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Opposition to the 'Shulhan Aruch': Articulating a Common Law Conception of Halacha



Abstract: *Because the two monumental works of medieval codification of halacha—Maimonides' Mishneh Torah¹ and R. Yosef Karo's Shulhan Aruch—achieved canonical status, it is easy to overlook their rather unorthodox nature vis-à-vis prior halachic literature. The Mishna, the founding codex of Jewish law, despite its normative structure, includes dissenting opinions as an integral part of its discourse. Moreover, the Talmud, in its exposition of the Mishna and its contemporaneous legal sources, is frequently inconclusive, lacking a clear determination of the authoritative position. Sixteenth-century Poland witnessed fierce opposition to the Shulhan Aruch led by three figures—R. Shlomo Luria, R. Yehuda Loew ben Betzael, and R. Haim ben Betzael. In this paper I examine the nature of the shared claims against codification put forward by these seminal figures, with an eye toward elucidating the philosophy of halacha implicit in their approach. In the final section of the paper, I demonstrate the deep affinity between this approach to halacha and what is termed in contemporary jurisprudence "common law reasoning."*

1. INTRODUCTION

Because the two monumental works of medieval codification of halacha—Maimonides' *Mishneh Torah* and R. Yosef Karo's *Shulhan Aruch*—achieved canonical status, it is easy to overlook their rather unorthodox nature vis-à-vis prior halachic literature. The Mishna, the founding codex of Jewish law, while clearly establishing the authoritative position on each matter, nonetheless includes dissenting opinions as an integral part of its discourse. Moreover, the Talmud, though at one level an exposition of

the Mishna and its contemporaneous legal sources,¹ is frequently indeterminate; its discussions consist primarily of detailed expositions of competing positions, often lacking a clear statement as to which position is authoritative. Maimonides' *Mishneh Torah* and Karo's *Shulhan Aruch* differ profoundly from these two canonical texts. Maimonides' work eliminates references to the bases of his rulings and almost entirely ignores even the existence of dissent and minority opinions.² Karo's *Shulhan Aruch*, similar though less extreme than the *Mishneh Torah* in this regard, phrases its rulings in general language, rarely mentioning the sources on which it relies or citing the positions of opposing rabbinic authorities. While one might point to the fact that Karo published the *Shulhan Aruch* only after authoring the *Beit Yosef*—an elaborate work that provides an exhaustive range of sources on each halacha, with a broad range of opinions and full citations—he nonetheless presented the *Shulhan Aruch* as a distinct, self-contained work.³ Arguably the most unorthodox part of the *Shulhan Aruch* is its method of determining halacha: it sides on any given issue with the majority of the three great Sephardic

¹ I describe the Talmud as a legal exposition only "at one level," because as a whole it combines legal discourse and *agada*, narrative and fable.

² As Isadore Twersky has pointed out, Maimonides acknowledges diverse views in numerous places throughout his work, on rare occasions even leaving the matter indeterminate. See Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), p. 121f. This notwithstanding, as Twersky himself acknowledges, the dominant style of the *Mishneh Torah* is univocal, and when Maimonides explicitly confronts the idea of disagreement (*ma'hloket*) in the halachic tradition (in "Judges," Laws of Rebels 1, especially 1:3–4), he expresses a thoroughly negative attitude toward its existence. For a detailed analysis of (a) whether Maimonides attributes the origin of disagreement to the cessation of the Sanhedrin or to lax mores among the students of the houses of Shamai and Hillel, (b) whether he limits the scope of disagreement to specific applications of halachic principles or views it as extending to broader principles, and (c) how best to understand his assertion that no disagreement whatsoever exists in received oral traditions traceable all the way back to Moses at Sinai (*halacha* [Moshe misinai], see Yaakov (Gerald) Blidstein, *Authority and Dissent in Maimonidean Law* (Tel Aviv: Hakibutz Hametbad, 2002), ch. 1, esp. pp. 38, 46–65 [Hebrew]; Moshe Halbertal, "Maimonides' Book of Commandments: The Architecture of the Halacha and Its Hermeneutical Theory," *Tarbiz* 59 (1990), pp. 468–476 [Hebrew]; and David Hartman, *Maimonides: Torah and Philosophic Quest* (New York: Jewish Publication Society, 1976), ch. 3, esp. pp. 108–121.

