FREEDOM AND CONSTRAINT IN THE JEWISH JUDICIAL PROCESS*

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Benjamin Nathan Cardozo, in his small but influential volume, *The Nature of the Judicial Process*,[1] made a major effort to separate and describe the subjective elements that operate in the judge's decision-making process and in the body of objective law which he

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*ED. NOTE: To aid the uninitiated reader in following Dr. Lamm's and Professor Kirschenbaum's discussion, we offer a brief chronological overview of the basic rabbinical texts employed in the article.

The oral interpretation of biblical law, passed down from Moses through the sages of each generation, was first redacted by R. Judah ha-Nasi (d. 219 C.E.) in the topical compendium known as the *Mishnah*. The *Mishnah* is subdivided into six Orders, each of which deals with a broad self-contained area of the law (*e.g.*, *Nezikin* (Torts)). The six Orders are further subdivided into a total of sixty-three tractates, each of which explores a circumscribed topic (*e.g.*, *Sanhedrin* (Judges)) within the more general Order. Scholars in the *Mishnahic* era were known as *Tannaim*. The *Gemara*, a large body of commentary to and expansion upon the *Mishnah*, was developed over the next four centuries. There are two *Gemarot* (plural of *Gemara*), one that was composed in the Babylonian academies and another that represented the contributions of the Palestinian scholars. The former is the more exhaustive and authoritative of the two *Gemarot;* citations to any of the tractates refer to the Babylonian *Gemara* unless prefaced with the notation T.J. (Talmud Jerusalem). Scholars cited in the *Gemara* were known as *Amoraim*. The *Mishnah* and the *Gemara* form the component parts of the Talmud, the basic text of rabbinic learning.

The post-talmudic history of Jewish scholarship is divided into three eras: the era of the *Geonic* (roughly 600-1050), the era of the *Rishonim* (early scholars—roughly 1050-1550), and the era of the *Acharonim* (latter-day scholars—roughly 1550 until the present). Outstanding among the *geonim* was Saadia Gaon, whose philosophical works are considered classics to this very day. Prominent among the numerous *Rishonim* whose works are cited by Dr. Lamm and Professor Kirschenbaum is Maimonides (1135-1204), who contributed a formal Code of Jewish Law *(Mishneh Torah)*, as well as numerous commentaries and philosophical writings. R. Joseph Karo's *Shulchan Arukh*, composed during the middle of the sixteenth century, serves as the authoritative Code of Jewish Law, and is often viewed as demarcating the era of the *Rishonim* from that of the *Acharonim*. Aside from commentaries and codes, rabbinic writings include a vast body of responsa literature that provide great insight into the decision-making process of the Jewish judge.

For an elaborate discussion of the chronology and structure of Jewish Law, *see, e.g.*, D. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 3-18 (paperback ed. 1974); M. MARGOLIS & A. MARX, A HISTORY OF THE JEWISH PEOPLE 216-76, 321-64 (1938).

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[1] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

must consult and whose loyal interpreter he must be in reaching a judicial decision. The four "methods"[2] he elaborates offer a structure by which to probe the degree of freedom of and restraint upon the judge in his judicial role.

It is appropriate to pursue the same theme in other forms and traditions of law. This essay is devoted to a preliminary exploration of the question of freedom and constraint in the Jewish judicial process. Because of certain basic dissimilarities between Jewish law (*Halakhah*) and Anglo-Saxon and American law, the problem will have to be posed in different form and begin with more fundamental philosophic issues. Hence, we shall first investigate the theoretical underpinnings of the question, and we shall then proceed to a *halakhic* survey and analysis.

I. The Halakhic System: Monistic or Pluralistic?

The *Halakhah* claims for itself divine origin: the Written Law (or *Torah*—*i.e.*, the Scriptures, especially the Pentateuch) and the Oral Law (later reduced into writing in the Talmud) were revealed to Moses at Mount Sinai, and contained a warrant for the judges of each succeeding generation to decide, in each case brought before them, all doubts and disputes in the light of the revealed legislation. This assumption of divine provenance must, of course, be accepted at face value and on its own terms if any investigation into the nature of the *halakhic* judicial process is to be valid in assessing the role of the judge who must, a priori, accept this assumption in order to qualify as a judge.

The problem, then, may be stated as follows: Is the *Halakhah*, which has undergone massive development and elaboration through the centuries, always assumed to be in consonance with the absolute, divinely revealed will; or is it, despite its transcendent origin, open to a plurality of judgments, all of which retain divine sanction? If we choose the first option, then there is only one valid solution to every legal problem, and the judge is thus denied any significant latitude. Under this approach, judicial error (in the sense of non-conformity with the Absolute, rather than technical error) represents a major catastrophe: the falsification of the single unequivocal divine will. The conscientious judge who is aware of this potential catastrophe will obviously approach his task with great trepidation and is likely to con-

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[2] They are more accurately described as classification devices. *See* G.E. White, The American Judicial Tradition 259 (1976).

sider his range of discretion severely constrained. If we accept the second thesis, we assume a plurality of valid solutions, at least theoretically, and we broaden the scope of the judge and allow him significant freedom in coming to a decision. In pursuing this issue, it must be borne in mind that the sources are mostly indirect, and that we do not find this formulation explicitly in them. The great *halakhists* were, for the most part, practitioners rather than philosophers of the law.

Some of the renowned medieval talmudists (*Rishonim*) incline to a monistic view of the *Halakhah*: there is only one correct decision, and that is presumed to accord with the divine will. The laws of the *Halakhah*, like the moral qualities of right and wrong, are intrinsic. As the revealed will of God, the *Halakhah* presents us with norms that are ontological and hence not subject to qualification. The judge's role, in this case, is solely that of the transmitter of the law, and his creativity is limited to the discovery, transmission, and promulgation of the true law which, though previously unknown, is indeed the authentic will of the divine legislator.

The author of *Sefer ha-Chinnukh*, commenting on the principle of majority rule,[3] holds that it is not only a legal procedure for adjudication, but also a desirable means for arriving at the truth:

> When [the two sides] are equal or approximately equal in wisdom, the *Torah* informed us that the majority views always accord with the truth, more so than the minority; and whether or not it indeed accords with the truth according to the opinion of the observer, the law is that we may not depart from the way of the majority.[4]

Yehudah Halevi, referring to the Biblical injunction against adding to or detracting from the Law, coupled with the grant of the right to interpret doubtful issues to the priests or judges of each generation,[5] maintains that they have divine assistance and would never concur in anything which contradicts the *Torah*.[6] The infallibility of

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[3] This principle is derived from the accepted talmudic interpretation of *Exodus* 23:2. *See generally Mishnayot Sanhedrin* 1:1; *Bava Metzia* 59b; *Chullin* 11a; T.J. *Moed Katan* 3:1; *Sanhedrin* 29a, *Rashi s.v. shenayim*. Although the plain meaning (*peshat*) of the scriptural text is quite different, the Oral Law—as recorded in the above sources—does attach the principle of majority rule in a divided court to the last three words of this verse; hence it is accorded the authority of Biblical Law.

[4] SEFER HA-CHINNUKH, Commandment 78.

[5] *Deuteronomy* 13:1, 17:8-11.

[6] Y. HALEVI, KUZARI 3:41. But this may be more an expression of faith than an assertion that the doctrine of infallibility is necessary to a valid conception of the *halakhic* process.

the authorized courts, in the sense that their decisions accord with the original intention of the law, is also mentioned by Nachmanides.[7]

Despite the views of these influential *halakhists*, the greater weight of authority may be cited for what might be termed the pluralistic view of the *Halakhah*, namely, that it is possible to have more than one valid solution to a legal problem; that "*halakhic* truth" is not and need not necessarily be identical with absolute or divine truth. This is so because the revealed law is, in its nature, not necessarily unequivocal or absolute; it is extrinsic and existential rather than intrinsic and ontological, and more than one judgment may therefore claim equal validity.

The source for this pluralistic view is a fascinating passage in the Talmud.[8] The Rabbis were debating a *halakhic* issue: the ritual purity or impurity of an oven (the "oven of *Akhnai*") made of rings with sand as filler. R. Eliezer ruled that it was levitically pure, while his colleagues held it impure. Despite all of R. Eliezer's arguments in favor of his opinion, the Rabbis persisted in their decision. Having failed to succeed through the forces of logic, R. Eliezer invoked a number of miracles in an attempt to persuade the Rabbis. "If the *Halakhah* (law) is according to my opinion, let this carob tree offer testimony." The tree was uprooted and moved a hundred or four hundred ells. But the Rabbis said, "We adduce no evidence from carob trees." R. Eliezer then tried another miracle: the waters of a nearby brook reversed their direction. The Rabbis persisted, maintaining that this proved nothing. A third miracle was then produced by R. Eliezer, and still the Rabbis refused to yield. Whereupon R. Eliezer exclaimed: "If the *Halakhah* accords with my view, let it be demonstrated from Heaven." Thereupon, a Heavenly Voice (*bat kol*) issued forth, saying, "Why do you disagree with R. Eliezer; *Halakhah* is always as he says it is." R. Joshua responded by citing the Biblical verse: "It [the *Torah*] is not in heaven."[9] The Talmud here parenthetically inserts R. Jeremiah's explanation of R. Joshua's response: Once the *Torah* was revealed at Sinai, we pay no attention to a

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[7] M. NACHMANIDES, PERUSH AL HA-TORAH (COMMENTARY TO THE PENTATEUCH), *Deuteronomy* 17:11. However, it is doubtful if this theory of infallibility because of divine grace is fully accepted by Nachmanides. He mentions it in what seems to be an afterthought ("certainly you ought to think that. . . .") after he tells us that the authority of the courts as authentic interpreters of the divine will must be accepted because the Law was given to us as they decide it "even if they are in error." Moreover, in his HASAGOT HA-RAMBAN LE'SEFER HA-MITZVOT (CRITIQUE ON THE BOOK OF COMMANDMENTS), Root I, Nachmanides omits any mention of the infallibility theme.

[8] *Bava Metzia* 59a-b.

[9] *Deuteronomy* 30:12.

Heavenly Voice,[10] because the law is decided by the majority.[11] Furthermore, we are told, R. Nathan encountered the prophet Elijah and asked him: "What did the Holy One do at that time?" Elijah answered, "He laughed [with joy], and said, 'My children have defeated Me, My children have defeated Me!'" Returning to the debate itself, the Talmud informs us that the Rabbis resolved to excommunicate R. Eliezer.

What may appear to the modern reader as a strange mixture of fact and fancy, law (*halakhah*) and legend (*aggadah*), is nevertheless an accepted method of the Talmud. The *aggadah* in this passage teaches us something about the conception of the law itself:[12] what we have called "*halakhic* truth" is independent of the original revealed law, even if the latter is confirmed by a fresh revelation.

R. Nissim Gerondi turns to this passage on the oven of Akhnai as the *locus classicus* of thinking on this problem:

> Now, all of them saw that R. Eliezer came closer to the truth than they . . . and Heaven decided according to his view, and yet they acted on their own opinion; for since their reason inclined them to declare [the oven] impure, though they knew that this opinion was the opposite of the truth, they did not wish to declare it pure. Had they declared it pure, they would have violated the words of the *Torah* because their reason told them [the oven] was impure. The [power of] decision was given over to the Sages of each generation, and what they agree to—that is what God commanded.[13]

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[10] There is a considerable literature on the validity of prophecy and visions as a source of legislation or judicial decision. Such mystical intrusions into the *halakhic* process continued well into modern times. *See, e.g.*, Heschel, *Al Ruach ha-Kodesh Be'yemei ha-Benayim* (*On the Divine Spirit in the Middle Ages*), in SEFER HA-YOVEL LI'KHEVOD ALEXANDER MARX (ALEXANDER MARX JUBILEE VOLUME) 175 (1950); Urbach, *Halakhah u-Nevuah* (*Halakhah and Prophecy*), 18 TARBITZ 1 (1947); note 19 *infra*. If one accepts such supra-rational visions as a legitimate source of Jewish law, one might then refer to a fifth or "mystical method" in addition to the four adumbrated by Cardozo in his THE NATURE OF THE JUDICIAL PROCESS, *supra* note 1, except that one can hardly call a spiritual-charismatic event a "method"; at most it can be termed an alternative "classification." *See* note 2 *supra*.

