufficient discipline, controlled by rules that could produce authentically *legal* truth and meaning. And for a time, “realism” was eclipsed in jurisprudential circles by theories which defined law, again, as a reasoned discipline, whose immanent rules and procedures constrain legal decision, rather than as a pale reflection of politics or sociology. Yet “realism” returned

31. On the history of the movement, see Gary Aichele, *Legal Realism and Twentieth-Century American Jurisprudence* (New York: Garland, 1990). That Holmes was a “forerunner” of the realist movement is a judgment made by realists and others who note the skeptical and pragmatic tendencies in some of his writings. This, however, is not to say that Holmes *was* a “realist” or that his complex approach to law is composed solely of “realist” elements. See Neil Duxbury, “The Birth of Legal realism and the Myth of Justice Holmes,” *Anglo-American law Review* 20 (1981), 81ff.

32. For the strongest presentations of this point of view from a “legal realist” see Jerome Frank, *Law and the Modern Mind* (New York: Doubleday, 1930), and Felix Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35 (1935), 809ff.

with a vengeance in the 1970s and 1980s, as movements such as Critical Legal Studies³³ and Law and Economics made their presence felt in law schools. For all the differences between them, the adherents of these approaches agree that law does not exist as an “autonomous discipline”,³⁴ one which operates according to and can be sufficiently explained by internal [164] legal criteria. Rather, “there is never a ‘correct legal solution’ that is other than the correct ethical or political solution to that legal problem.”³⁵ The decisions of judges and other legal actors are choices that are political or economic in nature and are then rationalized in legal language designed to make these choices appear natural, value-neutral, and inevitable. Since legal doctrine is indeterminate--that is, since any given set of legal principles can be used to yield competing or contradictory results--it is useless to inquire as to the “legitimacy” of a judicial decision. Law, the texts and doctrines in the books, does not constrain judicial discretion. Rather, the judge determines the “law” according to the operative nonlegal factor and then massages the texts and doctrines so as to claim legal legitimacy for what is in fact his or her subjective choice.³⁶ As one critical scholar phrased the matter: “lawyers, judges, and scholars make highly controversial

33. For introductions to this movement, see Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard, 1987); David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York, Pantheon, 1982); and Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: NYU Press, 1995), ch. 6.

34. See Richard Posner, “The Decline of Law as an Autonomous Discipline,” *Harvard Law Review* 100 (1987), 761ff.

35. Duncan Kennedy, “Legal Education as Training for Hierarchy,” in Kairys, *The Politics of Law*, 47.

36. “One of my few expectations regarding judicial opinions...is that they will almost always be written in a tone of impersonality suggesting that the legal materials themselves, rather than the personal desires of the judge, required the result in question”; Sanford Levinson, “The Rhetoric of the Judicial Opinion,” in Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in Law* (New Haven: Yale U. Press, 1996), 188.

political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.”³⁷

The foregoing description, a necessarily brief and insufficient one, indicates something of the fragmentation of current legal thought. This breakdown of consensus is perhaps only natural, given that the rise of “postmodernism”³⁸ and the collapse of “foundationalism”³⁹ have seriously undermined the faith in our ability to discover firm truths and to impose a rational order upon experience. This intellectual climate affects philosophy and many other fields of inquiry. In jurisprudence, it expresses itself as a seemingly unbridgeable chasm between those who believe in law as a rationally comprehensible phenomenon and those who identify it with politics, ideology, or some other form of social thought. The former condemn the latter as “nihilists”⁴⁰ and speak darkly of the end of their discipline,⁴¹ for if the skeptics should manage to convince the public that there is indeed no authentically *legal* content to the law, then the law as a distinct

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37. Joseph Singer, “The Player and the Cards: Nihilism and Legal Theory,” *Yale Law Journal* 94 (1984), 5. This description is more obviously suited to Critical Legal Studies than to Law and Economics, a movement much more favorably disposed to free-market capitalism and that aspires to the scientific rationality of economic thought. We might note, however, that Richard Posner, one of the leading Law and Economics scholars, has lately become a legal pragmatist and has accordingly written some words whose skepticism rivals that of the “crits.” See his “The Jurisprudence of Skepticism,” *Michigan Law Review* 86 (1988), 827-891, and *Problems of Jurisprudence* (Cambridge, MA: Harvard U. Press, 1990), 454-469.
38. Costas Douzinas, *Postmodern Jurisprudence: The Law of Texts in the Texts of Law* (New York: Routledge, 1991), 1ff.: postmodernists doubt that “there is a ‘real’ world or legal system ‘out there’, perfected, formed, complete and coherent, waiting to be discovered by theory.”
39. See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton U. Press, 1979), 3: “the notion of knowledge as accurate representation... needs to be abandoned.” And 11: the traditional program of epistemology, which held that “rationality” and “objectivity” could offer accurate representations of reality, is now seen to be “a self-deceptive effort to eternalize the normal discourse of the day.”
40. See Paul Carrington’s condemnation of Critical Legal Studies in “Of Law and the River,” *Journal of Legal Education* 34 (1984), 222ff.
41. See Owen Fiss, “The Death of the Law?” *Cornell Law Review* 72 (1986), 1ff.

discourse [165] will surely disappear. The “skeptics,” for their part, have long since done away with the “noble dream” of law’s self-sufficiency and objectivity and are committed to speaking the truth as they see it.

Toward A Literary Solution.

The extreme positions in halakhic thought represented by Bleich and Jacobs are therefore mirrored in the legal academy as well. In both venues, the controversy consists of two sides--“formalists versus “rule-skeptics”--and the stakes are also the same. Either *halakhah*/law is a practice based upon the “rule of law”, a set of immanent procedures capable of yielding demonstrably correct legal answers by which the legitimacy of decisions is tested; or *halakhah*/law is the collection of “acceptable legal ploys” by which the decisor expresses a decision that is in fact not “legal” at all, which therefore cannot be “legitimate,” and whose authority is established solely by his or her political or social power to issue it. As is the case with *halakhah*, the conflict in law is not easy to resolve, since both the formalist and the skeptical positions are plausible and have much to recommend them.

It is thus not surprising that much recent jurisprudential writing has been devoted to the attempt to resolve or at least to minimize this conflict. Legal positivists, for example, seek to compromise between the extremes by asserting that legal rules and concepts possess both a “core” of settled, determinate meaning and a “penumbra” or “open texture,” a range of uncertainty at the edges of the concepts as to how they should be applied to concrete cases. Judges enjoy discretion only on issues falling within this range. This, of course, means that in “hard cases,” those for which settled answers do not yet exist, the law is in fact indeterminate until such time

as the [166] judges create those answers. Positivists concede that judicial discretion amounts to legislation but that, since most legal questions are “easy cases,” the amount of indeterminacy in the legal system is moderate and does not threaten the system’s legitimacy.⁴² Ronald Dworkin, in a series of powerful if much-debated writings, argues that legal indeterminacy and “strong” judicial discretion do not exist. There is “one right answer” to every legal question, a *legal* answer, and the judge is obliged to search it out. Judges solve “hard cases” through the application of principles of political morality which are inherent in the law and which the judge constructs into a theory that gives the data of the law--the cases and statutes which might be interpreted in several different directions--their best and most coherent explanation. Since theories of political morality differ from critic to critic and from judge to judge, there will always be differences over which answer is “right.” The point, though, is that the standards of judgment used are internal to the practice. Thus, judicial decision is a process of adjudication and interpretation, whereby the judge endeavors to present the existing law in its fullness and integrity; it is not legislation, the imposition of policy choices by a judge-turned-legislator.⁴³

One of the intellectual trends which holds the most promise for legal theory is the recent “turn to interpretation” in many fields of inquiry. By “interpretation” I mean the contemporary

42. The best-known exposition of legal positivism is Hart, *The Concept of Law*. See at 136: “In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate... None the less these activities...must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules.” On the “moderate” and non-threatening nature of legal indeterminacy see Frederik Schauer, “Easy Cases,” *Southern California Law Review* 58 (1985), 399ff., and Ken Kress, “Legal Indeterminacy,” *California Law Review* 77 (1989), 283ff.