³ Twersky points out the idleness of a scholarly attempt to assess whether Karo intended the *Shulhan Aruch* as a companion volume to the *Beit Yosef* or as an independent literary unit. See Isadore Twersky, "The Shulhan Aruk: Enduring Code of Jewish Law," *Judaism* 16 (1967), p. 150. For Twersky, the very move on Karo's part, from the detailed, excursive *Beit Yosef* to the laconic *Shulhan Aruch*, demonstrates the necessary and healthy dialectic in halachic literature. At this point, suffice it to say that the legal authorities whose vociferous opposition to the *Shulhan Aruch* constitutes the heart of this study did not share Twersky's assessment of how to view the *Shulhan Aruch* in broader contexts—either as part of Karo's work as a whole, or as part of a dialectic within halachic literature. See Twersky, "Shulhan Aruk," pp. 148–150, 156–158.

halachic authorities, R. Yitzhak Alfasi (the Rif), R. Asher ben Yehiel (the Rosh), and Maimonides, irrespective of their reasoning.⁴

Aware of the unorthodox nature of their compositions, both Maimonides and Karo justified their codification efforts by citing the initial difficulty of locating the source of a halacha within the Talmud and the additional difficulty of tracing that particular halacha's evolution through the vast, ever-expansive corpus of post-talmudic halachic literature.⁵

While both codification efforts sparked caustic criticism, sixteenth-century Poland and Ashkenaz saw an entire coterie of halachic authorities who articulated elaborate positions denouncing the *Shulhan Aruch* along with its Ashkenazic gloss, the *Mapa*, written by R. Moshe Isserles (the Rema; 1520–1572).⁶ The three major figures of what we may view as the “anti-codification movement”—R. Shlomo Luria (the Maharshah; c. 1510–1573), R. Yehuda Loew ben Betzael (the Maharal of Prague; c. 1520–1609), and R. Haim ben Betzael (1530–1588), the brother of the Maharal—had all been fellow students of the Rema in the Lublin Yeshiva of R. Shalom Shachna (1495–1559).⁷ The three figures were very different from one another—in their tendencies toward leniency or strictness in halacha, in their degrees of openness toward the study of philosophy and secular studies, and in the genres of their compositions. Yet in their opposition to codification they shared three central, recurrent claims: an

⁴ For a full elaboration on his technique, see R. Yosef Karo, “Introduction to the *Beit Yosef*,” in R. Yaakov ben Asher, *Arbba Turim* (Tel Aviv: Shirat Devora, 1993) [Hebrew]. As Menahem Elon and others have pointed out, this method is problematic not only in terms of its place in the genealogy of halacha (strictly speaking it has none) but also in terms of sheer coherence. As a result of this approach, Karo can find himself siding with Maimonides and the Rif in case A and with the Rif and the Rosh in case B, while it may be that Maimonides’ stances in cases A and B are related—thus creating a jurisprudential incoherence in Karo’s work. See Menahem Elon, *Jewish Law: History, Sources, Principles*, vol. 2, 3rd ed. (Jerusalem: Magnes Press, 1992), p. 1095 [Hebrew].

⁵ See the last paragraph of Maimonides’ “Introduction to the *Mishneh Torah*” and Karo’s “Introduction to the *Beit Yosef*,” especially the first four paragraphs.

⁶ The Rema was at an advanced stage of producing a work remarkably similar in aim and scope to the *Beit Yosef*—built, like *Beit Yosef*, around the *Arbba Turim*—when he received news of Karo’s composition. Assuming that Karo’s scholarship would dwarf his own, the Rema changed the goals and structure of his endeavor, composing his *Darkhei Moshe* as a gloss on the *Beit Yosef* and supplementing it by including more recent authorities of Ashkenaz, granting them premier status in his process of determining halacha, in keeping with the principle of *hitchata k’batrai*, “the law is in accordance with the later authorities.” (For more on this concept, see note 13, below.) See Twersky, “Shulhan Aruk,” pp. 145–149.

⁷ Luria and the Maharal, in turn, trained scores of students who echoed their approaches, foremost among them R. Yehoshua Falk, R. Meir ben Gedalia of Lublin (the Maharam of Lublin), R. Mordechai Yaffe (the Levush), and R. Shmuel Eliezer Halevi Eidels (the Maharsha).

appeal to halachic authorities to return to the oft-indeterminate Talmud as the ultimate source of authority in their reasoned legal opinions, an emphasis on the uniqueness of each individual case, and an ascription of privileged status to the custom of the local community.⁸

In this paper I will examine the nature of the three claims against codification, with an eye toward elucidating the philosophy of halacha implicit in their shared approach. In the final section of the paper, I will demonstrate the deep affinity between this approach to halacha and what contemporary jurisprudence terms “common law reasoning.”