[11] We may have here one of two explanations. *See* Englard, *Majority Decision vs. Individual Truth*, 15 TRADITION 137, 150 n.6 (1975).

[12] Englard, *supra* note 11, is skeptical as to whether this talmudic passage may be used to adduce any general views on Jewish law. Although he is undoubtedly right in cautioning about the problematical nature of generalizing from single remarks or passages, and while he correctly points to a variety of interpretations of this very passage, this much is certain—that all agree that what we have here is a statement of the difference between *halakhic* truth and original truth.

[13] NISSIM OF GERONDI, DERASHOT HA-RAN (EXPOSITIONS), *Derashah* VII. *See also id.*, *Derashot* III & V. R. Nissim comments on another talmudic tale, *see Bava Metzia* 86a (concerning Rabbah bar Nachmeni) which, while providing less dramatic force, offers a similar melange of *halakhah* and *aggadah* leading to the same conclusion.

More explicitly, the notion of divine sanction for competing judicial opinions is evident in the following talmudic exegesis of a verse from *Ecclesiastes* (12:11):

> The disciples of the wise (*i.e.*, scholars of the Law) sit in manifold assemblies and occupy themselves with the *Torah*, some pronouncing unclean and others pronouncing clean, some prohibiting and others permitting, some disqualifying [witnesses] and others declaring [them] fit. Should a man say: how [in view of these contradictory opinions] shall I learn the *Torah*? Therefore [*Ecclesiastes*] says, "all of them are given from one Shepherd." One God gave them; one leader [Moses] uttered them from the mouth of the Lord of all creation.[14]

Rav maintains that in order to qualify for membership in the *Sanhedrin* (the highest *halakhic* court) a candidate had to be able to prove, from Biblical sources, the ritual purity of *sheretz* ("swarming" or "creeping" creatures, explicitly declared impure by the *Torah*).[15] Rav, and according to another version, Ravina, attempted to do just that, but without success.[16] Before them, R. Meir was praised for his ability to demonstrate the ambivalence in the law; he was so profound that his colleagues could not follow him, and the *halakhic* decision therefore usually went against him.[17] The Palestinian Rabbis were less tolerant of what they considered casuistry than were their Babylonian colleagues.[18] But what motivated these Rabbis to recommend extraordinary intellectual agility was not a preference for casuistry or a liking for virtuosity per se, but an awareness of the nominalist character of the law and the consequent need for the judge to be prepared with a variety of solutions.[19]

The sixteenth century *halakhic* judge and commentator, R. Solomon Luria, affirms the theory of *halakhic* pluralism and its con-

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[14] *Chagigah* 3b.

[15] *Sanhedrin* 17a.

[16] *Eruvin* 13b; *Sanhedrin* 17a.

[17] *Eruvin* 13b.

[18] *See* T.J. *Sanhedrin* 15b.

[19] *See* N. LAMM, FAITH AND DOUBT 253-58 & 257 n.30 (1971). Mention should also be made of the various references to divine assistance to the judge in his *halakhic* deliberations. Some scholars take these references to the supernatural quite literally. *See* I. TWERSKY, RABAD OF POSQUIERES 291-300 (1962) (concludes that such *kabbalistic* references in the works of *Rabad* and other medieval *halakhists* are literary flourishes and not descriptive of actual mystical experiences). Twersky's arguments are convincing. One might add, however, the observation that the very fact that their *personal* evaluations (as opposed to tradition and precedent) were couched in these powerful metaphors indicates the importance they attached to such instances of independent and intuitive judicial interpretations and decisions.

comitant idea of the freedom of interpretation. He offers a mystical basis for the role of the individual personality of the judge: all souls were present at Mount Sinai when the *Torah* was given, and each received the revelation through his own specific "channel," according to his own powers of perception, so that a variety of mutually incompatible opinions on a given question may result, and yet "all are true."[20]

Similar sentiments are voiced by a renowned eighteenth century talmudist, R. Aryeh Leib ha-Kohen:

> *Torah* was . . . given to man, endowed with human reason. The Holy One gave us the *Torah* . . . in accordance with the dictates of human reason, even if it be not true according to the Separate Intelligences (*i.e.*, absolute truth).[21]

An illustrious contemporary talmudic scholar, Rabbi Moshe Feinstein, echoes this view. Decisions must be made:

> as the sage sees it, after proper research to clarify the *Halakhah* [as it emerges from] the Talmud and Commentaries to the best of his ability, in seriousness and with piety. What appears to him as the [correct] verdict is the truth for decision-making, and he is obligated so to decide, even if in fact Heaven knows that this is not the [correct] interpretation.[22]

Natural Law and Positive Law

A question that has serious consequences for Jewish thought in general and the conception of Jewish law in particular is that of natural law. Legal positivists will naturally tend towards a pluralistic conception of the *Halakhah*, while advocates of natural law will in-

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[20] S. LURIA, *Introduction* to YAM SHEL SHELOMOH, *Bava Kama*. On the role of the judge's individual value-judgments in his judicial decision-making, *see* Goldman, *Ha-Musar, ha-Dat, Ve' ha-Halakhah (ethics, Religion, and Halakhah)* (pt. 4), 22 DEIOT 65, 71 (1962). In a debate with Eugene Borowitz, *see* Borowitz, *Subjectivity and the Halachic Process*, 13 JUDAISM 211 (1964), Immanuel Jakobovits defends the presence of objectivity in the *halakhic* process. *See* Jakobovits, *Jewish Law Faces Modern Problems*, in STUDIES IN TORAH JUDAISM 335-38 (1969). What should be added is that there obviously are subjective elements that come into play in the decision-making process, but never does the decision-maker *consciously* intrude his extraneous ideological or value judgments into his *halakhic* verdicts. Paradoxically, the judge's subjectivity is most acceptable when he is least aware of it. Otherwise, the integrity of the *Halakhah* is at the mercy of influences that derive from axiological structures that may be most inimical to its most cherished fundamentals. *See* Kirschenbaum, *Rabbi Moshe Feinstein's Responsa: A Major Halakhic Event*, 15 JUDAISM 364, 366-67 (1966).

[21] ARYEH L. HA-KOHEN, *Introduction* to KETZOT HA-CHOSHEN.

[22] M. FEINSTEIN, *Introduction* to IGGEROT MOSHEH, *Orach Chayyim* (1959).

cline to a monistic view. As will be seen, it is not at all clear whether or not Jewish law as such can rightly be said to accommodate a natural law theory or whether, indeed, there ever was a major *halakhic* jurist, as opposed to a Jewish philosopher, who ever advocated natural law in the *Halakhah*.

Some definition of the terms "natural law" and "legal positivism" are necessary in order to determine whether they apply to Jewish law. By positivism we mean the view that the law is what the divine Sovereign commands;[23] it is the will of God which He revealed to man. There are no immanent qualities in the nature of man or the world which constitute moral criteria that need to complement or can supplant the Law which was transcendentally legislated. Such extraneous notions as right/wrong, good/evil, just/unjust can be considered only when the law specifically makes room for them. Hence, great emphasis is placed on the judge's use of logical deduction and interpretation in order to reach decisions. This does not necessarily lead, however, to a "slot-machine" conception of the judicial process. On the contrary, because positive laws can never cover the whole gamut of life and its almost unlimited possibilities, and because moral judgments are not considered as absolutes, the judge is comparatively free in his decision-making.

The theory of natural law holds that the universe is governed by laws which exhibit rationality.[24] They issue from a primordial and eternal order and govern even inanimate nature.[25] Hence, certain moral notions are indigenous to man and nature and discoverable by unaided reason. Because such natural law is ontological and intrinsic, it constitutes a form of obligation that preceded the promulgation of positive law[26] (in the case of Jewish law, revelation), and that now complements positive law in those areas where the latter does not legislate. It stands as a criterion for the judge in his interpretation of positive, revealed law, because it is unthinkable that the two should be in conflict. In his deliberations, therefore, the judge must be guided not only by the body of positive law which he seeks to interpret and apply, but by his reason or moral intuition as well. Moreover, because natural law is identified as the core and essence of revealed law, the judge must be exceedingly careful to discover the

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[23] *See* M. GOLDING, PHILOSOPHY OF LAW 25 (1975).

[24] *See* A.P. d'ENTRÈVES, NATURAL LAW 37-50 (1970).

[25] AQUINAS, SUMMA THEOLOGICA.

[26] *See* A.P. d'ENTRÈVES, *supra* note 24.

correct decision which is the one, true answer to the question before him.[27]

Some fifty years before Plato, a notion of natural law had already appeared in Euripides. It received its most active development among the Stoic philosophers. Roman philosophy, in its classical period, accepted the legal authority of this *jus naturale*[28] as one of the major foundations of jurisprudence. Cicero held that natural law is identical with the divine mind, and with the *ratio summa* which was impressed in nature and which is the divine understanding.[29] Natural law, which is thus fixed in the essence of both God and man, is not limited in either time or space—it is universal and eternal and is discoverable by man's use of *recta ratio*[30] or *sana ratio*. The various "natural laws" constitute a common element in a large variety of codes and conventions, referred to by some Roman jurists as *ius gentium*,[31] and this became the basis for the modern conception of international law.[32]

The principle of natural law was accepted by the Church Fathers and the Scholastics as a major feature of their ethical and religious philosophy. The *lex naturalis* is the source of other laws; when derived by human reason, it is called natural law, and when revealed by prophecy, it is termed *lex divina*. Unlike man-made, positive laws, natural law does not require proclamation or *promulgatio*. Natural law is related to natural morality—the idea that the values of good and evil are inherent in the human mind,—and to natural religion—that there exists a natural bond (*religatio*) between God and man, and man can, therefore, by himself discover the nature of true religion.[33]

To resolve the question of natural law in the Jewish legal system, however, one must concentrate more on the development of the theme in Islam than in Christianity. To the extent that the great Jewish jurists and philosophers in the Middle Ages were influenced at all by the environing culture, that influence was much greater and much more direct in the case of Islamic thought and jurisprudence.

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[27] *See generally* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 82, 82-90 (1977); R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 181-210 (1975).

[28] *See generally* A.P. d'ENTRÈVES, *supra* note 24, at 26-35; C. J. FRIEDRICH, THE PHILOSOPHY OF THE LAW IN HISTORICAL PERSPECTIVE 32-34 (1958).

[29] C.J. FRIEDRICH, *supra* note 28, at 29.

[30] *Id.* at 30.

[31] *Id.* at 32.

[32] *See* H.S. MAINE, INTERNATIONAL LAW 20-25 (J. Murray publ. 1890).

[33] A.P. d'ENTRÈVES, *supra* note 24, at 43-46.

José Faur shows that two great opposing schools in Islamic thought correspond to the schools of natural law and positive law in Western philosophy and law.[34] The rationalistic *Mu'tazila* (part of the *Kalam*—the two names are often used interchangeably) held that there is an absolute category of good and evil which is inherent in the nature of things and which is cognizable by any rational being by his own intuition and without the assistance of divine revelations. This moral concept is primordial and eternal in the mind of God and obligates even God Himself.