43. See Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard, 1986); *A Matter of Principle* (Cambridge, MA: Harvard, 1985); and *Taking Rights Seriously* (Cambridge, MA: Harvard, 1977).

version of that process of knowing. Under the influence of such thinkers as Gadamer⁴⁴ in philosophy and Kuhn⁴⁵ in physical science, theorists have begun to question the old epistemological distinction between “explanation,” that is, objective, verifiable scientific findings, and “interpretation,” which signified the more impressionistic type of understanding associated with the human sciences.⁴⁶ That distinction, [167] these theorists suggest, is untenable, for no knowledge is “neutral,” objective, or context-free. All knowledge is hermeneutical and contextual; one can know a thing only from the perspective he or she occupies and against the backdrop of his or her experience. Every act of inquiry is perforce an exercise in interpretation, the construction of knowledge by an interpreter who stands in the shadow of his or her interpretive “horizon,” the theoretical frameworks and preconceptions within which we all operate and without which no understanding can take place. The significance of the “interpretive turn” for legal theory is that it affords an explanation for judicial decision which avoids the pitfalls of either the formalist or the skeptical position. The legal decision is neither the result of a purely deductive process carried out by a detached observer nor of the manipulation of data in accordance with the decisor’s subjective value judgments. Rather, like all knowledge, the legal decision is an attempt at understanding, the product of a dialogical meeting between a situated observer, who of necessity perceives the world from the context of a particular horizon or perspective, and the legal text, whose concrete existence limits but does not dictate the outcome of the decision.

44. H.G. Gadamer, *Truth and Method*, tr. J. Weinsheimer and D.G. Marshall (New York: Crossroad, 1989).

45. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: U. of Chicago Press, 2nd ed., 1970).

46. See the Introduction by James F. Bohman, David R. Hiley, and Richard Shusterman, the editors of *The Interpretive Turn: Philosophy, Science, Culture* (Ithaca: Cornell U. Press, 1991), 1-14.

If law could be viewed as an interpretive process, it was only natural that legal scholars would perceive that a fruitful connection might be drawn from literature to law. The study of literature is the original hermeneutical activity, and if the domain of “hermeneutics” was once restricted primarily to the explication of religious text--Hermes, after all, was the messenger of the gods--legal scholars soon grasped the obvious connections between the canons of religious knowledge and those utilized in the interpretation of legal materials.⁴⁷ Literary theory, particularly in the 1970s through the 1990s, was heavily preoccupied with the same interpretive issues that engaged lawyers.⁴⁸ Given that the law is an activity bound tightly to [168] engagement with the written word, the creation of new legal texts and the application of existing ones, and given the view in critical circles that the act of interpretation is ubiquitous--no text, even the most deceptively simple, can be understood apart from the activity by which the interpreter constructs meaning out of it⁴⁹--it was thought that a literary approach to law might help to explain how judges construct meaning from legal sources. The growing interest in interpretive theory went hand-in-hand with the rise of two other “literary” approaches to legal studies. The first of these is “narrative jurisprudence,” which focuses upon both the narrative elements in the law (the way in which legal actors and the law itself construct the raw materials of human experience into a story which lends them meaning) and the origins of the law and its

47. Thomas C. Grey, “The Constitution as Scripture,” *Stanford Law Review* 37 (1984), 1ff; Sanford Levinson, *Constitutional Faith* (Princeton: Princeton U. Press, 1988).

48. For example, shall the meaning of a text be identified with the intention of its author, or does that meaning lie inherent in the text apart from what its author might think? Does the reader entirely construct a text’s meaning, either in accordance with a set of objective standards of literary excellence or as the result of a conversation within an identified “community of interpretation”? Is “truth in interpretation” in fact discoverable at all, or does any standard of “truth” imply an artificial construct that represses other competing standards?

particular institutions within the matrix of the larger narratives by which a community gives meaning to its own existence.

The second is “rhetoric,” which in this context is not defined, as is often the case, as the art of eloquence, of speaking well. Rhetoric in the sense I mean it here denotes the entire realm of argumentation, the means by which a speaker or writer attempts to persuade an audience, to elicit its adherence to the correctness of a particular point of view.⁵⁰ Since law is an activity consisting in large part of argumentation, a rhetorical study of law, of the techniques by which lawyers and judges frame their persuasive efforts, could offer useful insights into the nature of legal thought. The confluence of these three components, the theories of interpretation, narrative, and rhetoric as applied to jurisprudence, places us within the domain of the academic movement known as Law and Literature.

[169] Unlike other such jurisprudential “movements” or schools, Law and Literature boasts no single organizing platform or agenda. Those scholars associated with Law and Literature occupy various points of the professional and political spectra, disagreeing with each other on numerous fundamental issues. What unites them ultimately is the conviction that the practice of law can be better understood through the application of techniques of literary study,

49. Sanford Levinson and Steven Mailloux, *Interpreting Law and Literature: A Hermeneutic Reader*: (Evanston, IL: Northwestern U. Press, 1988), x.

50. This expansive view of the domain of “rhetoric” is commonly associated with Chaim Perelman; see his *The Realm of Rhetoric* (Notre Dame: Notre Dame U. Press, 1982) for a summary of his theories. Perelman draws upon the Aristotelian tradition, in which “rhetoric” includes the forms of evidence used in disciplines such as ethics and politics where argumentation, rather than the formal syllogism, is the way in which conclusions are ultimately drawn. Rhetoric therefore *is* a form of reasoning, rather than simply a collection of speaker’s tricks. But it differs from formal logical reasoning in that it admits such standards as shared values, common sense, and other criteria accepted as persuasive within a particular culture.

theory, and criticism. This implies a strong affinity between the disciplines. In the words of a “founding father” of the movement:

The lawyer and the literary critic are both readers of texts, and as such they face difficulties, and enjoy opportunities, that are far more alike than may seem at first to be the case... Law is in a full sense a language, for it is a way of reading and writing and speaking, and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, that has a character of its own. (In this way) the law can more properly be seen not as a set of commands and rules...but as the culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning.⁵¹

To conceive of law as a literary activity means to understand legal texts as acts of literary creation and performance. Thus, it is not surprising that Law and Literature scholars pay especially close attention to the judicial opinion, for it is here, in the ruling on the specific case, that judges display their literary power in full. It is here that the judge becomes the author, the creator of a textual universe through the use and manipulation of words, the translator who gives life to old texts by re-reading them and placing them in new relations, the writer who in his choice of phrase and shaping of language evokes an “ideal reader” and calls upon him to share in a particular experience of community. All of this is the province of literature, rather than economics, politics, sociology or any other “science.” A judge’s [170] decision may be affected by all these factors, but it is not reducible to them. The opinion is rather a composition which, though it makes use of the data of “real life”, presses those facts into a framework of created meaning, a discourse marked by a formal and technical style that invites its partners to share in the author’s particular understanding of the legal traditions of the community. The power and

51. James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: U. of Wisconsin Press, 1985), 78, 98.

effect of an opinion is therefore largely a result of its form, the judge's performative success according to the canons of his or her "culture of argument." Thus,

Rhetoric...does not assist an argument to march to its conclusion; rhetoric *is* the argument, and the perceived rightness or wrongness of the conclusion may be as much based on the style and the form of the argument as on the extrinsic application to it of the observer's notion of what the law of the case "should have been."⁵²

One need not accept the extreme version of this theory, which posits that there is little or no real difference between the "form" and the "substance" of a judicial opinion⁵³ or, for that matter, between the disciplines of "law" and "literature" in general.⁵⁴ Yet so long as judges issue their rulings in the form of a text containing supporting argumentation, it is difficult to deny that a judge's opinion is a deeply literary and rhetorical exercise, the work of an author seeking to persuade the members of a professional community of the rightness of the decision in terms that the community finds acceptable and compelling.