2. HISTORICAL BACKGROUND

Before exploring the nature of our thinkers’ claims against codification, I will devote a brief excursus to the historical background of Ashkenaz and Poland leading up to and in the immediate aftermath of the publication of the *Shulhan Aruch* between the years 1550 and 1559.⁹

I begin as far back as the late thirteenth to fourteenth centuries, which saw a general decline in the status of Jewish learning and scholarship in Poland and Ashkenaz.¹⁰ The period of the Tosafists, which had drawn to a close by the mid-thirteenth century, had been characterized by intellectual prowess as well as by daring: the Tosafists’ methodology of talmudic exposition demanded tremendous knowledge along with keen analytic ability, and their novel expositions exhibited a bold willingness to take issue with hitherto authoritative interpretations.¹¹ The close of this period saw two related phenomena take hold: the establishment of a professional rabbinat, and the undertaking of significant efforts to record and summarize the Tosafot’s halachic conclusions (absent of all their reasoning).

⁸ Though each of these authorities offered his own distinct articulation of the problems inherent in codification, my purpose here is not to engage in a comparative examination of their claims against codification. Instead, I view them as exponents of a similar approach to halacha and therefore treat their various works as parts of a shared corpus.

⁹ Hereafter, when referring to the *Shulhan Aruch*, I include the Rema’s *Mapa*, unless otherwise indicated.

¹⁰ In the description that follows, I draw heavily on the work of Israel Ta-Shma, “Defining Characteristics of the Halachic Literature of Ashkenaz in the Thirteenth to Fourteenth Centuries,” *Alai Sefer* 4 (1979), pp. 20–41 [Hebrew].

¹¹ The Tosafot’s exaltation of the intellect crafted a religious ideal of “excellence” as primarily, if not exclusively, intellectual in nature—an ideal necessarily limited to those few members of the community with such capability. It meant further that even for those select individuals, supreme—if not exclusive—value was ascribed to the intellect as opposed to other aspects of their personality. Ta-Shma understands *Sefer Hasidim*’s emphasis on moral excellence as an attempt by its authors (many of whom were Tosafists) to offer an antidote to the Tosafot’s emphasis on the intellect alone. See Ta-Shma, “Defining Characteristics,” pp. 31–32.

These halachic works¹² can in some way be seen as handbooks for this new professional rabbinat, providing them with "bottom-line" summaries of the intricate arguments characteristic of the Tosafot.

This was the backdrop of events leading into the fifteenth century, the first part of which continued along these same lines. The end of the fifteenth century, however, saw the emergence of a new vitality in Jewish learning in Poland and Ashkenaz, the leading figure in this development being R. Yaakov Pollak (1460–1541). Pollak invented and instituted a form of learning called "*pitpul*," and his outstanding student, R. Shalom Shachna, developed it further. Lest their students follow their rulings obsequiously, neither Pollak nor Shachna left a written corpus,¹³ so in our efforts to understand the technique, we must rely upon their students' descriptions. What emerges from such descriptions is an approach to the text that included three stages of learning: (1) a distinct talmudic pericope learned on its own (that is, without reference to accompanying commentators or other *sugiot*);¹⁴ (2) the commentary of R. Shlomo Yitzhaki (Rashi) and the Tosafot on that *sugia*; and (3) an oral discussion, led by the head of the yeshiva, consisting of *pitpul* (after which the entire approach is named)—an analytic study of the text by breaking it into its smallest constituent components.¹⁵ Although it originally served

¹² Such as *Hilchot Mita*, *Sharei Dura*, *Ha'aguda*, and *Barruch She'amar*, among others.