The Traditionalists (variously: *Ash'ariya*, *ahl al-haq*, *ahl al-faqqah*) maintained that good and evil are subjective ideas, not established in the nature of man, and what is good or evil for one is not necessarily so for another. Because man's obligations flow from the free will of the Deity (rather than from His supernal reason), God may forbid what man considers good, and command him to do that which he regards as evil. Revelation not only informs us what is good and what is evil, but establishes their content. Justice is what God commands, injustice what He forbids. There are no values or principles that obligate God, because He supersedes all and is not subservient to any order of good and evil. By means of reason one can differentiate between good and evil, but they do not obligate man before God. This controversy was not limited to theology, but encompassed law as well. The *Mu'tazilites* placed a much greater emphasis on reason than did the Traditionalists, and the latter were far more insistent upon the inviolability of the *Kuran* and the *Sunnah* (the Moslem oral law, equivalent to the Jewish *Halakhah*).

Most important for our own consideration of freedom and constraint in the Jewish judicial process is how the two Islamic schools related their views on natural law to their conceptions of the role of the judge. What is the authority of the judge in the interpretation of laws, especially those not directly dealt with in revelation? According to the *Mu'tazila*, justice precedes, and is obligatory even before, revelation by prophecy. The judge's systematic reasoning, his interpretive-judicial exercises (*ijtihad*), merely disclose this primordial justice; they do not establish the law *ab initio*. The Traditionalists, however, held that whatever was not explicitly revealed does not obligate man. The judicial *ijtihad* is actual legislation and not merely revelation of what was previously valid but concealed; it is an act of *promulgatio* of law established by the judge. Hence, the form that

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[34] J. Faur, Inyunim Be'Mishneh Torah: Sefer ha-Madda (Studies in the Mishneh Torah: The Book of Knowledge) 66-73 (1978).

the law takes depends on the judge's decision. The obligatory nature of laws defined by *ijtihad* is not uniform for all times and places. The judge has the right to make differentiations and to redefine the law. Even though one judge may forbid and one may permit, both are the will of God.[35]

Can *Halakhah* support a natural law theory? Does Judaism, especially Jewish law, lend itself to a belief in the ontological quality of laws? If the answer is affirmative, we have the philosophical underpinnings for a restrictive and highly limited view of the autonomy of the judge. If negative, we have room, at least theoretically, for a broader conception of the role of the judge and his freedom in the exercise of his judicial functions.

No simple answers to this question are available. They range from a blanket statement by one historian of the Jewish law that the Rabbis believed that religion, ethics, and *Halakhah* flow from natural law and that the *Torah* is in its entirety rational,[36] to a contemporary writer who argues strongly against a natural law conception in the *Halakhah*.[37] A nineteenth century Italian scholar argues that the identification of the *Torah*'s laws for man with natural law is one of the most characteristic teachings of the *Kabbalah*, and that the laws of the *Torah* have cosmic and ontological significance.[38] A contemporary scholar, in contrast, sees in the attitude to natural law a major difference between Judaism and Christianity, declaring unqualifiedly that "[i]n Judaism there is no natural law doctrine and, in principle, there cannot be,"[39] and, "there is nothing in the Hebrew Bible

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[35] *Id.* at 79-80.

[36] *See* I.C. TCHERNOWITZ, TOLDOT HA-HALAKHAH (HISTORY OF THE HALAKHAH) 151-63 *passim* (1934). Less sweeping is the contention of the late Samuel Atlas that natural law constitutes an inner and suppressed layer of much of talmudic law. *See* S. ATLAS, NETIVIM BE'MISHPAT HA-IVRI (PATHWAYS IN HEBREW LAW) 17-20 (1978).

[37] *See* Goldman, (pts. 1-2), *supra* note 20; 20 DEIOT 47, 49 (1962); (pt. 3) 21 DEIOT 59 (1962); (pt. 4) 22 DEIOT 65 (1962).

[38] *See* E. BENAMOZEGH, ISRAEL ET L'HUMANITÉ 179 (Heb. trans. 1967). Benamozegh supports his arguments by referring, *inter alia*, to statements in the Talmud and in the *kabbalistic* literature referring to God observing the commandments—both the social-ethical and the ritual or cultic. This recalls the idea of the *Mu'tatzilites*, that natural law implies that God too is obligated by these laws. However, these sayings of the Sages may be nothing more than *aggadic* or didactic statements illustrating the importance of being law-abiding by averring that even the Lawgiver abides by His norms; they need not be invested with philosophic significance leading to a conclusion that the Sages considered the law intrinsic and ontological. Benamozegh, in this section, tends to rely more on *kabbalistic* approaches to the *Halakhah* than on what the *halakhists* thought about the *Halakhah*. However, he is on more solid ground in citing both *kabbalistic* and talmudic texts referring to the preexistence of the *Torah* which, by suggesting the independence of the law from the act of revelation, imply their ontological quality, and hence natural law.

[39] Fox, *Maimonides and Aquinas on Natural Law*, 3 DINÉ ISRAEL v, v (1972).

which even approaches the Ciceronian idea of natural law."[40] While this article is not the place for a full exposition of the natural law question in Jewish law, it may be worth pursuing the matter briefly by testing a limited number of talmudic sources and medieval authorities.

First, a brief historical note: An identifiable and explicit concept of natural law came into Jewish thought from Muhammedan philosophy of law via the Karaites, a fundamentalist heretical Jewish sect which was quite powerful in the medieval period and now has all but vanished. Karaism followed the *Mu'tazila* in advocating natural law, in holding that good and evil are inherent in nature; in attacking the authority of the oral tradition; and in upholding the Islamic notion of *Qiyas*[41]—the use of reason and analogic argumentation in formulating the law.[42]

The major talmudic passage which may serve as a source for a theory of natural law expounds upon a verse in *Leviticus* (18:4):

> Our Rabbis taught: "Mine ordinances shall ye do," *i.e.*, such commandments which, if they were not written [in Scripture], they should by right have been written, and they are: [the laws concerning] idolatry, immorality, bloodshed, robbery, and blasphemy. "And My statutes shall ye keep," *i.e.*, such commandments to which Satan objects, [such as] . . . the prohibition against wearing a mixture of wool and linen, the ceremony performed by a childless widow in the event her brother-in-law refuses to marry her, the purification of lepers, and the scape-goat. Perhaps you might think that these are vain things [because these latter laws cannot be explained rationally]? Therefore Scripture says, "I am the Lord," *i.e.*, I the Lord have made it a statute and you have no right to question it.[43]

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[40] *Id.* at vii. Fox's argument against natural law in the Bible on the grounds that there is no word for "nature" in biblical Hebrew is poor etymological support for his thesis. Ideas may be implicit in a text or body of literature, and receive their formulation in sophisticated terminology much later; the absence of specific terms cannot prove the openness to, or exclusion of, a theory explicated much later without risking an etymological anachronism. Moreover, his assertion that in ancient Hebrew thought there is only one source for the knowledge of good and evil, namely revelation, leaves unanswered the question of why punishment was meted out, according to the Bible, for moral infractions of laws for which no revelation is recorded. Thus, if there is not some form of natural law, how does one explain the punishment of Cain for slaying Abel, or the deluge in the days of Noah? Some universally valid moral code seems presupposed by these narratives.

[41] *Qiyas* is derived from the talmudic exegetical term *hekkesh* (or *heqqesh*). *See* J. SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 99 (1950).

[42] *See* J. FAUR, *supra* note 34, at 64-65, 99-107, 115.

[43] *Yoma* 67b.

On the face of it, the Talmud is distinguishing between rational laws and those which defy rational explanation (and hence "to which Satan objects" because they require an act of faith), with the former constituting the core of what might be called "natural law." Yet Faur insists that natural law has no *halakhic* basis in all talmudic literature, that according to the Rabbis all obligation flows from divine command in the *Torah*, and that the concept of natural law is in direct contradiction to the basis of Judaism.[44] Similarly Fox concludes that "there is no suggestion here that human reason could have known by itself that these acts are evil" and that the words "should by right have been written" (the Soncino translation of *din hu she'yikatvu*) asserts only that, "having been commanded to avoid these prohibited acts, we can now see, after the fact, that these prohibitions are useful and desirable."[45] There is sufficient ambiguity in the passage to warrant caution against reading a natural law doctrine into the Talmud. However, the same ambiguity, on the other side, should caution against the categorical denial of natural law in Jewish law. On balance, the passage does tend more to favor an autonomous moral-rational criterion independent of revelation, *i.e.*, one that could have been operative had the Law not been revealed, but which is now subsumed under the Law as a totality. In the absence of proof to the contrary, we must at least reserve the possibility that some talmudic Rabbis were aware of a notion of natural law.

The tenth century Saadia Gaon (along with Joseph Albo of the fifteenth century), is most prominent in his espousal of natural law in Judaism. Guttmann pointed out some one hundred years ago that Saadia's famous distinction between rational laws (*sikhliot*) and religious or revelational laws (*shim'iyot*), which is the methodological foundation of his entire religious philosophy, represents a compromise between the *Mu'tazila* and the *Ash'ariya*.[46] While the revelational commandments are a species of Aristotle's "legal religion" or positive law, the laws that can be independently formulated by reason (*'aql*) are based on the *Kalam* and are in direct descent from the Stoics' identification of reason (*logos*) with nature. The classical instance of a rational law for Saadia is that proposed by the *Mu'tazila* writers: gratitude.[47] While Saadia may have consciously taken over

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[44] *See* J. FAUR, *supra* note 34, at 63, 174, 175. Faur qualifies his position somewhat at 65 n.51.

[45] Fox, *supra* note 39, at viii.

[46] *See* J. GUTTMANN, DIE RELIGIONSPHILOSOPHIE DES SAADIA 133 (1882).

[47] *See* Altmann, *Chalukat ha-Mitzvot Le' Rasag (The Division of the Commandments by R. Saadia Gaon)*, in RAV SAADIA GAON 658, 661 (1943).

the theory of natural law from the Karaites in order the better to do battle against Karaism,[48] he "followed a tradition which was not entirely alien to the Jewish heritage,"[49] and indeed the talmudic passage cited above was unquestionably a major source of influence on Saadia.[50] Saadia, drawing upon both Jewish and Islamic sources, bequeathed his formulation of natural law—without, however, calling it by that name—to Joseph Albo and, through him, influenced Hugo Grotius and thus, the entire school of natural law.[51]

Marvin Fox, who adamantly rules out any possibility of natural law in Jewish thought, applies to the exegesis of Saadia, the same form of criticism that he did to the Bible and Talmud: since Saadia does not use the term "natural law," as did Albo some five or six hundred years later, one may not attribute a natural law theory to him.[52] This argument is weak indeed; concepts, like people, have an existence independent of their names.[53]

Fox further argues that Saadia means by "rational commandments" those laws for which, *after* their legislation by revelation, good reasons can be found; this is the interpretation he gives to the Talmud's "by right they should have been written."[54] He asserts that this is not, however, "equivalent to saying that reason knows them independently, or that reason alone can determine what is proper behavior for man."[55] But this interpretation is clearly contradicted throughout Saadia's writings on the subject. Thus, when Saadia lays down his first rational principle, from which a number of laws flow, that of gratitude, he writes that "reason demands that whoever does something good be compensated either by means of a favor shown to him, if he is in need of it, or by means of thanks if he does not require any reward."[56] In the next sentence, Saadia tells

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[48] *See* J. FAUR, *supra* note 34, at 65.