The literary method suggests one way in which to resolve the formalist/skeptic dispute over the nature of the judicial decision. The theory would hold that the legitimacy of the decision, its "correctness," is a function of the judge's adherence to the literary demands of the

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52. Richard Weisberg, *Poethics, and Other Strategies of Law and Literature* (New York: Columbia U. Press, 1992), 16-17.
53. Weisberg, *Poethics*, 7-8: "no opinion with a misguided outcome has ever in fact been 'well-crafted'." Richard Posner responds that it is entirely possible for a judge to present a horrendous ruling in a felicitous style; see "Judges' Writing Styles (And Do They Matter?)" *University of Chicago Law Review* 62 (1995), 1421ff. See also John Fischer, "Reading Literature/Reading Law: Is There Really a Literary Jurisprudence?" *Texas Law Review* 72 (1993), 135ff.
54. Despite his acknowledgment of the significance of "metanarratives" for the understanding of law and legal institutions (see "Nomos and Narrative," *Harvard Law Review* 97 [1984] 4ff), Robert Cover also noted that law, at bottom is an exercise in authority and the controlled imposition of violence upon the members of a community; "Violence and the Word," *Yale Law Journal* 95 (1986), 1601-1629. See also Robin West, "Adjudication is Not Interpretation: Some Reservations About the Law and Literature Movement," *Tennessee Law Review* 54 (1987), 203-278, and Sanford Levinson, "The Rhetoric of the Judicial Opinion."

craft. The judge's freedom is constrained by the texts [171] with which he or she must support the decision and by the requirement that the ruling be structured within the linguistic framework deemed necessary and sufficient by the opinion's intended audience. The judge operates according to the rules of a discourse that might be characterized, in terms borrowed from Wittgenstein, as a literary "practice," that is, an internally-defined activity carried on by individuals committed to a particular interpretive strategy which applies rules and norms in light of a commonly-held conception of the purposes they serve.⁵⁵ But if the judicial decision is shaped by these literary requirements, it remains in the end the product of its author(s), an act of writing involving the interpretation and combination of existing texts in a way that is not dictated in advance and which perforce is unique to the mind of its creator(s). If a judge can be free to exercise "subjective preferences" within the parameters of a defined discipline, then this is the freedom that he or she can and must enjoy.

On Responsa As Literature.

Would such a literary method be helpful toward resolving or elucidating the very similar dispute in halakhic theory, the disagreement highlighted by the positions of David Bleich and Louis Jacobs? Literary theory has lately become a popular academic tool for the study of rabbinic thought. The rabbis, we are now accustomed to say, were not only philosophers, theologians, lawyers and mystics; they were writers who, by presenting their teachings through the vehicle of text, placed an indelible literary stamp upon them. Put differently, it is difficult if

55. See Thomas Morawetz, "Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging," *U. of Pennsylvania Law Review* 141 (1992), 371-456.

not impossible to detach the rabbinic message from its medium; the reality of text as *the* form of rabbinic study and conversation is inextricably entwined with the substance of rabbinic Judaism. And, particularly relevant to the subject under [172] discussion here, some preliminary efforts have been made to apply literary analysis to rabbinic responsa (*she'elot uteshuvot*), the “questions and answers” which, containing the legal decisions of rabbis and their supporting argumentation, are the closest analog in traditional rabbinic writing to the judicial opinion.⁵⁶

It seems to me that the kind of analysis described in Law and Literature writings might indeed be useful toward the understanding of the intellectual activity called *pesak*. To this end, I want to consider three responsa of Rabbi Moshe Feinstein, the acclaimed halakhist, *rosh yeshivah* and communal leader who died in New York in 1986. Known as a formidable talmudist in his native Russia, Feinstein in 1937 emigrated to the United States, where he achieved renown as one of the outstanding Orthodox *poskim* in the world. His responsa, the *Igerot Moshe*, are widely read for the authoritative halakhic guidance they provide to observant Jews. They have yet, however, to be studied as *literature*, as examples of the art of writing. I want to pursue that study here, if only in brief, as a sample and demonstration of all that we might learn from a literary approach to rabbinic legal decision and the *she'elot uteshuvot*.

1. *The Wedding in the Reform Temple*. The first example is taken from a pair of *teshuvot* in which Rabbi Feinstein allows wives to remarry by declaring their existing marriages null and

56. Peter J. Haas, *Responsa: Literary History of a Rabbinic Genre* (Atlanta: Scholars Press, 1996); Solomon B. Freehof, *The Responsa Literature* (Philadelphia: Jewish Publication Society of America, 1955); Mark Washofsky, “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: Sheffield Academic Press, 1994), 360-409.

void.⁵⁷ In each case, the marriage has ended for all practical purposes and divorces have been secured in the civil courts, but neither husband will agree to grant his wife a divorce at Jewish law (*get piturin*). The stakes are clear: if no halakhic remedy can be found, the women will be *agunot*, “chained” to their husbands and forbidden under *halakhah* to remarry. Feinstein provides this remedy by annulling the women’s [173] marriages on the grounds that their weddings took place in Reform synagogues where Reform rabbis acted as officiants.

He begins his analysis with a paragraph describing Reform Jews as thoroughly alienated from normative Judaism.

Concerning the woman married by a Reform “rabbi,”⁵⁸ in a setting where all those who attended the wedding were non-observant (literally, “evil”, *resha`im*) libertines who violate the Sabbath and transgress every commandment of the Torah, and where everyone ate a meal consisting of non-kosher meat...

The fact that the wedding was held in a Reform “temple”⁵⁹ allows us to presume that no valid witnesses (*i.e.*, halakhically-observant Jewish males) were present at the wedding, and in the absence of valid witnesses, a constitutive component of the Jewish wedding, no valid act of betrothal (*kidushin*) has taken place. Feinstein, however, must deal with a difficulty posed by a famous responsum of R. Moshe Sofer, who ruled that an act of *kidushin* may indeed be binding in the absence of valid witnesses.⁶⁰ Sofer dealt with a case in which a rabbi mistakenly appointed two relatives as witnesses to a wedding, a technicality which disqualifies their testimony.

57. *Resp. Igerot Moshe*, EHE 1:76-77.

58. Feinstein spells this word phonetically in Hebrew letters, rather than using the customary Hebrew word *rav*, to emphasize the foreign nature of Reform Judaism: their clergy are not real rabbis, but merely transliterated ones!

59. In 1:77, Feinstein spells this word out in Hebrew letters, obviously to distinguish the Reform house of worship from a true *bet kenesset* (synagogue).

Nonetheless, he held the wedding valid because, since there were qualified witnesses outside the synagogue who observed “from a distance” that a couple entered the place for a wedding, their testimony can serve to establish that a proper act of *kidushin* took place even if they did not attend the actual ceremony. Here, too, Feinstein must contend with the possibility that valid witnesses saw the couple “enter the ‘temple’ in order to marry or saw them leave from there as a ‘married’ couple.” The decision of a great authority such as Sofer is a powerful precedent. But, like any skillful judge, Feinstein is able to distinguish the precedent and to declare that it has nothing whatsoever to do with the case at hand. [174] Sofer’s decision, he writes, applies only when the “distant witnesses” who know that a wedding took place can presume⁶¹ that the wedding was properly conducted. However,

with respect to one of these non-observant (“evil”) Reformers who conducts a wedding, it is obvious that we cannot presume that the act of *kidushin* was conducted properly, with the transmission of an object of value from groom to bride along with the proper declaration of intent. For every “Reform rabbi” simply invents some ritual and calls it “*kidushin*” ...

That is, “distant” witnesses can testify to a legally-valid wedding on the basis of appearances only when that “apparent” wedding was conducted by a rabbi who is *presumed* to be observant and knowledgeable of Jewish law. That presumption does not hold in our case. “Clearly,” Feinstein concludes, witnesses who were not present at a wedding in a Reform synagogue cannot testify that a valid ceremony occurred, even if they know that the “rabbi” performed “an act

60. *Resp. Chatam Sofer*, EHE 100.