¹³ This we know not only because of the scant material they left to historians, but explicitly from two of Shachna's students: the Rema mentions it in one of his responsa (*The Responsa of the Rema*, sec. 25), and R. Haim ben Betzalel does so in the introduction to his *The Argument of Living Waters*, quoted in Haim Tchernowitz (Rav Tzair), *The History of Adjudicators*, vol. 3 (New York: Haim Tchernowitz, 1947), p. 94 [Hebrew]. Implicit in Shachna's decision not to leave a written record of his teachings is a desire to empower his students—and, by amplification, later generations as well—to be independent in their rulings, unconstrained by the judgments of their predecessors. At the same time, his assessment that leaving written opinions would prevent students from achieving such independence indicates that a deeply conservative strain characterized their milieu. For more on this tension between later and earlier authorities, see Israel Ta-Shma, "*Hilchata K'batrai*," Historical Observations on a Legal Rule," *Jewish Law Annual* 6–7 (1979–1980), pp. 405–423 [Hebrew]; Yisrael Yaakov Yuval, "*Rishonim Ashkenaz*," *Tzion: A Quarterly for the Investigation of the History of Israel* 57 (1992), pp. 369–394 [Hebrew]; and the English-language version of Ta-Shma's *Hilchata K'batrai*, which includes an afterword responding to Yuval's claims: "The Law Is in Accord with the Later Authority—*Hilchata K'batrai*," Historical Observations on a Legal Rule," in Hanina Ben-Menahem and Neil S. Hecht, eds., *Authority, Process, and Method: Studies in Jewish Law* (Amsterdam: Harwood, 1998), pp. 101–128.

¹⁴ "*Sugiot*" is the plural of *sugia*—sometimes termed in English a "pericope"—or a distinct unit of talmudic discussion.

¹⁵ This description draws on H.Z. Dimitrovsky, "Regarding the Manner of *Pitpul*," in Shaul Liberman, ed., *The Jubilee Book in Honor of Shalom Baron* (Jerusalem: American Academy for Jewish Studies, 1975), pp. 117–120 [Hebrew]; and on Elchanan Reiner,

only as a pedagogic tool aimed at sharpening the analytical skills of the student of Talmud, during the course of the sixteenth century the place of this approach in the curriculum of the yeshivot of Poland and Ashkenaz expanded. Indeed, many authorities (Shachna foremost amongst them) employed it not only as a pedagogical technique in the study of Talmud but also as a method of determining halacha.¹⁶ Furthermore, the technique itself became more elaborate, incorporating a fourth component, the *hiliuk*—an attempt to synthesize the constituent components of the *sugia* by focusing on the connective links between them. *Pitpul* thus acquired an increasingly central place in the curriculum of the yeshivot of Poland and Ashkenaz at precisely the time that its increasingly intricate nature further limited the student body capable of participating in it.

Tightly enmeshed with this change in the curriculum of the yeshivot in the early to mid-sixteenth century were two further developments. First, the rabbinat became an increasingly professionalized local institution, led by the *rosh yeshiva* (the head of the yeshiva). In contrast to the existent model of Ashkenazi *semincha* (rabbinic ordination), the *rosh yeshiva's* elevated status now derived not only from his being an ordained master of the Jewish tradition of learning but also, and perhaps primarily, from his status vis-à-vis the community.¹⁷ Second, the reception of the *Shulhan Aruch* as an authoritative text greatly diminished the need for students to achieve mastery of halacha. In this sense, the *Shulhan Aruch* represented a further step along the path set out by the aforementioned professional halachic literature of the fourteenth century. For while the latter summarized halachic positions while remaining highly technical and designed for halachic "professionals," the *Shulhan Aruch* was accessible—because of its language, style, and structure—to the laity, requiring only a basic familiarity with the halachic tradition.¹⁸

The emergent picture in Ashkenaz and Poland, therefore, as it developed from the end of the thirteenth through the middle of the sixteenth centuries, was of increasing bifurcation in the world of Jewish learning:

"Changes in the Yeshivot of Poland and Ashkenaz in the Sixteenth and Seventeenth Centuries and the Argument Surrounding *Pitpul*," in Y. Baral, H. Torininsky, and A. Mendelson, eds., *According to the Custom of Ashkenaz and Poland: The Jubilee Book in Honor of Chanah Simnik* (Jerusalem: Zalman Shazar Center, 1993), pp. 13–20 [Hebrew].

¹⁶ Reiner, "Changes," pp. 38–43.

¹⁷ Ibid., p. 32.