[49] *See* Altmann, *Saadya's Conception of the Law*, 28 BULL. JOHN RYLANDS LIB. 320, 337 (1944).

[50] *See* D. NEUMARK, *Saadya's Philosophy*, in ESSAYS IN JEWISH PHILOSOPHY 145 (1929). *See generally* Neumark, *Musar ha-Yahadut (The Ethics of Judaism)*, 6 HA-SHILOACH 65, 70-72 (1899).

[51] *See* Altmann, *supra* note 49, at 334.

[52] Fox, *supra* note 39, at x. Albo's writings on the subject may be found in SEFER HA-IKKARIM (THE BOOK OF PRINCIPLES) ch. 7 (I. Husik trans. 1929).

[53] *See* note 40 *supra*.

[54] *See* Fox, *supra* note 39, at x.

[55] *Id.*

[56] SAADIA GAON, THE BOOK OF BELIEFS AND OPINIONS 139 (S. Rosenblatt trans. 1948). Rosenblatt translates the first word in the cited passage as "logic," and later uses "reason." While this variation may make for more literary grace, it is more accurate to follow Saadia's words with greater fealty. The word Saadia uses throughout is the Arabic *'aql*, reason.

us that since reason demands this it would not have been seemly for the Creator to neglect it in His own case, and then:

> It was, on the contrary, *necessary for Him* to command His creatures to serve Him and thank Him for having created them. Reason also demands that he who is wise not permit himself to be treated with contempt or be insulted. It was, therefore, likewise *necessary for the Creator* to forbid His servants to conduct themselves in such a way toward Him.[57]

Clearly, the "necessity" for the Creator to legislate what "reason demands"[58] goes far beyond an after-the-fact search for good reasons for the laws. Moreover, in Chapter III of his *magnum opus*, Saadia proceeds to explain why, if reason can independently attain the rational laws, it was necessary for revelation to ordain them. He answers that reason could derive only the general principles, but revelation was necessary to provide the practical details.[59] The question is irrelevant, and the answer superfluous, if Saadia did not intend the ability of autonomous reason to formulate the moral laws. It requires but a change in terminology to say that natural law provides us with the general principles of law, and positive law with the details.

Of even greater moment to the determination of the role, if any, of natural law in the history of the Jewish philosophy of law, but less certain than the case of Saadia, is the view of the greatest of all Jewish philosophers and jurists, the twelfth century Maimonides.[60]

Did Maimonides espouse the theory of natural law?[61] Faur, in his recent book on the first volume of the Maimonidic *Code*, maintains that Maimonides denies that there are any natural obligations and disagrees with those of the *Geonim*, particularly Saadia, who held that good and evil (*i.e.*, the "rational commandments") are engraved in the nature of man. The laws of the *Torah* are positive, in that they are the command of the Deity. The *Torah* is "created," not primor-

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[57] *Id.* (emphasis added).

[58] The Arabic for "reason *demands*" and "*necessary*" is the same root, *wajab*.

[59] SAADIA GAON, *supra* note 56, at 145.

[60] Maimonides is widely known as the greatest of medieval Jewish rationalists. The extent to which this is true, and to which this judgment must be qualified, is beyond the scope of this paper. He certainly accorded reason a very high role, especially in his MOREH NEVUKHIM (GUIDE FOR THE PERPLEXED), yet he was contemptuous of the *Kalam*. We shall confine our remarks here to his conception of reason insofar as it affects his philosophy of law.

[61] On the philosophic question of whether morality is considered by Maimonides "conventional," in the same category with aesthetic judgments, or as part of the rational order, *see* N. LAMM, *supra* note 19, at 268 n.35.

dial.[62] Maimonides sees a need for laws in order to regulate society. Such laws, however, do not exist in nature, and one of the purposes of *Torah* is to compensate for this lack. Hence, one may regard as "natural" any law the purpose of which is the ordering of society. The adjective "natural" thus describes the *telos* of the law, not its source. But Maimonides does not recognize natural law in its classical or Aristotelian interpretation.[63]

While Faur and Fox[64] make a strong case against a theory of natural moral law in Maimonides, the sixteenth century R. Judah Loewe, known as the *Maharal* of Prague, held that Maimonides did indeed base his philosophy of law on the principle of natural law. He devoted a good part of one of his major works, *Tiferet Yisrael*, to a polemic against Maimonides for this. He faults Maimonides for advocating a pre-existent criterion of right and wrong that issues from the nature of man and that is discoverable by reason. Maimonidean rationalism leads to a preference for the *via contemplativa* over the *via activa*, and hence is injurious to the *Halakhah*, which is theonomous.[65]

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[62] *See* J. FAUR, *supra* note 34, at 147-48. Faur cites a passage from Maimonides' MOREH NEVUKHIM 3:17, to prove his point. Maimonides, adumbrating five theories of providence, attributes to the Sages of the Talmud the concept of divine providence as distributive justice. God's reward and punishment are determined by man's conduct. Here Maimonides adds, in what seems a casual comment, that the Rabbis held that "an obedient individual receives compensation for all the pious and righteous actions he has accomplished, even if he was not ordered by a prophet to do them, and that he is punished for all evil acts committed by him, even if he was not forbidden by a prophet to do them." M. MAIMONIDES, GUIDE FOR THE PERPLEXED 470 (S. Pines trans. 1963). In the paragraph following, Maimonides presents his own theory of providence which is at variance with that of the Sages. An argument can be made for the thesis that Maimonides disagrees with the view in the above quotation, *see* J. FAUR, *supra* note 34, at 147 n.20, although this is not at all certain. Yet it is clear that Maimonides attributed to the talmudic sages a view of obligation—deserving of reward and punishment, albeit in a different measure for the reward and punishment for revealed law—that is independent of revelation. Surely this is sufficient to challenge the sweeping statements of Faur himself, *id.* at 174-75, and others that the Talmud knew of no theory resembling natural law.

[63] J. FAUR, *supra* note 34, at 164.

[64] *See* Fox, *supra* note 39, at xii-xix.

[65] *Maharal* substitutes for what he takes as Maimonides' natural law a supernatural essence of man to which the *Halakhah* corresponds by virtue of a metaphysical order of its own as a divinely revealed *logos*. Hence, the observance of the *Halakhah* is an accommodation to the absolute order of existence. *See* Shatz [Uffenheimer], *Ha-Tefisah ha-Mishpatit shel ha-Maharal: Antitezah Le'chok ha-Tiv'i (The Judicial Conception of Maharal: Antithesis to Natural Law)*, 9 DINÉ ISRAEL (to be published in 1979). *Maharal's* own thesis cannot, however, serve as an example of that kind of philosophy of the *Halakhah* which would lead to a pluralistic view of judicial decision-making and hence greater freedom for the judge, for instead of a natural law conception we have what might be called a "supernatural law" theory which, like natural law, presupposes an immutable body of preexistent law to which the judge must conform in deciding on open questions in his interpretation of positive or revealed law.

The determination of whether or not Maimonides advocated natural law turns on two issues: how Maimonides related to the Saadianic bifurcation of the law into rational and revelational commandments, and how he formulated the *halakhic* doctrine of the "Noahide Laws."

In Chapter VI of his *Eight Chapters*,[66] Maimonides essays a reconciliation between two opposing ethical theories—whether a saint, *i.e.*, a naturally moral and benevolent man, is the highest type of personality, or whether one who struggles against his base instincts and overcomes them is superior—and utilizes the distinction between rational and revelational commandments: The "saint" is preferable in the case of the rational laws; the man who exercises self-control, in the case of the revelational laws. In describing the rational commandments, such as the prohibition of bloodshed, theft, robbery, fraud, etc., he says,

> The prescriptions against these are called "commandments" (*mitzvot*), about which the Rabbis said, "If they had not already been written in the Law, it would be proper to add them." Some of our later Sages, who were infected with the unsound principles of the *Mutakallimun* [*i.e.*, the *Mu'tazilates*] called these *rational laws*.[67]

Here Maimonides accepts the distinction made by Saadia (whose name he respectfully does not mention) between the two categories of law, and acknowledges that it had precedents in the Talmud. Yet he is harsh in referring to the philosophy of the *Kalam* as a sickness or disease.

It is obvious that Maimonides accepts the methodological dichotomy between *sikhliot* (rational laws) and *shim'iyot* (revelational laws) and that he yet disagrees with the *Mu'tazila*. Faur goes too far in asserting that Maimonides rejected any notion that the rational commandments have some relation to the nature of things and that his doctrine of "reasons for the commandments" is based upon his opposition to the rational/revelational dichotomy.[68] It is equally evi-

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[66] M. MAIMONIDES, THE EIGHT CHAPTERS 75-78 (J. Gorfinkle trans. 1912).

[67] *Id.* at 76-77. The quoted talmudic portion appears in *Yoma* 67b. *See* text accompanying notes 43-45 *supra*.

[68] J. FAUR, *supra* note 34, at 169-74. However, he does make a trenchant point in distinguishing between the source and the practical utility of the commandments: "[R]ational" for Maimonides describes a commandment the practice of which results in socially, morally, or politically beneficial results. This point was made by Dr. Samuel Belkin, who distinguished between "reason" (or motivation, source) and "purpose" (practical beneficial effect). *See* S. BELKIN, THE PHILOSOPHY OF PURPOSE (1958).

dent that Maimonides does not accept this analysis in the way that Saadia intended it.[69] The term "rational" (*'aql*) is reserved by Maimonides for the cognitive commandments, not the moral laws.[70] Fox is probably correct in saying that Maimonides regards certain moral laws as "rational" not in the sense of being demonstrable, but in the sense that man can give good reasons for them.[71] Hence, this one passage in Maimonides would seem to indicate a non-acceptance of a theory of natural law; but one passage is not enough to establish the matter definitively.

The question of the Noahide laws is more complex. The Talmud teaches that there are seven commandments that are obligatory on "the sons of Noah," *i.e.*, all mankind.[72] These include the prohibitions against idolatry, bloodshed, immorality, blasphemy, robbery, the eating of a limb torn from a living animal, and the positive commandment to establish courts of justice. This apparently constitutes a prima facie case for a doctrine of natural law in classical Jewish sources: the laws are universal, they allow for no exceptions and, unlike other laws, do not consider ignorance of the law as an excuse—they require no explicit warning in order for the violator to be punished. Are these, indeed, the core of natural law, rationally discoverable, or are they, too, positive divine commandments given to all humanity and not only, as are the other commandments, to the Children of Israel?

The interpretation of Maimonides' view revolves about this crucial text towards the end of his monumental Code of Jewish Law, the *Mishneh Torah*:

> Anyone [*i.e.*, any non-Jew] who accepts the seven commandments and is meticulous in observing them is considered one of the righteous (*chasidei*—pious, saintly) of the nations of the world and he has a share in the world-to-come. But this is so only if he accepts and observes them because the Holy One commanded them in the Torah, and informed us through our teacher Moses that the children of Noah were commanded [to observe] them from before [*i.e.*, before the Torah was given]. But if he observed them because of his own rational decisions, he is not a resident-alien and is not one of the righteous (*chasidei*) of the nations of the world, and not one of their wise men (*chakhamehem*).[73]

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[69] *See* Fox, *supra* note 39, at xvi-xvii.

[70] *See* Editor's Notes, in 18 RAMBAM L'AM 193 (M. Rabinowitz ed. 1960); N. LAMM, *supra* note 19, at 268 n.31.

[71] Fox, *supra* note 39, at xxvi.

[72] *Sanhedrin* 56a.