61. The technical term for this presumptive evidence is *anan sahadey*, “we are the witnesses,” *i.e.*, it is common knowledge that such-and-such occurred, even if no valid eyewitness testimony exists to that event.

which he called ‘*kidushin*’” and even by some chance it turns out that in this particular wedding the “rabbi” did manage to include the necessary halakhic requirements.

By establishing that no proper act of *kidushin* can be proved or presumed to have taken place, Feinstein is able to dispense with another grounds on which this marriage might be valid: the suggestion that, inasmuch as “no man makes his intercourse an act of licentiousness,”⁶² the husband subsequently performed the act of marital intercourse *leshem kidushin*, “in order to effect a valid betrothal.”⁶³ The reasoning is as follows: the marital intercourse effects *kidushin* only if the husband intends it as such; but he would only intend it as such if he thought that the original act of *kidushin* (*i.e.*, the wedding in the Reform temple) was itself of no legal force; and since “those who go to ‘Reform rabbis’ think, erroneously, that [175] their wedding was halakhicly valid, they perform their marital intercourse on that false assumption,” that is, thinking they are already married. Moreover, the presumption that “no man makes his intercourse an act of licentiousness” probably does not apply to “those libertines who violate all the prohibitions of the Torah”: why would we say that such persons are not perfectly happy with licentious behavior?

The arguments rests, therefore, on the finding that Reform Jews and their clergy are presumed to be non-observant of Jewish law in general and of the ritual requirements of *kidushin* in particular. Rabbi Feinstein declares this to be the case in the manner of sweeping generalization: “it is known that” Reform Jews are non-observant; “it is obvious that” a Reform

62. *BT* Gitin 81b.

63. On this method of betrothal, *kidushey bi'ah*, see *M. Kidushin* 1:1; *B. Kidushin* 9b; *Yad*, *Ishut* 3:5. This method of effecting betrothal, while halakhicly valid, has been in disfavor since the days of the third-century amora Rav; see *B. Yevamot* 52a and *Kidushin* 12b.

rabbi “creates” a wedding ceremony that he calls *kidushin*. Yet nowhere does Feinstein cite any proof for these assertions. Has he observed Reform weddings? Does he have evidence that such ceremonies do not usually contain the necessary halakhic elements for valid *kidushin*? Does he know for a fact that halakhically-observant Jews do not attend Reform weddings? These assertions may be correct, but their correctness is a matter of observable fact, to be established by empirical evidence which Feinstein neither cites nor mentions. This, the assuming of facts not in evidence, would seem to be an egregious error of legal method.⁶⁴

Rabbi Joel Roth levels this very criticism against Rabbi Feinstein, addressing himself to a decision in which Feinstein holds that because Conservative Jews are heretics (*koferim* or *apikorsim*), a “fit” Jew should not accept a teaching position in their community.⁶⁵ Again, Feinstein simply declares this to be the case, offering no proof for the heresy of Conservative Jews. And while he enjoys the judicial discretion to make this decision, says Roth, the systemic rules [176] of the halakhic process require that he support it with evidence. Following the theory of legal positivism, Roth notes that Feinstein has confused the boundaries between “questions of law” and “questions of fact.”⁶⁶ A question of law is one whose answer is derived through

64. Indeed, R. Yosef Eliyahu Henkin asks, in his critique of Feinstein, “who knows what Reform Judaism is or that for a certainty no ‘kosher’ witnesses are present at those weddings?” (*Resp. Teshuvot Ibra*, no. 76)

65. Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986), 71-74. The decision in question is *Resp. Igerot Moshe*, YD 1:139.

66. Roth’s conceptual approach to law, as he notes on p. 5, footnote 1, relies heavily upon the works of John Salmond (P. J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. [London: Sweet and Maxwell, 1966]) and Menachem Elon, *Mishpat ivri* (Jerusalem: Magnes, 1977). These works speak at length about the discrete “sources” of the law, a central aspect of positivistic legal thought.

interpretation of the legal sources. The definition of heresy, a topic discussed in the texts, is such a question.⁶⁷

A question of fact, on the other hand, must be answered by an examination of the circumstances of the particular case. The determination that Conservative Jews are “heretics” is a question of fact: do Conservative Jews *in fact* ascribe to doctrines which the legal sources point to as indices of heresy? The question must be answered by means of factual evidence. Yet Feinstein never adduces such evidence, even though “such a characterization of Conservative Jews is, at best, a *machloket*, and conceivably a matter of opinion.”⁶⁸ It may, in other words, be true that Conservative Jews meet the legal definition of *apikorsim*, and if a *posek* can prove this point to his own satisfaction then his decision is a legitimate one. Feinstein’s responsum is a failure, however, because his decision rests upon facts not in evidence, upon a mere assumption rather than the required standard of proof.

Roth makes a good point, especially if one accepts the formalist notion that a legal answer be “legitimate”, that it measure up to rational, even “scientific” standards of correctness and proof. The point, however, is totally irrelevant to Feinstein and to the context in which he operates. As an Orthodox *posek*, writing for Orthodox Jews, Feinstein does not have to “prove” that Conservative Jews are heretics. While a readership of Conservative Jews might indeed contest this conclusion, Feinstein is not addressing himself to them. He is speaking to an Orthodox audience, inviting them to share in a particular view of the Jewish religious world and

67. See, for example, *M. Sanhedrin* 11:1.

68. Roth, 73. And see n. 50: presumably, Feinstein declares the Conservatives to be “heretics” because of their supposed widespread denial of the Mosaic authorship of the Torah and their apparent lack of commitment to *halakhah*. “What he ignores, however, is the possibility that there may be legitimate *machloket* between

of their place in it. [177] He creates a community by this linguistic act, this use of words. Feinstein in effect tells his readers: “I want you to join with me in a common Jewish enterprise, one in which we, the Orthodox Jews, are the sole representatives of Jewish religious authenticity.” For those readers who accept this invitation, no “proof” of the heresy of Conservative Jews is necessary; that heresy is rather a self-evident fact, an essential element of those readers’ self-identification as Jews. The *posek* may not subject the truth of this “fact” to formal demonstration, but it is no less “true” for that. It is a *literary* and *rhetorical* truth, because it meets the test of persuasiveness. In the eyes of the particular halakhic community which Feinstein both creates and addresses through his *teshuvah*, the heresy of Conservative Jews and Judaism is accepted as a convincing interpretation of Jewish law and as proper grounds for legal decision. As such, the *posek* has met the only standard of “proof” that really counts.

In our case, too, Feinstein uses words to create a *rhetorical* and *literary* truth, a truth measured not by its correspondence to some objective standard of correctness but by the quality of its performance, its effect upon an intended legal audience. Again, he does not demonstrate through empirical evidence that Reform Jews are non-observant and that Reform rabbis are halakhically ignorant. And again, this fact is irrelevant. What is relevant, and crucial, is that Feinstein’s intended audience is persuaded of the truth of these statements, to the point that no “proof” is necessary for them. Feinstein addresses an ideal reader who cannot imagine that Reform Jewish religious practice could possibly meet the minimum criteria of halakhic acceptability. This reader is the one whom Feinstein addresses and invites to share his own perception of the world of Torah and *halakhah*. Once again, an audience of Reform Jews and

him and the Conservative movement about the nature of the halakhic process, such that neither he nor they are heretics.”

other Jews might object that Feinstein's blithe assertions about [178] Reform Jews and rabbis are a "matter of opinion," even factually incorrect. They would not accept his *pesak*, because they would not necessarily be persuaded of the legal correctness of the assertions on which it is based. But then, he is not addressing himself to Reform Jews. They are not part of the community he creates in these responsa, and they are not his ideal readers.