¹⁸ It is important to note that for both Karo and the Rema, this was by design. Karo's *Beit Yosef* goes into expansive and exhaustive explorations of every halachic ruling, as does the Rema's *Darkei Moshe*. The *Shulhan Aruch* and the *Maga* then give the halachic "bottom line" to those unable to follow the halachic derivation and discussion in all of its intricacies, or uninterested in doing so.

alongside the elite, intellectually demanding path of talmudic interpretation represented by the tradition of *piḥpul* (itself predicated on the higher learning of the Tosafot), the process of learning halacha became more isolated and mechanical over time and, by a parallel process, required less mastery of the talmudic tradition. Put otherwise, talmudic and halachic discourses became distinct endeavors: talmudic hermeneutics became the bastion of an elite cadre of students, while halachic discourse, based on increasingly accessible codes, opened up to a wider audience.

3. THE CLAIMS AGAINST CODIFICATION

As noted above, the three leading opponents of codification were fellow students of the Rema in the Lublin Yeshiva of R. Shalom Shachna, one of the leading exponents of *piḥpul*. Interestingly, and surely not a matter of coincidence, these same figures were at the forefront of the fight against the increasingly central place of *piḥpul*¹⁹—a convergence that, to the best of my knowledge, has not received ample scholarly attention. At first glance, it may seem surprising that opponents of codification would oppose *piḥpul*, for what is *piḥpul* if not an acknowledgment and expression of the intricacy of halachic discourse? In fact, the perhaps counter-intuitive alignment of these two battles shall help us to understand the nature of the movement against codification as an expression of a wider effort to fashion a certain approach to halacha. It is to the substance of their claims that we now turn.

In the broadest sense, the Maharshal, the Maharal, and R. Haim ben Betzalel all viewed the halachic process as an ongoing conversation between halachic authorities seeking to apply principles articulated in the Talmud to ever-changing situations they encountered. The foremost claim that we find repeatedly in all of their writings—and in some sense the starting point of their critique of codification—is that the halachic arbiter must arrive at his decision directly from within the discourse of the Talmud and not on the basis of any post-talmudic exegete or code. According to the Maharshal, the halachic tradition in its deepest recesses is multi-valent:

Everything that is contained in the words of the sages of the Torah... was given by one shepherd,²⁰ and one should not wonder at the gulf separating the sages in their disagreements, one of them declar-

¹⁹ Reiner claims that the "argument about *piḥpul*" pertained not to *piḥpul* per se, but rather to its increasingly prominent role in the yeshiva curriculum. See Reiner, "Changes," pp. 25–26.

²⁰ See *Tosefta* Sota 7:12.

ing impure, the other declaring pure; one of them forbidding, the other permitting; one of them disqualifying, the other allowing; one of them exempting, the other obligating; one of them distancing, the other drawing near—so long as their views are for the sake of heaven.²¹ In fact, the early authorities even went so far as to disregard a heavenly voice²²—and all are the words of the living God²³ as if each and every one of them received [the halacha] directly from God via Moses—even though the matter was not at any stage issued forth by Moses, taking two opposing stances on the same subject.... And the kabbalists explained that all of the souls were at Mount Sinai, and they received via forty-nine channels... and all of Israel saw the voices²⁴—which [the kabbalists] understand as the opinions as they divided in the channel, each person seeing through his channel according to his capacity... this one distant from that one, to the effect that one arrives at [a determination of] pure, while the other arrives at [a determination of] impure, and a third is in the middle, far from the extremes—and everything is true; understand this.²⁵

When divine revelation enters into the realm of human understanding and discourse, it necessarily achieves a variety of expressions and

²¹ See *Mishna*, Avot 5:17.

²² He is referring, of course, to the story of the oven of Aknai, in which the sages refuse to be convinced by R. Eliezer, despite the variety of miraculous proofs he garners from heaven in support of his position, until finally a heavenly voice declares that the halacha is according to R. Eliezer. In response, R. Yehoshua counters that the Torah is "not in heaven" (Deuteronomy 30:12)—that is, that halachic matters are determined not by divine decree but by the vote of a majority of sages following reasoned discussion in the *beit midrash* (house of study). See *Babylonian Talmud*, Bava Metzia 59b.

²³ See *Babylonian Talmud*, Eruvin 13b: "R. Abba said in the name of Shmuel: For three years the House of Hillel and the House of Shammai disagreed, these saying, 'The halacha is in accordance with our position,' while the others claimed, 'The halacha is in accordance with our position.' A heavenly voice issued forth, proclaiming, 'These and those are the words of the living God—but the halacha is according to Beit Hillel.'"