[73] M. MAIMONIDES, MISHNEH TORAH (CODE OF LAW), *Hilkhot Melakhim* 8:11.

Maimonides presents us with two categories of universal law: the Noahide law accepted as revealed and hence of divine origin, and the Noahide law accepted on the basis of rational-moral values. Unquestionably the former is preferable.

That Maimonides recommends acceptance of the Noahide legislation because of its divine origin does not argue against his conception of the Noahide commandments as a type of natural law. The Noahide laws may well represent universal moral principles, but they become more significant—and entitle one to the encomium of a gentile *chasid* or saint—if what already exists "in nature" is consciously accepted and deliberately adopted for one's self as a code of personal and societal conduct.

What is most significant is the last category—those who accept Noahism not because of revelation but because of rational considerations or moral intuition. If Maimonides regards such a person as neither a saint (*chasid*) nor a wise man (*chakham*), then he obviously holds no brief for natural law.

But this issue is compounded by a textual problem. The standard printed editions read as above—"not one of the righteous of the nations of the world, *and not* one of their wise men." The emphasized words are represented in the Hebrew by the three-letter word *ve'lo*. However, the manuscript of the *Mishneh Torah* in the Bodleian Library changes the first of the three letters and reads *ela*, "but"; hence, "not one of the righteous of the nations of the world, *but* one of their wise men." If this variant reading is correct, Maimonides is distinguishing between *chasid* and *chakham*, saint and sage: one who follows the Noahide code because of moral considerations is a *chakham*, sage; if because of revelation, or religious reasons, he attains the status of *chasid*, saint. It is reasonable to assume, if this reading is correct, that this indicates a natural law theory by Maimonides. The single letter in Maimonides' *Code* is thus of the greatest moment in deciding the question of whether Jewry's greatest jurist and most eminent philosopher advocated or rejected natural law.[74]

In the absence of an autograph manuscript, and because of the large number of manuscripts containing one variant or the other, the

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[74] For an elaborate discussion of the textual problem and citation of the various sources, as well as a history of the exegesis of this passage, *see* Schwarzschild, *Do Noachites Have to Believe in Revelation?* (pt. 1), 52 JEWISH Q. REV. 297 (1962); (pt. 2), 53 JEWISH Q. REV. 30 (1962). *See also* J. FAUR, *supra* note 34, at 151 n.43. Schwarzschild, among others, accepts the Bodleian reading *"ela,"* while Faur and others prefer *"ve'lo."* A remarkable, but questionable, interpretation of our text is offered in A. KOOK, IGGEROT REIYAH 99 (1943).

matter must be decided on other than textual grounds—preferably, on a contextual basis. The following points are offered to support the reading of *ela*, "but."

1. The term *chasidei umot ha-olam*, righteous gentiles, is widely used in talmudic literature. The term *chakhmei umot ha-olam* is all but unknown. Had Maimonides meant to discount completely those who embraced Noahism purely out of moral or rational considerations, he would have said simply that such people are not qualified as *chasidei umot ha-olam*, and would have dispensed with the phrase *ve'lo mi-chakhamehem*, "and not of their wise men." It adds nothing but confusion, and Maimonides was too gifted a stylist to permit that. Moreover, he would have taken the effort of defining positively what constitutes a wise gentile, before denying that honorific to those whose moral conduct is independent of revelation. If, however, the correct reading is *ela*, then Maimonides is making a distinction that his readers were probably unaware of before, and the concluding phrase is indeed meaningful.

2. The juxtaposition of the two terms, *chasid* and *chakham*, appears fully developed in Maimonides' *Code*, in his *Hilkhot Deiot*, or *Laws of Character*. This typology must be considered in the light of Maimonides' use of the relevant terms in his *Guide* and in his *Eight Chapters*.[75] In general, the *chasid* and the *chakham* are, for Maimonides, different but not antipodal types: The *chasid* must first have been a *chakham* and then surpassed him; saintliness includes and transcends wisdom. The *chakham* is one whose intellectual deliberations lead him to a functional morality, while the *chasid* embodies the element of holiness which leads him beyond moderation to a higher degree of virtue. Thus, for instance, in his *Commentary to the Mishnah*, Maimonides writes that the *chasid* is a *chakham* who acts morally in a supererogatory manner.[76] Maimonides is consistent in his treatment of this theme.[77] This typology articulates well with our passage if we accept the *ela* reading: the gentile whose morality is autonomous, and does not include the element of holiness, is a wise man; the one whose acceptance of the Noahide laws is predicated upon divine revelation is a *chasid*.[78]

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[75] For an analysis of Maimonides' typology of character, *see* Lamm, *He-chakham Ve'ha-chassid Be'mishnat ha-Rambam (The Sage and the Saint in the Thought of Maimonides)*, in SEFER HA-ZIKARON (DR. SAMUEL BELKIN MEMORIAL VOLUME) (to be published in 1979).

[76] M. MAIMONIDES, PERUSH MISHNAYOT (COMMENTARY TO THE MISHNAH), *Avot* 5:7.

[77] *See* Lamm, *supra* note 75.

[78] An additional point may be made which, while less cogent, is still supportive of the *ela* reading. The immediately preceding *halakhah*, 8:10, informs us that the *Torah* and commandments were given only to Israel and the proselytes, and that no gentile may be forced to accept

We may conclude this discussion of Maimonides by saying that we have no indisputable proof one way or the other, but that the weight of the evidence would imply that Maimonides sees in the Noahide code the core of a natural law. Yet, even if this be so, it is clear that natural law by no means played as important a role in the thought of Maimonides as it did in the Muhammedan *Kalam* or in Christian Scholasticism.

Other Jewish thinkers dealt with the problem, some directly and some by implication. Natural law theory was favored by many of the *Geonim* and found its most articulate spokesman in the beginning of the Middle Ages, in Moslem Spain, in the person of Bachya *ibn* Pakudah.[79] Others who may be mentioned in this respect are Shem b. Shem Tov and possibly David Kimchi;[80] and, toward the end of the medieval period, the previously mentioned Joseph Albo. Yehudah Halevi was opposed to natural law and most insistent upon revelation as the exclusive source of Jewish law.[81] *Kabbalists* would normally tend toward a conception of natural law, if only because of the correspondence they posited between creation and revelation, and the conception of *Torah* as the mystical Name of God. Lurianic *Kabbalah* saw in the observance of the commandments an act of *tikkun* or repair of flaws in the cosmos. R. Chayyim of Volozhin (1749-1821) was aware of the tension between this mystical conception of *Torah* and the *Halakhah*;[82] he clearly opted for *Halakhah* over mystical *tikkun*.[83] Translated into exoteric terms, he is eager to preserve the *Halakhah* and the positive *halakhic* process from interference by a corpus of norms independent of revelation.

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or observe them. God commanded through Moses, however, that the Noahide be forced to observe the seven Noahide commandments; one who accepts them is called a *ger toshav*, a resident-alien. The next *halakhah* begins at this point—after having codified the requirement for coercion. *Halakhah* 11 is therefore concerned with those gentiles whose acceptance of the Noahide laws is voluntary. If the acceptance is formal (before a court of three scholars), one is considered a *ger toshav;* if not formalized, but predicated on religious belief in the Mosaic revelation, a gentile is considered as one of the *chasidei umot ha-olam*. It stands to reason that Maimonides now lists another category, beneath that of *ger toshav* and *chasidei umot ha-olam*, and yet higher than one whose moral observance is forced upon him, and this is the *chakham*, the wise but unsaintly gentile who observes the Noahide code neither out of coercion nor out of religious conviction, but because of rational-moral persuasion.

[79] *See* J. FAUR, *supra* note 34, at 115-26.

[80] *See id.* at 65 n.50.

[81] Y. HALEVI, KUZARI 1:89; *see* J. FAUR, *supra* note 34, at 127.

[82] An example of this tension is provided by those actions performed by the Patriarchs, presumably to effect *tikkun*, which were illegal in terms of the Revelation at Sinai, *e.g.*, Jacob marrying two sisters. CHAYYIM OF VOLOZHIN, NEFESH HA-CHAYYIM 1:21.

[83] *Id.* at 1:22. *See* N. LAMM, TORAH LISHMAN BEMISHNAT RABBI CHAYYIM MI'VOLOZHIN U-VE'MACHSHEVET HA-DOR (THE STUDY OF TORAH FOR ITS OWN SAKE IN THE WORKS OF R. CHAYYIM OF VOLOZHIN AND HIS CONTEMPORARIES) 65 (1972).

To sum up this section, we have seen that some *halakhists* favor a monistic conception of the law, making for a more restrictive view of judicial function, while others tend towards a pluralistic conception. Assuming that the relationship we found in Muhammedan jurisprudence—namely, a natural law theory limits the judge's freedom whereas a positivist view expands it—applies to Jewish law, we have found a considerable lack of consensus. The key talmudic passage does lend itself to a natural law interpretation. Saadia, along with other *Geonim*, and followed by Bachya, Albo, and others, espoused natural law. Yehuda Halevi opposed it, and certain *kabbalistically* inclined *halakhists* attempted to isolate the *Halakhah* from a natural-law of type structure. Maimonides presents a special problem. In some passages he seems to deny natural law, in others to be receptive to it; but even then, natural law does not at all assume for him the significance it does in other traditions.

II. A Halakhic Survey

The underlying philosophical principles of Judaism regarding freedom and constraint as well as their inner dialectic are reflected in the formal *halakhic* rules governing the Jewish judicial process. Here, too, we meet the paradox of a system of thought in which the appearance of underpinnings of divine fiat, theocratic authority, and the sovereignty of tradition—with all their creedal significance—nevertheless allows, fosters, and even encourages wide parameters of freedom. No monolithic, one-party-line mentality here. Rather, controversy and disagreement, flexibility and discretion are regularly prevalent in a legal system based on Holy Scripture and its authoritative interpretation in the Oral Tradition as recorded in talmudic literature and its medieval development in commentaries, codes, and responsa. These characteristics of dispute and development, modification and adaptation which inhere in Jewish law have already been described as far as the legislative process is concerned.[84] We propose to describe these very characteristics as they

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[84] *See* 2 M. Elon, Ha-Mishpat ha-Ivri 239-828 (1973). The *grundnorm* of Jewish law has been defined as the Five Books of Moses with their authorized-received interpretation as formulated in the Oral Tradition. *See* note 87 *infra* and accompanying text. What are the inner dynamics of a legal system which is accepted as of divine origin? How are the laws subsequently developed, modified, abrogated, or adapted to new situations? Elon describes the five methods whereby *Torah* law *(de'oraita)* is derived, formulated, modified, amended, or even annulled: interpretation *(midrash)*, legislation *(takkanah u-gezerah)*, custom and usage *(minhag)*, case and precedent *(ma'aseh)*, and legal logic *(sevara)*. A 19th century scholar, Rabbi Zvi Hirsch Chajes, was perhaps the first to undertake a systematic analysis of the topic. *See* Z. Chajes, The Student's Guide Through the Talmud (2d ed. J. Schacter trans. 1960).

inform the judicial process. Because an exhaustive, fully documented treatment would carry us far beyond the confines of an article, we have limited ourselves to a broad outline of the subject, merely alluding to its major highlights—with the hope that experts and future students will take up our suggestions and subject them to full scientific scrutiny.

Three major constraints limit the freedom of a judge: the body of substantive law, the rules of civil and criminal procedure, and the rulings and decisions of his predecessors ("precedent") and superiors. It is in the light of these constraining factors that we approach our survey of the Jewish judicial process.