The import of community and audience is manifest when we compare Feinstein's ruling to a decision of the Supreme Rabbinic Court of Eretz Yisrael in 1946.⁶⁹ Feinstein invalidates the wedding in the Reform temple by invalidating the testimony of the witnesses: individuals who transgress the ritual commandments of the Torah (he mentions Shabbat and the dietary laws explicitly) are by that reason ineligible to serve as witnesses. This is certainly a plausible interpretation of Jewish law: the Torah disqualifies the "evil" (*rasha*) as a witness, and those who habitually violate the Torah's commandments are defined as "wicked."⁷⁰ The Jerusalem court, by contrast, suggests that the testimony of such individuals may be accepted. The court holds that the *rasha* is ineligible to be a witness, not merely because he is sinful but because he is untrustworthy. His non-observance, in and of itself, is not the issue; rather, the fact that he violates any of God's laws leads us to presume that, as he is lawless and immoral, he would not hesitate to violate the rest of them. Thus, one who eats non-kosher food is just as likely to transgress the prohibition against bearing false witness. Today, says the court, against the backdrop of widespread non-observance, we can no longer make this presumption. The judges

69. Chief Rabbinate of Israel, *Osef Piskey Din* (1950), 337-338. The court (chief rabbis Yitzchak Halevy Herzog and Benzion Meir Hai Ouziel, along with R. Meshulam Ratta) refused to annul a marriage on the grounds that the wedding was not conducted according to proper halakhic form.

70. Ex. 23:1; *BT Sanhedrin 27a*; *Yad*, Edut 9:1ff.

write that in a secular age, “when ritual transgressions (*aveirot shebein adam lamakom*)” have become a rampant phenomenon among the Jewish people, “such transgressions do not imply that the witnesses are dishonest.” If most Jews in our time are non-observant, this fact is to be attributed to [179] “general, world-wide forces” beyond their control. In a secular age, when “God’s face is hidden” from so many, those who violate the ritual commandments do not do so intentionally, are not necessarily “wicked,” and are quite possibly honest and reliable individuals. A court should therefore consider each case on its own merits, and if it should find that an individual is unlikely to deliver false testimony, then he should be accepted as a witness even though he is ritually non-observant. This alternative theory of the law of testimony is, to be sure, controversial; the Israeli court concedes as much, writing that “this question demands much clarification.” Yet whether or not one accepts it, it does exist, and we might say that Feinstein’s failure to mention⁷¹ and to argue against it weakens his claim that, as a matter of halakhic doctrine, those in attendance at Reform weddings are invalid witnesses.

Again, however, the literary method would advise us that the real difference between the two positions is not one of legal doctrine or method but rather of audience. The Israeli rabbinic court issues its ruling in the context of the nascent Jewish state, a community in which, although the institutions of marriage and divorce for Jews are governed by *halakhah*, the preponderant majority of its citizens are non-observant of Jewish ritual law.⁷² By referring to these this majority as “unintentional transgressors” (*shogegim*), the Court calls upon its audience, made up

71. It is, of course, quite likely that Feinstein was unaware of the ruling, which is published in an obscure pamphlet of the Jewish Law Institute of Israel’s Ministry of Justice.

72. For an analysis of this ruling see Menachem Elon, *Miba`ayot hahalakhah vehamishpat bemedinat yisrael* (Jerusalem: Hebrew University, Institute for Contemporary Judaism, 1973), 22ff.

primarily of rabbis and other knowledgeable students of Jewish law, to include *all* Jewish citizens within the circumference of the halakhic community. True, this audience, like the Court's judges, are "Orthodox Jews." But the Court's appeal is persuasive to them to the extent that they accept the decision's definition of the Jewish community, *kelal yisrael*, as the entire Jewish people, observant and not. And they will accept this definition to the extent that they are able to see the entire people as engaged in the [180] fulfillment of a common religious destiny. The members of the Court were rabbis closely associated with the Zionist movement and with the dream that *halakhah*, the law of the Torah, would become the legal foundation for the new Jewish state. The audience they address, therefore, is an audience of rabbis and Jewish legal scholars who share their basic assumptions about the religious meaning of the Jewish national movement, its messianic implications, and about the need to draw all Jewish citizens under the umbrella of participation in the legal framework of the state. The *charedim*, those "ultra-Orthodox" Jews who reject the notion that the new state possesses any Jewish religious value, would likely disagree with this argument to include the secularists and non-observant within the parameters of the legal community. But then, the Court is not addressing itself to that audience. Instead, it evokes an ideal reader who, while Orthodox and observant, can entertain the notion that some degree of pluralism is a necessary and permissible element in the administration of the Jewish legal system.⁷³

73. See Mark Washofsky, "Halakhah and Political Theory: A Study in Jewish Legal Response to Modernity," *Modern Judaism* 9 (1989) pp. 289-310. That the "Zionist rabbis" were aware that they were speaking to a particular, identified audience that did not include the anti-Zionist *charedim* is made clear by R. Shaul Yisraeli, the editor of the Zionist-halakhic journal *Hatorah vehamedinah*, 1 (1949), 11, and by Shelomo Zalman Shragai, the noted theorist of Hapo`el Hamizrachi, in *Sha`ah venetzach* (Jerusalem: Mosad Harav Kook, 1960), 326-336. That such an inclusive "*kelal yisrael*" approach to the *halakhah* is no longer taken by Israeli rabbinic courts is stressed by Elon *Miba`ayot*. This change, too, can be attributed to the notion of

Feinstein, meanwhile, addresses himself to a very different audience: that group of North American Orthodox Jews which consciously defines itself, over against the larger liberal Jewish community,⁷⁴ as the sole embodiment of authentic Judaism. Such a community does not--indeed, cannot--include non-observant Jews within its notion of *kelal yisrael*, let alone accept them as valid witnesses under the *halakhah*. Indeed, such a community must regard non-observant Jews as “libertines,” equally liable to violate the moral commandments of the Torah as they are its ritual laws; for this reason, we will recall, the rule “no man makes his intercourse an act of licentiousness” does not apply to anyone outside the Orthodox world. Not all Orthodox rabbis will agree with this assessment of non-Orthodox Jews,⁷⁵ yet Feinstein need not argue with them or prove that his view is more correct than theirs. His very language is the tool by [181] which his community of interpretation constitutes itself: by assuming the “wickedness” of the non-Orthodox, by not even discussing the possibility that non-observant Jews might be allowed to testify, he invites his audience to share in his conviction that the halakhic community, the Jewish religious community, consists solely and exclusively of Orthodox Jews. He offers no proof for this assertion, because no proof is necessary. The apodictic statement, put forward as self-evident fact, allows a community to define itself, to delineate its own realm of existence by excluding others who do not share its sense of identification. Feinstein’s words are not so much “proof” of

audience, to the particular public to which contemporary rabbinic authorities believe they are addressing themselves.

74. These responsa, it should be noted, were written during the decade of the 1950s, at a time when American Orthodoxy was just beginning to emerge into an era of self-confidence.
75. Compare Feinstein’s approach to that of his American contemporary R. Yosef Eliyahu Henkin, *Resp. Teshuvot Ibra*, no. 76. Henkin criticizes Feinstein on this very point. Even the secular and non-observant Jew wishes that his marital relations be “legitimate”; therefore, by his act of intercourse he does intend to constitute a valid Jewish marriage, regardless of the ritual circumstances of the wedding. The marriage is valid and requires a *get* to dissolve it. Henkin also does not attempt to “prove” this assertion; rather, like the

a position as they are a banner, a linguistic formula that enables this particular audience to coalesce around a shared conception of Jewish authenticity. For this reason, even if different halakhic theories exist and no matter how well or poorly Feinstein “proves” his case according to a set of formalist criteria, he has accomplished his task through language that both persuades and defines his intended audience.

2. *Flags in the Synagogue*. Our second example is a ruling issued by Feinstein in 1957.⁷⁶ The leaders of a synagogue have decided to place the national flags of the United States and Israel in the sanctuary. This offends some of the members, who have threatened to leave and form a breakaway congregation. What should be done?