²⁴ See Exodus 20:14.

²⁵ R. Shlomo Luria, *Shlomo's Ocean*, vol. 2, introduction to Bava Kama (Jerusalem, 1986). Emphasis added. This explanation of the existence of *mahloket* within halacha stands in stark contrast to both Maimonides' and Karo's, both of which see the existence of *mahloket* as a negative phenomenon, revealing a distancing from (rather than a fulfillment of) the authentic halachic tradition. See, for example, Karo's "Introduction to the Beit Yosef" as well as Maimonides' explanation of the nascent of disagreement in the *Mishneh Torah*, "Laws of Apostates," ch. 1. Basing himself on a talmudic passage in the *Babylonian Talmud*, Sanhedrin 88b, Maimonides attributes the existence of *mahloket* to problems in the transmittal of the authoritative tradition. See also *Babylonian Talmud*, Sota 47b. In its typical fashion, the Talmud includes various (conflicting) explanations as to the origins of disagreement, including versions resonant with the Maharshal's approach. See, for example, Eruvin 13b (which, as we saw in note 23, above, the Maharshal cites); *Mishna*, Avot 5:17 and Eruvin 1:5; and *Tosefta* Sota 7:12.

understandings, including positions that are in tension and attitudes in downright opposition to each other. Each and every halachic determination ("pure" or "impure," "permitted" or "forbidden," and so forth) reflects a human—and therefore inherently partial—expression of divine command. The Talmud reveals this essential aspect of halacha both in its content (by containing diverse opinions) and in its style (by placing those opposing opinions in conversation with each other in a way that is frequently combative and often unresolved).

It is in this context that we must understand the Maharshah's repeated demand that the halachic arbiter, having thoroughly studied the opinions of later authorities, must ultimately make his determination on the basis of his understanding of the Talmud itself: "Therefore I will not [automatically] favor one authority over another... but rather, the Talmud is determinative."²⁶ The Maharshah made it unequivocal that he turned to the Talmud not only because of its canonical status but also because of its style. It contains

deep, lengthy, intricate arguments before presenting a conclusion or the end of the matter; moreover, the *sugiot* reveal different facets of the matter, to the extent that the reader at one point inclines to declare "clean," while at a different point he inclines to declare "unclean," God forbid, or at one place to obligate while at a different point to exempt—as if the Talmud were contradicting itself, regretting what it said previously, and we do not know which position is the prior thought and which is the latter thought that should function as the conclusion and sealing of the decision.²⁷

Fundamentally distinct in style from any code, the Talmud weaves together conversations between sages of various opinions in a fashion that invites careful scrutiny and independent thinking on the reader's part. The discourse itself, the reasoning process in the determining of a legal position, and the conversation between sages that ensues as each stakes out his position are the mainstays of the Talmud. The genre of "codes" is altogether different. For this reason, the Maharshah found fault with Maimonides and Karo. The *Mishneh Torah* phrases halacha "as if [Maimonides] received it directly from Moses at Mount Sinai, who received it directly from heaven, offering no proof texts... in such a way that the person who comes to take issue with him cannot win, for who knows what was the basis for his determination?"²⁸ In response to Karo's

determining halacha in the *Shulhan Aruch* by siding on any given issue with the majority of the three great Sephardic halachic authorities (the Rif, the Rosh, and Maimonides), the Maharshah accused Karo of determining halacha "as if [on the basis of] a received tradition going back to the days of the Elders."²⁹

The Maharal gave an even more extreme expression to this advocacy of a return to the Talmud when he wrote:

The sage has only that which his intellect provides him and allows him to learn from within the Talmud. And when his understanding and wisdom lead him to err, he is nonetheless beloved to God so long as he is issuing instructions based on the dictates of his reason. For a judge has only what his eyes see.³⁰ And this person is preferable to the person who determines halacha from within one book, knowing not the reason for the matter, walking like a blind person along the way.³¹

The reasoned legal determination based on the Talmud is so essential to halachic discourse, argued the Maharal, that it is preferable to make an errant judgment than to issue the "correct" judgment without understanding the underpinnings of that position. Thus, the call to issue halachic judgments from within the Talmud, beyond limiting authority to this text, contains an appeal to seamlessly integrate the argument for a given position with the actual verdict.