The Body of Substantive Law

In *The Nature of the Judicial Process*, Cardozo produced a classical formulation of his subjective awareness of those factors that are at work in the rendering of a judicial decision and in the creation of judge-made law.[85] Early in his work, Justice Cardozo points to the formulated statute, if clear and if appropriate, as the obvious source of the law and the obvious determinant of the decision.[86] This is, of course, equally true of Jewish law, as it is for almost all systems of law known to man once society reached the level of statutory legislation. We may say the same thing for all these systems in negative terms as well, namely, that the body of normative law serves as the greatest constraint on the judge; deviation therefrom renders the judicial decision null and void. Systems might vary as to how this deviation is determined and how the nullity is declared; the principle nevertheless remains constant.

Maimonides describes the sum total of Jewish law as being comprised of the Written Law of Moses and the Oral Tradition.[87] Al-

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[85] B. CARDOZO, *supra* note 1.

[86] *Id.* at 14.

[87] M. MAIMONIDES, HAKDAMAH LE'PERUSH HA-MISHNAYOT (INTRODUCTION TO COMMENTARY ON THE MISHNAH). Maimonides describes the oral tradition as being comprised of the following five elements: (a) interpretations of the Written Law that have been received from Moses himself and that have been unanimously accepted as authentic from time immemorial; (b) oral traditions of similar antiquity and authenticity but having no relationship to the Written Law literally, through allusion or hermeneutically; (c) rabbinic interpretations of the Written Law which have been derived through the accepted hermeneutical rules but which have been the subject of disagreement among the rabbinic interpreters and, therefore, lack the unanimity which is the hallmark of Mosaic origin; (d) precautionary measures taken by the Rabbis to guard against infringement upon or erosion of Mosaic provisions; (e) institutions, conventions, usages and customs ordained or ratified by the Rabbis, the legal authorities of each generation. These five elements are divided into two categories: those that have Biblical status similar to the Written Law *(de'oraita)*, and those having Rabbinic status *(de'rabbanan)*. Oral interpretations of the Written Law and oral traditions (items (a) and (b)) clearly attain Biblical status; precaution-

though the highest courts—in their judicial-legislative role[88]—are empowered to make certain limited changes in the body of substantive law,[89] the regular courts are bound by the entire body of Written and Oral Law. For them, the governing rule regarding deviation from the law reads, "If the judge errs in a law cited in the *Mishnah*, the decision is reversed; if he erred in the weighing of [conflicting] opinions, the decision may not be reversed."[90] Indeed, a judge could be held personally liable for monetary damage he caused by a faulty decision.[91]

Whether and to what extent "a law cited in the *Mishnah*" should be given an ever-widening construction has been a matter of controversy throughout the generations. Maimonides defines the class as those laws that are widely known, "such as laws that are explicit in the *Mishnah* or *Gemara*."[92] Some early medieval opinions included *geonic* decisions;[93] others excluded them.[94] Later medieval Sephar-

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ary measures and institutions, etc., (items (d) and (e)) are clearly of Rabbinical status. Disputed hermeneutical derivations (item (c)) are, in Maimonides' view, Rabbinic unless the Talmud explicitly labels them Biblical. *See* M. MAIMONIDES, HAKDAMAH LE'SEFER HA-MITZVOT (INTRODUCTION TO THE BOOK OF COMMANDMENTS). Nachmanides, however, considers them Biblical unless the Talmud declares them to be Rabbinic, either explicitly or by identifying the biblical source as merely an external support *(asmakhta)*. *See* M. NACHMANIDES, HASAGOT HA-RAMBAN LE'SEFER HA-MITZVOT (CRITIQUE ON THE BOOK OF COMMANDMENTS), Rule 2. *See generally* Elon, *Introduction* to THE PRINCIPLES OF JEWISH LAW 10 (M. Elon ed. 1975) [hereinafter cited as PRINCIPLES]; J. FAUR, *supra* note 34, at 19-32.

[88] Jewish legal tradition knows no strict separation of powers. The biblical king was both chief executive and chief justice possessing also legislative prerogatives. With Moses—who was simultaneously the chief legislative officer and chief judicial officer of the Israelites—as its model (*see Sanhedrin* 16b, *Rashi s.v. de'oki*), the Great *Sanhedrin* functions both as the highest house of *halakhic* legislation and as the supreme judicial body. *See* MISHNEH TORAH, *Hilkhot Mamrim* 1:1. The Hebrew term *Bet Din* (Court) is used indiscriminately throughout the legal literature to describe this judicial-legislative body.

[89] As a general rule, the high court can neither augment nor diminish laws that attain Biblical status *(de'oraita; see* note 87 *supra)*, but is freer to add to or subtract from law of Rabbinic stature *(de'rabbanan; see* note 87 *supra)*. *See generally* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Mamrim* 2.

[90] *Sanhedrin* 33a. The developed *halakhic* doctrine contains a number of additional factors: the source of the judge's authority *(e.g.*, the agreement of the parties or the license of the state); the manner of execution (*e.g.*, by judicial fiat or by physical intervention). *See generally* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Sanhedrin* 6. Although the resultant combinations and permutations have important practical consequences, they are tangential to our thesis.

[91] *Sanhedrin* 33a. *See generally* 4 A. GULAK, YESODEI HA-MISHPAT HA-IVRI (1967); Mechlowitz, *Finality of Judgments in Jewish Law*, 1 DINÉ ISRAEL 7 (1969). *Contra*, Stump v. Sparkman, 435 U.S. 349 (1978) where the United States Supreme Court, in a case involving a state judge who approved the sterilization of a fifteen-year-old girl and had been sued for damages, declared: "A judge will not be deprived of immunity because the action he took was in error, was done maliciously or was in excess of his authority." *Id.* at 356.

[92] M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Sanhedrin* 6:1.

[93] *Rabad, cited in* TUR, *Choshen Mishpat* 25.

[94] *See* J. FAUR, *supra* note 34, at 45-46 & nn.85-92.

dic scholars tended to consider Maimonides' *Code* itself as so authoritative that they viewed a decision that contravened a Maimonidean restatement of law as tantamount to an error in "a law cited in the *Mishnah*."[95] Late medieval authorities declared that contravening a law of the *Shulchan Arukh* which had been accepted without dispute by its classical successors is to be regarded as an error in "a law cited in the *Mishnah*"; and for Ashkenazic Jewry, whenever R. Moses Isserles cites with approval an opinion that disagrees with the *Shulchan Arukh*, that opinion achieves the status of "a law cited in the *Mishnah*."[96] Yet R. Moses Isserles himself—with all due respect to earlier accepted authorities—asserts in no uncertain terms that the authorities of each generation have the right consciously to overturn any provision found in the Codes if they are convinced otherwise—as long as they do not abrogate a law of the Talmud.[97]

Error "in the weighing of [conflicting] opinions," the second clause in the governing rule of the Talmud, is defined by the Talmud itself narrowly:

> If, for example, two *Tannaim* or *Amoraim* opposed each other's views in a certain matter, and it was not clear with whom the true decision lay, but the general trend of practice followed the opinion of one of them, and yet he decided according to the opinion of the other, that is termed "an error of judgment in the weighing of [conflicting] opinions."[98]

The overwhelming body of legal literature has retained this narrow interpretation. This is significant, for the definitive law did hold errors in the weighing of conflicting opinions sometimes reversible, and, sometimes, even to be remedied by compensation on the part of the judge.[99]

Thus the substantive law itself, in its fullest formulation, is the first major constraint on the judge.

Yet the rabbinic interpretation of *Deuteronomy* 17:11, whereby judicial decisions are regarded as binding upon the citizen even if the

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[95] J. KARO, BET YOSEIF, *Choshen Mishpat* 25, *Bedek ha-Bayyit*.

[96] *See* A. EISENSTADT, PITCHEI TESHUVAH, *Choshen Mishpat* 25:1 (citing a responsum of R. Ya'ir Bachrach).

[97] M. ISSERLES, HAGAHOT [GLOSS TO] SHULCHAN ARUKH, *Choshen Mishpat* 25:1 (following the opinion of R. Asher b. Yechiel *(Rosh), cited in* TUR, *Choshen Mishpat* 25).

[98] *Sanhedrin* 6a, 33a.

[99] *See* text accompanying note 91 *supra*. However, errors in judicial discretion were rarely interfered with. *See* 4 A. GULAK, *supra* note 91, at 179-83; Mechlowitz, *supra* note 91, at 39-47.

judges have declared "left" to be "right" and "right" to be "left,"[100] would appear to grant the judges extraordinary freedom to overrule legislation or authorized interpretations thereof that define what is "right" and what is "left."

This is not so. The overwhelming majority of authoritative teachers read the rabbinic interpretation as referring to the subjective frame of the citizen's mind.[101] In effect, it says to the citizen: "Even though you sincerely believe that you are being told that left is right, you are mistaken, and you must obey the judges." A minority opinion does hold the rabbinic interpretation valid even if the judicial tribunal is in fact mistaken: better that discipline be maintained and a bad judgment obeyed than that civil chaos prevail where any member of society can arrogate to himself the authority to decide what is the "right" decision.[102]

In reaction to this last opinion, Don Isaac Abarbanel offers a novel understanding of the rabbinic interpretation. In his *Commentary to the Pentateuch*,[103] Abarbanel refuses to acknowledge the fallibility of pious, devout judges administering the divine law. Yet the purport of the biblical verse as interpreted by the Rabbis indeed does indicate that the "correct" or "true" law is being distorted. He therefore expounds the intent of the rabbinic interpreters in the following manner. Divine law, *i.e.*, the *Torah*, is formulated in objectively true, just, and equitable *generalizations*, which of necessity disregard individual circumstances. Pious and devout judges, however, are duty-bound to find the just decision in the *particular* case before them. Hence in the individual case they are judging, factors may enter which demand that the solution, to be just, must deviate from the general law. Thus, if we think of the generalization as being "right," their decision emerges as "left." Nevertheless, their decision must be obeyed "even" if they have declared "right" to be "left."[104]

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[100] SIFRE, *Deuteronomy* 17:11, *cited in* RASHI, PERUSH AL HA-TORAH (COMMENTARY TO THE PENTATEUCH), *Deuteronomy* 17:11.

[101] *See, e.g.*, M. NACHMANIDES, PERUSH AL HA-TORAH (COMMENTARY TO THE PENTATEUCH), *Deuteronomy* 17:11.

[102] This opinion is cited in I. ABARBANEL, PERUSH AL HA-TORAH (COMMENTARY TO THE PENTATEUCH), *Deuteronomy* 17:11.

[103] *Id.*

[104] Abarbanel's discussion is reminiscent of Plato's struggle—and development—regarding the superiority of an individualized rendering of judgment (THE REPUBLIC) and the (second best) generalized formulation of rules (THE LAWS, with THE STATESMAN somewhat intermediate). *See* H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 39-40 (1949). For an alternate interpretation of Plato, *see* J. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL LAW 48 (1958).

But not only do the courts have wide latitude in applying laws, no matter how clearly and authoritatively formulated; they have equally wide latitude in arriving at a specific decision—no matter how profuse the regulations are regarding judicial procedure.

Judicial Procedure

The Jewish law of judicial practice and procedure contains fully developed provisions concerning the conduct of a case and the taking and weighing of the pleadings of the parties and of the evidence of the witnesses. The two-witness rule[105] is of great probative value: qualifications and disqualifications of witnesses and documentary evidence are carefully detailed; the place of oaths is carefully circumscribed; in relatively rare instances, courts must cope with common repute, rumor, and hearsay. Under the rubric of judicial notice, there is an elaborate structure of presumptions and quasi-presumptions of conduct, or credibility, of common sense, and of conditions.[106]

Despite,[107] or because of,[108] all these rules, regulations and guidelines, the judicial theory of the Talmud—as understood by the authoritative interpreters of the Middle Ages (*Rishonim*)—left it for the mind and heart of the individual tribunal to decide between truth and falsehood and to dispense justice.