Feinstein begins his responsum by noting that a synagogue is not rendered an unfit place for prayer by sin committed within its walls. He cites an incident in which the *shamash* of a synagogue was discovered *in flagrante delicto* with a woman in the sanctuary; after removing him from the place, the congregants prayed there nevertheless.⁷⁷ This proves that “the sanctity of a synagogue does not depart, even if it is treated in an unholy manner or if actual sins and disgraceful acts are performed therein.” Thus, “even if we say that the [182] placing of flags violates a ritual prohibition, the synagogue is not profaned thereby. And it is preferable to pray there than to form a *minyán* in a place not devoted to prayer (*makom chol*).”

In addition, Feinstein continues, the *halakhah* contains no explicit prohibition against the presence of national flags in a synagogue sanctuary. This is not a case of idolatry or an

rabbinic court of Eretz Yisrael, he states it as a fact, assuming that his intended audience will find it persuasive as a basis for deriving conclusions of law.

76. *Resp. Igerot Moshe*, OC 1:46.

77. Feinstein cites this incident simply in the name of the *Magen Avraham*, providing no additional information. I have not succeeded in locating the reference.

appurtenance of idolatry. The synagogue's leaders, who put the flags there, do not consider them to be holy, objects of religious devotion; they are merely symbols "that the leaders of the synagogue love this country and the state of Israel and that they wish to display this love in a public place." Even though "those who created the flag of Israel [*i.e.*, the Zionists] were wicked people (*resha'im*; that is, non-observant)," we need not worry that an act of idolatry is being committed because nobody imagines that they are worshipping the flags. For this reason, although "it is certainly improper" to put the flags in the sanctuary, especially (*kol shekhein*) on a permanent basis and especially (*kol shekhein*) next to the ark, this is nothing more than "a matter of nonsense and foolishness" (*hevel veshetut*) that violates no explicit prohibition. It would, of course, be a good thing to remove the flags, particularly that of Israel, which calls to mind the "deeds of the wicked" (*ma'aseh haresha'im*), but such a move should not be taken if it should lead to communal strife and contention (*machloket*). Feinstein closes with an admonition to the members of the synagogue who threaten to quit the synagogue over the flags. "They think they are doing a great thing, but they are acting improperly; this is nothing more than politics, instigated by the evil impulse."

What is especially noteworthy about this *teshuvah*, I think, is the deftness with which Feinstein changes the subject at issue. The central question in this case, one would think, is the propriety of placing [183] national flags in the synagogue sanctuary: is it right or wrong, proper or improper, to introduce these non-religious symbols into a place that partakes of sanctity (*kedushah*)? To the extent that he discusses this question, Feinstein makes it clear that he agrees with the disgruntled congregants. It is, he writes, an "improper" thing to put national flags in the sanctuary. It is an act of "foolishness" to introduce secular symbols into sacred space,

particularly when the presence of one of those symbols would grant undeserved recognition to the deeds of the “wicked” Zionists. The flags do not belong in the synagogue, and they ought to be removed. Therefore, were the *she’elah* to be framed in this way--“is it permissible to put national flags in the synagogue sanctuary?”--there seems little doubt that its answer would be a resounding “no.” Feinstein, however, asks the question in a very different way: “does the presence of national flags, which admittedly do not belong in the synagogue, justify an extreme act of opposition (quitting the synagogue) that threatens the unity and perhaps the survival of the congregation?” The question, in other words, is no longer “about” flags as much as it is “about” *machloket*, communal strife that threatens to divide and perhaps to destroy a synagogue. This changing of the subject is crucial to the answer that Feinstein ultimately renders. Where the original question, the propriety of the flags, would seem to invite a decision in favor of the demands of the disgruntled congregants, this new question directs our sympathies away from them and their otherwise justified claims.

To construct the question thus is a rhetorical accomplishment of real significance. It accomplishes a major shifting of the burden of proof, the drawing of a distinction between the accepted opinion and the opinion that cannot be adopted without sufficient reason.⁷⁸ We [184] would normally expect that those who introduce a change into the existing situation (in this case, the synagogue’s leaders) would bear the responsibility of demonstrating that their innovation, which after all has instigated the problem in the first place, does not transgress against the

78. On the role of burden of proof--and its shifting--in legal argument, see R.H. Gaskins, *Burdens of Proof in Modern Discourse* (New Haven: Yale, 1992). See also Chaim Perelman and M. Olbrechts-Tyteca, *The New Rhetoric* (Notre Dame: Notre Dame University Press, 1969), 106: the very existence of a burden of proof, which denotes that there *are* presumptions and norms that we accept as valid without the need to demonstrate their validity, makes argument possible in the first place.

halakhah or Jewish religious norms. Feinstein's *teshuvah* transfers that responsibility onto the other side: it is the disgruntled congregants must now prove that the action of the synagogue's leaders is odious enough to warrant a breakup of the congregation. The setting and the shifting of the legal burden of proof is a powerful rhetorical tool in the hands of the judicial writer,* and Feinstein wields it here with consummate skill. The disgruntled congregants, who are, as Feinstein himself admits, *right* about the flags in theory, now find themselves at a tactical disadvantage: it is they, and not the synagogue leaders, who must prove their case. This disadvantage becomes insurmountable, moreover, when Feinstein determines just what it is they have to prove. In order to "win," the disgruntled congregants must demonstrate not only that the synagogue's leaders have violated Jewish religious norms but that the presence of the flags somehow desecrates the synagogue and renders it unfit for prayer. This is an impossible burden, because as Feinstein notes a synagogue never loses its holiness as the result of sins committed within the building. Of course, the disgruntled congregants in all probability never raised this concern: their claim is not that the synagogue has become desecrated but simply that the presence of flags is improper there. Feinstein, as we have seen, agrees with this more modest assertion. But because he perceives the "real" issue here as *machloket*, congregational division and strife, he declares that ritual [185] impropriety is no longer sufficient warrant to decide in favor of the disgruntled congregants. He requires rather that they prove the stronger claim of desecration. And this is a standard of proof that is beyond their reach.

All this points to a simple fact: nothing in this case *requires* that Feinstein address it as he does. He might have centered this question, as other responsa have done,⁷⁹ around the propriety of national flags in the synagogue; had he followed this course, his answer would presumably have offered support to the outrage of the dissatisfied synagogue members. Neither his answer nor the structure of his argument can thus be said in any way approaching objectivity to be “correct.”

The fact that the responsum exists in the form that we have it, expressing a very different answer than the one we might otherwise expect, is the result of a construct which its writer places upon the facts before him. A responsum, in other words, is a *literary* construct, a text which invites its readers to share in its author’s perception of legal reality. While the legal author is bound to his “data”, the facts at issue and the legal materials from which he is expected to fashion his answer, he is like all authors to a very real extent the creator of his literary universe. It is the author of a responsum who defines the parameters of the issue that he addresses, determining what the question is “about,” where the burden of proof shall lie, and of precisely what that burden consists. These activities, a necessary feature of every halakhic decision, are at bottom *literary* activities. No science or calculus dictates them to the *posek*. They are not deductions arrived at by a judicial scientist in search of an objectively verifiable legal answer. They are rather judgments of an author constructing a text whose words define the question at hand, the standards of proof that must be [186] met, and the very legal universe in which the *posek* and his readers function. Judgments are not syllogisms; they are not arrive at truth by way of logical demonstration. But no judicial writing or reasoning is possible without them. If the

79. Reform responsa have addressed the issue in this way. See *American Reform Responsa*, nos. 21 and 22, and

posek exercises these judgments well--that is, to the extent he succeeds in persuading his intended audience to view the question as he does--then he has accomplished his task; he has proven, in the best and only way he can, that his answer is a “correct” one.

3. *Artificial Insemination--Donor*. The third responsum I shall examine pertains to the field we call “medical ethics.” In the case before him, a woman has had herself inseminated with the sperm of a man other than her husband and without her husband’s consent. The husband wishes to know whether, according to *halakhah*, his wife is permitted to him sexually, that is to say, did she commit adultery by having herself inseminated?⁸⁰ He inquires as well as to the status of the child. Feinstein⁸¹ rules in favor of the wife on virtually every relevant issue. The wife is not forbidden to her husband, since “adultery” can be committed only by means of sexual intercourse. The child, should it be the offspring of a Jewish semen donor, is not a *mamzer*, since the status of *mamzerut*, too, is effected only through actual intercourse.⁸² Moreover, we can assume that in America, where the majority of males are Gentiles, the child is the offspring of a non-Jewish semen donor; this means that *mamzerut* is not an issue⁸³ and that we need not worry that the child may grow up and marry a relative of his Jewish father. Feinstein even suggests that although the daughter of a non-Jewish male is prohibited from marrying a *kohen*,⁸⁴ the prohibition does not apply when the conception took place through artificial means. Hence, if

Teshuvot for the Nineties, no. 5753.8.

80. *M. Sotah* 5:1; *SA EHE* 11:1.

81. *Resp. Igerot Moshe*, *EHE* 1:10.

82. See *Turey Zahav*, *YD* 195, no. 7.

83. *BT Yevamot* 45b; *Yad*, *Isurey Bi'ah* 15:3; *SA EHE* 4:5.

this child is a female, she is [187] permitted to marry a *kohen*. The woman's husband "wins" only to the extent that he is not obliged to support the child, who was after all conceived despite the husband's wishes.

The most significant feature of this responsum, perhaps, is what Feinstein does *not* say. At no point does he indicate that there is something "wrong" with the wife's action or that she has transgressed against some aspect of Jewish law by becoming pregnant in this manner. His ruling therefore stands in sharp opposition to the overwhelming consensus of Orthodox halakhic opinion which, though it permits artificial insemination when the semen donor is the woman's husband (AIH),⁸⁵ prohibits the procedure known as AID, artificial insemination by means of a "foreign" donor,⁸⁶ and this for two principal reasons. First, AIH is justifiable if it is the only way in which the husband can father children and thus fulfill his halakhic requirement "to be fruitful and multiply." AID, by contrast, does not produce a child to the husband. And since women are not obligated under the *mitzvah* of procreation,⁸⁷ a wife who is impregnated with the semen of a "foreign" donor fulfills no halakhic requirement that would warrant such a radical departure

84. *BT* Yevamot 45a; *SA* EHE 4:5. The matter is, however, controversial; see *Beit Shmuel* and *Chelkat Mechokek* to *SA* *ad loc.*

85. R. Sholom M. Schwadron, *Resp. Maharsham* 3:268; R. Zvi Pesach Frank, cited in *Otzar Haposkim* 23:1, no. 1; R. Yechiel Ya'akov Weinberg, *Resp. Seridey Esh* 3:5; R. S.Z. Auerbach in *No'am* 1 (1958), 157.

86. R. Eliezer Yehudah Waldenberg, *Resp. Tzitz Eliezer* 9:51, end; R. S.Z. Auerbach, in *No'am* 1 (1958), 165; R. Ovadyah Yosef, *Resp. Yabi'a Omer* 2, EHE 1, end ("Heaven forbid that we should permit such a thing"); R. Yechiel Ya'akov Weinberg, *Resp. Seridey Esh* 3:5 ("this is an ugly act, one which resembles the abominations of Egypt"); R. Ya'akov Breisch, *Resp. Chelkat Ya'akov* 3:45ff.

87. Gen. 1:28; *BT* Yevamot 65b; *Yad*, *Ishut* 15:2; *SA* EHE 1:1.

from the normal, natural means of conception.⁸⁸ In this case, since the child would not be the husband's offspring, its birth would not help him fulfill his *mitzvah* to bring children into the world. Second, most *poskim* consider the insertion of "foreign" seed into the womb of a married woman to be a revulsive act. If it is not, strictly speaking, adultery, it is nonetheless a *to`evah* ("abomination") and a *ma`aseh ki`ur* ("an act of ugliness"), a transgression against the most fundamental Jewish standards of sexual propriety.⁸⁹

How does R. Moshe Feinstein counter this weight of precedent? How does he prove unobjectionable a procedure that so many [188] authorities condemn so strongly? Once again, I would suggest that "proof", in the sense we normally use this term, has nothing to do with it. Feinstein instead establishes his point by literary means, by constructing a text in which the concerns that occupy the other *poskim* are conspicuous by their absence.

Let us consider, first of all, the language with which Feinstein introduces this *teshuvah*.

The matter concerns a woman who has been married for ten years and has not given birth to children. The physicians say that the cause of the childlessness lies with her husband. And for this reason the wife went to the doctor, who injected the semen of another man into her womb. She wishes to bear children as is the desire of all women, as we learn in *BT Yevamot 65b*... Aside from this halakhic evidence, it is well known that our holy matriarchs desired to bear children, as indeed do all women everywhere.

As indicated above, most halakhic authorities classify the issue of artificial insemination as a subset of the *mitzvah* of procreation. The procedure is permissible to the extent that it allows a Jewish man to fulfill his Toraitic obligation. *Poskim*, for example, will discuss at some length the question whether a child conceived by artificial insemination is, under *halakhah*, the legal

88. On Judaism's preferences in this regard see Daniel Schiff, "Developing Halakhic Attitudes to Sex Preselection," in Walter Jacob and Moshe Zemer, eds., *The Fetus and Fertility in Jewish Law* (Pittsburgh and Tel Aviv: Freehof Institute of Progressive Halakhah, 1995), 91-117.

offspring of the semen donor. If the answer is “no,” they are much less likely to permit the procedure, which in any case is a significant departure from natural procreation, since a child thus conceived would not be counted toward the male’s requirement for procreation.⁹⁰ The entire question is framed, in other words, from the perspective of the husband. That the wife may desire to have children is irrelevant to these discussions, because she fulfills no *mitzvah* thereby. In Feinstein’s *teshuvah*, however, the wife replaces the husband as the center of our concern. Her wish to have children is taken seriously, for three reasons: (1) it [189] is the desire of all women; (2) the biblical narratives of the matriarchs show that our tradition treats this desire as one of immense importance; and (3) the *halakhah* itself, in *BT Yevamot 65b*, regards a husband’s sterility as grounds for divorce, not because the wife is *required* to procreate but because her wish to have children is actionable, a sufficient warrant for the court to take legal notice.

In the space of a single paragraph, Feinstein has totally redefined the framework in which halakhists generally discuss the question of artificial insemination. No longer do we apprehend this technology primarily as a means of enabling a husband to fulfill his *mitzvah*; it is now chiefly a means of allowing a wife to fulfill her own hopes and dreams. And as such, the case for AID becomes a much stronger one. Feinstein does all of this, it must be emphasized, without ever mentioning the opinions of all those authorities who disregard the wife’s desire to bear children as irrelevant to the question. Those opinions had created a paradigm, a way of thinking and talking about artificial insemination that, because it proceeded from the husband’s *mitzvah* to

89. For a summary of the opinions see A.S. Avraham, *Nishmat Avraham*, EHE 1, pp. 5-13.

90. Thus, R. Benzion Ouziel prohibits AIH on the grounds that, as the child is not legally that of the husband, there is no warrant for the procedure that would supersede the prohibition against the improper emission of seed (*hotza’at zera levatalah*); *Resp. Mishpetey Ouziel 2:19*. The authorities cited in note 85, by contrast, do regard the child as the semen donor’s legal offspring.

procreate, virtually demanded a negative halakhic response to AID. The “weight of precedent” would seem to impose upon every *posek*, as a member of the halakhic community, the obligation to consider those other rulings. He would either have to submit to the judgment of all these worthy scholars; alternatively, he would have to refute them or at least to show why his own decision does not run counter to established rabbinic legal thought. Feinstein does none of this; he simply ignores the other opinions. His introduction, which speaks to the wife’s wishes and needs, totally reframes the question. It replacing the established paradigm with a new discourse on the subject, one that leads us inexorably to accept a *pesak* that diverges sharply from the existing halakhic consensus. For when we examine this issue from the standpoint of the wife, listening to her voice, placing her desires rather [190] than her husband’s ritual obligations at the foundation of our reasoning, we are much less likely to find a halakhic impediment against AID. In one fell swoop, therefore, Feinstein has turned the halakhic world upside down. What is now “irrelevant” is the fact that the husband will not fulfill a *mitzvah* if his wife is impregnated by another man’s semen; what is “relevant” is that the woman will realize a goal that is most proper and natural for her. In the textual universe that Feinstein has created, the husband’s *mitzvah* is never considered and plays no role in determining the law. The dominant consideration, instead, is our own *mitzvah* to alleviate the suffering of the childless Jewish woman.