Thus, on the basis of the Judicial Certitude Rule (*kim li*), Maimonides viewed the judge as the pillar upon which the entire judicial structure rests.[109] This rule emerges from the talmudic account (with approbation) of a judge who modified the prescribed administration of an oath (placing it upon the plaintiff instead of upon the defendant as provided by law) on the lone testimony of his (the judge's!) wife, whose honesty and accuracy he trusted implicitly.[110]

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[105] *See Deuteronomy* 19:15.

[106] *See generally Umdana*, 1 ENCYCLOPEDIA TALMUDIT 137 (1947); *Anan Sahadei*, 2 ENCYCLOPEDIA TALMUDIT 70 (1949); *Ha-Peh she-Osar*, 9 ENCYCLOPEDIA TALMUDIT 722 (1959); *Chazakah*, 13 ENCYCLOPEDIA TALMUDIT 453 (1970); *Chezkat*, 14 ENCYCLOPEDIA TALMUDIT 1 (1973). Other summaries appear in the writings of Haim H. Cohn in PRINCIPLES, *supra* note 87, at 574-620; 4 A. GULAK, *supra* note 91, at 72-174; G. HOROWITZ, THE SPIRIT OF JEWISH LAW 673-97 (1953).

[107] *See* Cohn, *Evidence*, in PRINCIPLES, *supra* note 87, at 603; G. HOROWITZ, *supra* note 106, at 652-53.

[108] *See* 4 A. GULAK, *supra* note 91, at 108-09.

[109] The following account of Maimonides' position is drawn from C. Heifetz, Circumstantial Evidence in Jewish Law 50-64 (Hebrew); 10-12 (English summary) (1974) (unpublished dissertation in Hebrew University).

[110] *Ketubot* 85a.

A contemporary scholar has described Maimonides' view:

> It is the judge's absolute prerogative and duty to decide between truth and falsehood and to dispense justice. His decisions in all civil matters ultimately rest solely on his deepest inner subjective convictions as to where the truth of the matter lies. All the forms of evidence, including the two-witness rule, merely serve as instruments to aid him in reaching his convictions concerning the truth. Therefore, if he feels secure in his convictions in a particular civil matter, all the evidence and all the witnesses to the contrary need not deter him from deciding the truth as he sincerely believes he knows it. The judge's knowledge and conviction constitute thus the highest norm of the laws of evidence in civil matters. In criminal matters, public legal policy rules come into play which place certain restrictions on the judge's wide inherent powers, but not stifling them entirely.[111]

The two-witness rule is of great persuasive value, of course; but only when the judge otherwise has little if any conviction in the matter does the two-witness rule achieve the crucial and ultimate probative value usually attributed to it. The judge's broad discretion in this area is evidenced by two of his judicial powers. First, the testimony of the two witnesses must be a faithful, objective rendering of what they saw. Conjecture, conclusions based upon approximations, or deductions made from reasoning upon circumstances are not in the domain of the witnesses—they are the function of the judge. Second, under the Fraud on the Court rule (*din merummeh*), if a judge has scruples about a case, suspecting dishonesty, or has no confidence in the witnesses, although he has no valid ground on which to disqualify

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[111] C. Heifetz, *supra* note 109, at 11 (English summary), based on M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Sanhedrin* 24:1. Maimonides' position is of greater theoretical than practical significance, for in the subsequent paragraph he states that inasmuch as the rabbinic judiciary has suffered a deterioration in the caliber of its members, the majority of judges reached a common consensus to refrain from wielding their wide discretionary powers and to abide closely to the formal rules of procedure as laid down in the legal sources. One should not, however, dismiss the Maimonidean position as *mere* theory. Time and again we read of the refusal of the great legal authorities to be unduly submissive to the formal rules of the Talmud.

> Know ye that in all matters, the truth of which is known to the *Bet Din*, even though the litigants may be turned from the path of truth by their own arguments and even though the rightful party may be unable to bring clear testimony and valid proof, it is incumbent upon the court to render a verdict which should be in accordance with what it knows to be true. Let no judge say, 'I base my decision only on the direct testimony of witnesses and, for the rest, the responsibility rests on the litigant . . .' For we have been commanded to render judgments of truth and nothing else.

2 SHELOMOH B. ADERET, SHE'ELOT U-TESHUVOT HA-RASHBA (RESPONSA), *Teshuvah* 148, *translated in* G. HOROWITZ, *supra* note 106, at 653.

them, he is forbidden to render a decision.[112] He either should withdraw from the case and let it be handled by another judge who can without qualms of conscience pronounce judgment;[113] or he should reject the suit outright.[114]

Admittedly, not all interpreters would go to the exact lengths Maimonides went in the totality of the discretion granted to the judicial tribunal.[115] Nevertheless, his doctrine serves as a representative sample which illuminates our thesis.

Judicial Precedent

Even greater freedom is granted the judge with regard to judicial precedent, for the simple reason that the *Halakhah* never adopted the doctrine of *stare decisis*.[116] As a modern authority on Jewish law has pointed out,[117] there are two reasons for this.

First, in *halakhic* theory, no case is ever closed, even with respect to the instant parties themselves. A case can always be reheard if new facts are introduced; thus, there always exists the possibility that a judgment will be set aside. Moreover, error "in a law cited in the *Mishnah*" also nullified the judgment given.[118] Although the value of putting an end to litigation once and for all inspired some practical counter-measures, this theoretical view of judgments as never being closed militated against the adoption of a doctrine of binding precedent.[119]

Second, the pervasiveness and legitimacy of differing points of view, coupled with the premium placed upon incisive thinking and humane application of principle, nurtured an abiding faith that, just as God's Word may have more than one meaning, a human problem may have more than one just solution.

> This conception of a flexible and dynamic legal order naturally left no room for the doctrine that especially a conclusion springing from a practical decision should impose itself on the judicial process. If . . . the judge should, in reasonable manner and in reliance

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[112] *See* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Sanhedrin* 24:3; SHE'ELOT U-TESHUVOT HA-RASHBA, *supra* note 111.

[113] *See* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Sanhedrin* 24:3.

[114] *See* ASHER B. YECHIEL, TESHUVOT HA-ROSH (RESPONSA) 68:20; 107:6; J. KARO, SHULCHAN ARUKH, *Choshen Mishpat* 15:3.

[115] *See* C. Heifetz, *supra* note 109, *passim*.

[116] *See* Elon, *Ma'aseh and Precedent*, in PRINCIPLES, *supra* note 87, at 115-16.

[117] *Id.*

[118] *See* notes 90-97 *supra* and accompanying text.

[119] *See* 4 A. GULAK, *supra* note 91, at 114.

> on the *halakhic* system itself, come to a different legal conclusion from that reached by earlier scholars, he will have not only the right but also the duty to decide as he sees fit; such decision will take precedence over an earlier decision in a like matter, since the judge will also have known the legal thinking of earlier scholars and have decided as he did by going to the root of the matter.[120]

License for judicial independence, granting ultimate authority in a particular case to the judges immediately involved therein, was found in this talmudic dictum quoted time and time again: "A judge has nothing but (*i.e.*, must be guided only by) that which his eyes see."[121] Thus from fourteenth century Barcelona we read: "If another case comes before him, even if it be a like case in all respects, he may deal with it as he sees fit, since a judge must be guided only by that which his eyes see."[122] Similarly, a sixteenth century Polish authority in Lublin refused to reduce his decisions to writing:

> I know that [once I do so] people, following the rule of *hilkheta ke-ratra'ei*,[123] will decide on the basis of what I shall have written. I do not wish people to depend upon me. . . . A judge must be guided only by that which his eyes see. Let each one decide according to the promptings of his heart regarding the exigencies of the moment.[124]

Indeed, the idea that the entirety of the law of Scripture was given *ab initio* with the intention of the divine Legislator that the scholars and sages of Israel, its legal authorities and judges, be entrusted with defining its ultimate content—by interpretation, construction, and decision[125]—is the key to an understanding of the roles of freedom and constraint in all the areas of Jewish law.

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[120] Elon, *supra* note 116, in PRINCIPLES, *supra* note 87, at 117.

[121] *E.g.*, *Bava Batra* 131a; *Sanhedrin* 6a.

[122] R. Nissim of Gerondi, *quoted in* SHITAH MEKUBETZET, *Bava Batra* 130b.

[123] Literally, "the law is according to the later scholars," a rule dating from the period of the *Geonim*, whereby from the time of Abbaye and Rava (Babylonia, mid-fourth century C.E.). "The statements of later scholars carry primary authority because they knew the reasoning of earlier scholars as well as their own, and took it into consideration in making their decision." ASHER B. YECHIEL, PISKEI HA-ROSH (RULINGS), Sanhedrin 4:6. *See* Elon, *The Rule of "Hilkheta Ke-vatra'ei"*, in PRINCIPLES, *supra* note 87, at 55.

[124] M. ISSERLES, TESHUVOT HA-RAMA (RESPONSA), *Teshuvah* 25, quoting a sixteenth century Polish authority (footnote added).

[125] *E.g.*, in defining the laws of *Chol ha-Moed*, *see Chagigah* 18a; in defining the afflictions obligatory on *Yom Kippur*, *see* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Shevitat Asor* 1:5, as interpreted by R. Nissim of Gerondi, in PERUSH HA-RAN AL HA-RIF (COMMENTARY TO ALFASI), *Yoma* 8; in defining *Torah* generally, *see* ARYEH L. HA-KOHEN, *supra* note 21; in judicial decisions, *see* I. SPEKTOR, *Introduction* to NACHAL ITZCHAK at ¶ 4.

Exercise of Judicial Discretion in Practice

But the broad discretionary powers granted rabbinical judges in the application of substantive laws (read, with Abarbanel: generalizations[126]) to particular cases, the essential freedom to be master of and not subservient to the mass of rules governing practice and procedure in deciding cases (read, with Maimonides: in pursuing truth and justice[127]), and the lack of a doctrine of binding precedent, never led to a chaotic hodge-podge of ad hoc awards or to an idiosyncratic maze of judge-made laws. Even a superficial perusal of the vast responsa literature, the case law of the Jewish legal system,[128] leads to the conclusion that Jewish judicial decisions reveal a remarkable loyalty to the body of codified law, a steadfast adherence to the rules of judicial procedure, and a most respectful attitude to precedent as being extremely persuasive though not formally binding.[129]

Why is this so? How did this come about?

Beyond a doubt, we behold before us the manifestation of a most powerful force in the Jewish religious psychology—and rabbinical judges throughout history were most pious and devout—namely, the awe with which former generations were regarded, the esteem in which earlier authorities were held, and the concomitant humility felt by later teachers in comparison. Something of the spirit of these feelings is conveyed by the following statements which are found in the Talmud and which became the refrain of each and every subsequent generation—indeed among the traditional God-fearing unto this very day.

> If the earlier [scholars] were sons of angels, we are sons of men; and if the earlier [scholars] were sons of men, we are like asses . . . .[130]
>
> The hearts [*i.e.*, intellectual powers] of the ancients were like the door of the *Ulam* [a Temple chamber whose door was twenty

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[126] *See* text accompanying notes 103-04 *supra*.

[127] *See* text accompanying note 111 *supra*.

[128] *See* S. FREEHOF, *Preface* to THE RESPONSA LITERATURE AND A TREASURY OF RESPONSA (2d ed. 1973).