How does Feinstein deal with the second objection to AID, that it is a *to`evah* or an “ugly” thing? Here, too, he “refutes” a troublesome legal argument by ignoring it. Feinstein treats the insertion of “foreign” semen as a normal medical procedure, discussing it in language that is entirely free of pejorative terminology and moral judgment. This is true even when the semen donor is a Gentile. Feinstein not only analyzes this possibility in a dispassionate tone; he

also points out that the use of a gentile's semen would solve some difficult halakhic problems that would arise were the donor a Jew.⁹¹ Once again, he diverges from the position of other halakhists, for they tend to regard the use of Gentile semen as a particularly disgusting thing.⁹² And once again, he "proves" his point by ignoring theirs. The moral concerns over Gentile semen do not exist because his text simply does not mention them. Were we to read his responsum in isolation from the others, we would have no idea that AID presents any special moral or even aesthetic problem.⁹³

How is it possible that the author of a halakhic responsum can smash the paradigms and ignore the conclusions of his peers? The [191] answer, as was the case with our two previous examples, is the literary nature of halakhic decision. Here, too, we see the *posek* at work as author, the creator of a text. Like an author, it is the *posek* who defines the parameters of his subject matter. It is he who establishes the responsum's perspective, the vantage point from which his readers are invited to consider the question as a whole. It is he who determines the issues that must be discussed, the points that must be proven, the objections to be ignored or taken seriously. None of these decisions is artificial, a trick, a distortion of formal legal process. Each one of them is a step that must be taken, necessary to the construction of the responsum, the analysis of the halakhic issues involved, and the justification of its ruling. Each one of them is an

91. See as well *Resp. Igerot Moshe*, EHE 1:71.

92. See, for example, R. S.Z. Auerbach in *No`am* 1 (1958), 159-166. Although he recognizes the seriousness of a woman's desire for children, and although he admits that "it is possible that this is not prohibited" (165-166), he is quite clear that a child born of a Gentile's sperm is "dirty" (*mezuham*; 164) and that it is an act of unquestioned ugliness (*ke`ur*) to bring Gentile seed into the community of Israel.

93. It is true that Feinstein subsequently withdrew from the more radical implications of his decision, writing that his words should not be taken as a blanket permit of AID; see his letter reprinted in *Resp. Chelkat Ya`akov* 3:47. Yet this does not affect our analysis of the approach he takes in his original ruling.

indispensable element in the creation of a language, a way of speaking and thinking about an issue that the author proposes to his audience. Each one is in other words a quintessentially *literary*, as opposed to a strictly “legal” activity. The halakhic decisor presents his *pesak* as part of a text that creates a community with its intended readers, which invites them to view halakhic reality in the way that its creator views it, and that suggests to them ways of thinking and speaking about the values that are constitutive of Jewish religious life. In this sense, we can say that R. Moshe Feinstein is successful as a *posek* to the extent that he succeeds as an author.

Some Concluding Observations.

We return to our original question: is there such a thing as “*halakhah*”? Does there exist a distinct process of Jewish legal reasoning, an activity possessing its own intellectual integrity and that cannot without loss be translated or assimilated into any other mode of thinking and speaking? The examples I have cited here suggest both that *halakhah*, like law, claims an autonomous existence and that this [192] autonomy ought to be acknowledged as real. *Halakhah* is not the same thing as ethics or theology or economics or any other discipline. It expresses its conception of reality, frames its arguments, and derives its conclusions in a language all its own, a discourse that operates according to its own understood procedures and that therefore cannot be reduced to any other form of discourse. It is in this sense that we can describe *halakhah*, with accuracy, as an “objective” reality: the answers it reaches are not simply the personal proclivities of the rabbis but the product of a process that justifies those answers according to accepted standards of legal validity.

On the other hand, an examination of these *teshuvot* indicates that such “standards of legal validity” are a literary invention. It is the *posek*, the author of this literary text, who determines just what those standards shall be. It is the *posek* who combines the materials at his disposal in order to persuade his intended audience, his set of “ideal” readers, that they should view halakhic reality in a specific way as opposed to other plausible ways. The creation of a responsum is therefore an act of language. It is the translation of texts, the substance of Jewish legal tradition, into new patterns of meaning. It is an act of conversation that helps constitute a community through a shared language of values, assumptions, and aspirations that link author to audience in a common culture of argument.

For this reason, while it is possible to speak of law as a distinct discipline, it is much more difficult to speak of legal correctness as the objective outcome of the operation of formal logic or method. Indeed, the word “method,” understood as a set of neutral principles by which the answers to all legal questions are tested and evaluated, is inappropriate in the extreme. It would be better, our findings suggest, to measure the correctness of an act of halakhic [193] reasoning in terms of its literary and rhetorical excellence, its success in winning the adherence of a community of readers and in shaping the course of halakhic discourse, the way in which subsequent communities of readers perceive and frame the issues. To put it differently, the question to ask of a rabbinic responsum is not whether it is “right” but whether it meets the standards of excellence we would expect of a well-written work of literature.

Although wide-ranging and general scholarly conclusions concerning rabbinic responsa cannot confidently be based upon a reading of but three *teshuvot*, what these examples suggest to us is that the next stage in the study of the responsa literature ought to be their study *as* literature.

This is not to say that they should be read and analyzed precisely as we seek to comprehend a poem, a novel, or a play. To impose such standards upon responsa would be as out of place as subjecting them to the criteria of formal logic and scientific reasoning. It is to suggest, though, that as written texts responsa share much in common with other literary creations and that it is this very literary nature that determines how the responsum functions as an act of rabbinic instruction addressed to and carried on within a community of observant Jews.

And this conclusion is a significant one for our self-understanding as liberal halakhists, as non-Orthodox Jews who seek to construct a language of religious meaning out of the sources of the Jewish legal tradition. It is significant because we carry out our work under the disapproving stares of critics to both our right and our left. The former, representing a formalist stance much like that expressed by J. David Bleich, argue that our activity and conclusions are simply wrong, that they transgress the set, logically-determined standards of halakhic validity that exist independently of the individual rabbinic [194] decision and that measure the correctness of every Jewish legal utterance. The latter, who draw to its logical extreme the observations of Louis Jacobs, assert that there *is* no standard of halakhic correctness, that every legal decision is nothing more than the translation of the rabbi's religious or ideological predilections into a neutral-sounding legal vernacular. We err, they say, in thinking that there is a thing called *halakhah* that is anything other than these predilections, and we waste our time attempting to enlist halakhic language in expressing our notions of Jewish religious truth when the "real" meaning conveyed by Jewish legal teaching is to be found in other forms of discourse.

A literary conception of the activity of *halakhah*, a conception that accounts for much of what the *posek* actually does, responds to both these criticisms. There *is* such a thing as

halakhah, we would assert, but it is properly understood as a culture of argument, a way of thinking and speaking, rather than a collection of discrete conclusions and a “scientific” method for arriving at them. Our *halakhah* is as “legitimate” as any other version of it, to the extent that our halakhic writings participate in this culture. Our audience differs substantially in fact from the audience of most Orthodox responsa, but all halakhic writing and argument is addressed to *some* Jewish audience that takes halakhic writing and argument seriously and considers it prayerfully. And, in principle, we present our arguments and conclusions to all Jews, for though we know that many will reject what we say we believe that they could be persuaded by our words, were they to open themselves to persuasion. For these reasons, we need not regard our work as halakhically suspect, let alone inauthentic. For these reasons, therefore, we can proclaim the importance and the necessity of our work, take pride in what we have accomplished and [195] turn our energies to the completion of the halakhic tasks that yet lie before us.