[129] It has similarly been pointed out, for example, that Lord Atkin in the landmark case of Donoghue v. Stevenson, [1932] A.C. 562, was not bound by precedent since all the important decisions which he discussed were those of courts inferior to the House of Lords. He was therefore permitted to overrule outright or simply not to follow the authorities who could be cited as being opposed to the doctrine he was advocating. Nevertheless, Lord Atkin used a variety of techniques to distinguish, explain away, or refute the opposing authorities. *See* W. TWINING, KARL LLEWELYN AND THE REALIST MOVEMENT 239 (1973).

[130] *Shabbat* 112b.

> cubits wide], and that of the later generations was like the door of the *Hekhal* [of the Temple which was ten cubits wide]; but ours is like the eye of a fine needle.[131]

Thus, in all the dynamism of Jewish law alluded to above,[132] and despite the broad freedom that Jewish law grants its jurists, we have here a most potent source of constraint upon them: their great reverence for their predecessors.

The *halakhic* attitude towards precedent may be depicted as one of extreme reverence but not absolute allegiance. Rabbinical decisions have constantly coped with new situations and have often been innovative—more or less, depending upon the times, the generations, the scholarship, and the self-reliance of the authorities. *Halakhists* have often avoided the impact of precedent in much the same fashion as have secular legal scholars faced with changing social conditions: by distinguishing, by reinterpreting, by modifying, or by simply ignoring them.

To what extent has this happened? How has it been done? What were the lines of thinking that accomplished it? How was the interplay of freedom and constraint enacted? To answer these questions, we await a Jewish treatment of the problem that will imitate Karl Llewellyn's *The Leeways of Precedent*,[133] making proper allowances for the differences in history, spirit, and nuances between the common law and the Jewish tradition.

In the meantime, Cardozo's *The Nature of the Judicial Process* has a significant contribution to make to the understanding of the operation of Jewish law.

The Four Methods and the Halakhic System

Cardozo sets out to identify and describe those factors that are at work in the rendering of a judicial decision and in the creation of judge-made law *after* the law as formulated has been examined and been found indeterminant or after apparently contradictory provisions or conflicting precedents have been pondered. He delineates four "methods" whereby the judge resolves the problem before him: the

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[131] *Eruvin* 53a. A judge lacking either reverence for earlier authorities or knowledge of a talmudic provision would be subject to great communal pressure. It has been pointed out that the appearance of the Maimonidean Code, which was understandable to the laity because of its clarity of language and simplicity of formulation, was disturbing to some rabbinical judges. *See* J. FAUR, *supra* note 34, at 57-60; Marx, *Texts by and about Maimonides*, 25 JEWISH Q. REV. 371, 426-27 (1934-35).

[132] *See* note 84 *supra* and accompanying text.

[133] K. LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62 (1960).

methods of philosophy, of history, of tradition, and of sociology.[134] It may prove illuminating to examine the Jewish judicial process, with its analogous duty of resolving conflicts and deciding cases in the face of unclear guidelines, using Cardozo's "methods." An examination, cursory by necessity, but pregnant with suggestion, is all we may allow ourselves in the present context.

(1) *"The Method of Philosophy," Which Follows the Rule of Analogy along the Line of Logical Progression.*[135] Here the inner logic of the law reigns supreme. Every judgment has a generative power; hence by comparing the case before him to the precedents available, the judge generally will decide a case on the basis of logical analogies.[136] "The method of philosophy," thus defined, is the very air the Jewish judge breathes. *Medameh milta le'milta* (literally, "comparing one thing to another") or logical analogy, is the basic exercise of logical reasoning that is the legal thinker's primary tool.[137]

(2) *"The Method of History," or of Evolution, Whereby a Principle, rather than Expand Itself to the Limit of its Logic, may Tend to Confine Itself within the Limits of its History.*[138] On the one hand, the historical reluctance of medieval courts to utilize their powers to annul a marriage, despite their theoretical right to do so, has had a strong influence on judicial behavior to this very day.[139] On the other hand, the impact of the changed position of women in society upon practice and procedure in the rabbinical courts of Israel may prove substantial.[140]

(3) *"The Method of Tradition," that is, the Great Influence the Customs of the Community Exert on the Judicial Mind.*[141] Allusion has already been made to custom as a source of Jewish law and as a factor in its development.[142] *Minhag mevattel halakhah*, "custom

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[134] B. CARDOZO, *supra* note 1, at 30-31; *see* notes 1-2 and accompanying text *supra*.

[135] B. CARDOZO, *supra* note 1, at 31-50.

[136] *Id.* at 19-20.

[137] *See, e.g.*, L. JACOBS, STUDIES IN TALMUDIC LOGIC AND METHODOLOGY (1961); Solomon, *Chilluq and Chaqira: A Study in the Method of the Lithuanian Halakhists*, 4 DINÉ ISRAEL at lxix (1973); Solomon, *Definition and Classification in the Works of the Lithuanian Halakhists*, 6 DINÉ ISRAEL at lxxiii (1975).

[138] B. CARDOZO, *supra* note 1, at 51-58.

[139] *See* ISAAC B. SHESHET, TESHUVOT RIVASH (RESPONSA), *Teshuvah* 399. On the broad historical development, *see* 2 M. ELON, *supra* note 84, at 686-712.

[140] *See* Holzer, *Edut Ishah Be'mishpat ha-Ivri (The Testimony of a Woman in Jewish Law)*, 67 SINAI 94 (1970); Rubinstein, *Kabbalat Edut Nashim, Kerovim, U'shear Pesulim Be'halakha (Accepting the Testimony of Women, Relatives, and Other Disqualified Persons in the Halakhah)*, 10 TORAH SHE-BE'AL PEH 99 (1968).

[141] B. CARDOZO, *supra* note 1, at 58-64.

[142] *See* note 84, *supra*. *See also* Z. CHAJES, DARKHEI HA-HORA'AH (pt. I), chs. 3-7. Although Rabbi Chajes refers only to ritual law, many of his observations are equally valid with regard to Jewish civil law.

overrides the law," may be a much-abused maxim; it nevertheless has a significant role in assisting the rabbinical judge in deciding an issue before him.[143] Thus, for example, acquisitions and conveyances in consonance with the Law Merchant have been accorded recognition as legitimate by rabbinic jurists.[144] Similarly, financial settlements arranged by the rabbinic courts between divorcing couples have indicated an increased recognition of the woman as an economic partner to her husband in present-day society.[145]

(4) *"The Method of Sociology" Along the Lines of Justice, Morals, and Social Welfare, i.e., the Mores of the Day.*[146] To paraphrase Cardozo in a Jewish context: "The final cause of law is the welfare of society under God and in accordance with His *Torah*." The Jewish tradition is replete with values and ideals which serve as constant antidotes to excessive formalism and which guard against *summum ius* leading to *summa iniuria*. Full description of these antidotes and the functions they fulfill in the Jewish legislative and judicial processes are prime desiderata in modern Jewish legal research.

(a) *Kedoshim tiheyu*, "And ye shall be holy."[147]

(b) *Ve'asita ha-yashar ve'ha-tov*, "And thou shalt do that which is upright and good."[148]

(c) *Darkhei no'am*, "Ways of pleasantness."[149]

(d) *Dinei shamayyim*, "Laws of heaven."[150]

(e) *Middat chasidut*, "An act of piety."[151]

(f) *Kofin al middat Sedom*, "We coerce people not to act true to Sodomite character."[152]

(g) *Le'migdar milta, Seyag*, "As a precautionary or protective measure."[153]

(h) *Tikkun ha-olam*, "For the welfare of society."[154]

(i) *Mi'pnei darkhei shalom*, "To promote peace and goodwill."[155]

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[143] *See* Elon, *Minhag*, in PRINCIPLES, *supra* note 87, at 97-103.

[144] *See* Katz, *The Acquisition by Situmta in the Decisions of the Rabbinical Courts of Israel*, 1 MORASHAH 79 (1971).

[145] *See* Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel* (pt. 3), 3 ISRAEL L. REV. 416, 432-33 (1968).

[146] B. CARDOZO, *supra* note 1, at 64-114.

[147] *Leviticus* 19:2. *See* M. NACHMANIDES, PERUSH AL HA-TORAH (COMMENTARY TO THE PENTATEUCH), *Leviticus* 19:2.

[148] *Deuteronomy* 6:18. *See, e.g., Bava Metzia* 35a, 108a.

[149] *Proverbs* 3:17. *See, e.g., Sukkah* 32a; *Yevamot* 15a.

[150] *See Dinei Shamayim*, 7 ENCYCLOPEDIA TALMUDIT 382 (1956).

[151] *See, e.g., Shabbat* 120a; *Bava Metzia* 52b; T.J. *Shevitt* 33a.

[152] *See, e.g., Bava Kama* 20b-21a; *Bava Batra* 12b.

[153] *See, e.g., Mishnayot Avot* 1:1; M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Mamrim* 2:4.

[154] *See, e.g., Mishnayot Gittin* 4:2-5:3.

[155] *See, e.g., Mishnayot Gittin* 5:8-9.

(j) *Mi'shum eivah*, "To avoid hostility."[156]

(k) *Li'fnim mi'shurat ha-din*, "Above and beyond the requirements of the law."[157]

(l) *Mi'pnei Chillul Ha-shem*, "To prevent the desecration of God's Name."[158]

(m) *Gemilat chassadim*, "Acts of loving kindness."[159]

Moreover, result-orientation in rabbinic decisions may be discovered in numerous instances that go beyond the maxims we have listed.[160] Clearly, Cardozo's "method of sociology" as a tool of analysis of the Jewish judicial process gives us an insight into the wealth of values that abound therein.

Constraints on a rabbinical judge abound: the substantive law, the rules of procedure, and the awesome reverence for the previous generations of scholars and authorities and for their rulings and decisions. Yet it is in the context of these very constraints that a true freedom of action and of resolution prevails: a freedom tempered by thoughtful responsibility, by the dutiful pursuit of justice, by the passion of fostering a Kingdom of God here on earth.

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[156] *See Eyvah*, 1 ENCYCLOPEDIA TALMUDIT 228 (1947).

[157] *See, e.g., Bava Metzia* 24b, 30b; *Bava Kama* 99b.

[158] *See Chillul ha-Shem*, 15 ENCYCLOPEDIA TALMUDIT 340 (1976).

[159] *See* M. MAIMONIDES, MISHNEH TORAH, *Hilkhot Evel* 14. A somewhat different listing of terms and phrases in Jewish law that represents values and ideals that are within the legal framework, yet not formally enforceable, appears in Septimus, *Obligation and Supererogation in Halakha*, 7 YAVNEH REV. 30 (1969).

[160] Thus, Z. CHAJES, *supra* note 142, at (pt. I) ch. 2, explains a number of *halakhic* relaxations and dispensations granted by the early medieval authorities (*Rishonim*) of Franco-Germany (*Ashkenaz*) in commerce and moneylending as being motivated by the economic plight of the Jewish population and the dire need it had for relief. In a similar vein, a recently published responsum of Rabbi Moshe Feinstein of New York, *see* 9 AM HA-TORAH 8 (1978), prohibits the use of electrical gadgets to accomplish prohibited labors on the Sabbath. Although formally within the letter of the law, such use—if allowed—would in effect destroy the traditional Jewish day of rest. In the course of his argument, Rabbi Feinstein cites the talmudic prohibition of the employment of non-Jews to perform tasks forbidden to Jews on the Sabbath as having been similarly result-oriented, namely, to prevent the destruction of the traditional Jewish Sabbath by subterfuge. *Id.* at 10.