Having examined the demand to issue halacha directly from the Talmud, we are now in a position to re-consider the opposition to *piilpul* within the context of the historical developments described in the previous section of this essay. The ascription of exclusive authority to the Talmud in the process of determining halacha must be understood as an attempt by these three sages to unify what had become, in mid- to late-sixteenth-century Poland and Ashkenaz, two distinct enterprises: the study of Talmud and the issuing of halachic decisions. Studying Talmud—

blessed memory, but lacks sufficient expertise in Talmud to know whence he derived his position, errs, permitting the forbidden and forbidding the permitted. For he acted differently from all previous authorities, who brought support for their positions, showing their sources in the Talmud, thus allowing [the reader] to understand the essential point and the truth. But Maimonides composed his book as if receiving prophecy directly from the divine, without reason or proof." *Responsa of R. Asher ben Yehiel* 31:9 (Jerusalem, 1980), p. 31a [Hebrew]. Emphasis added.

²⁹ Luria, *Shlomo's Ocean*, introduction to Bava Kama.

³⁰ This dictum appears in many places throughout the Talmud. See, for example, Sota 8a and Bava Batra 131a.

³¹ R. Yehuda Loew ben Betzalel (Maharal of Prague), *Paths of the World* (*Netivot Olam*), "The Path of Torah," end ch. 16 (London: Hunning and Sons, 1961), p. 59 [Hebrew].

²⁶ Luria, *Shlomo's Ocean*, introduction to Bava Kama.

²⁷ Ibid.

²⁸ Ibid. R. Asher ben Yehiel levels the same criticism, almost verbatim, against Maimonides: "Anyone who issues instructions based on the words of Maimonides, of

as evidenced by the ascendancy of the method of *piḥpul*—had become an intellectual exercise for the elite, an adventure in hermeneutics, but the halachic discussions therein were severed from the immediate claims of the day. Simultaneously, the issuing of halachic decisions had struck its roots in codes—first in professional literature and then in the *Shulhan Aruch*. In being severed from the Talmud, halachic discourse had not only become more shallow; it had become more rigid as well. The opposition to *piḥpul* and the concurrent turn to the Talmud as the source of Jewish law were thus part of a shared platform to fashion halacha in the spirit of the Talmud; halacha that seamlessly interweaves reasoning and decision, attentive to the uniqueness of every situation.

The proclivity to rely on codes rather than to engage the Talmud and subsequent halachic authorities directly, emerges not only from a distorted view of the halachic process. According to R. Haim ben Betzalel, it also reflects—and further encourages—a laziness and lack of discipline in study.³² Furthermore, it results from placing excessive trust in and ascribing excessive authority to the printed word. The result, according to the Maharshah, is that when students see a given halachic position in the *Shulhan Aruch*, “that which he wrote in a book they will believe; but if a living person were to stand and screech like a crane that the law is different, citing convincing proofs, or even an authoritative received tradition, they will pay no heed to his words....”³³ Or, as R. Haim ben Betzalel lamented, people fail to realize that the current authority who writes a book of law “is just one person amongst others.”³⁴

Of course, the Maharshah, the Maharaḥ, and Ben Betzalel were not addressing their criticism to the layperson who turns to the *Shulhan Aruch* for guidance. In fact, the Maharshah bemoaned the fact that the *Shulhan Aruch* creates an illusory equality between people of differing scholarly statures—small and great, young and old.³⁵ In a similar vein, Ben Betzalel criticized the *Shulhan Aruch* for making halachic determinations accessible to the amateur, chastising Karo for not explicitly limiting the use of his book to those qualified to pass judgment on matters of halacha.³⁶ Ben Betzalel compared a person who gleans judgments from such codes to a pauper who collects alms from a variety of wealthy

benefactors. At first glance, this indigent person seems himself to be wealthy: he has food, clothing, and so forth. But in truth, his “wealth” is only skin-deep, for his “riches” are all items he has received as alms. So, too, the person who skims halachic rulings from various codes is indigent, lacking the requisite depth of knowledge that the masters of halacha who wrote these codes possessed³⁷—and which anyone who wishes to determine halacha must possess.

What is it that the expert—to whom the Maharshah, the Maharaḥ, and Ben Betzalel all addressed themselves³⁸—brings to the halachic adjudication process? Beyond his mastery of the intricacies of talmudic and subsequent halachic literature, the expert understands that his perspective is partial and that each situation is sui generis. The Maharaḥ, as we saw earlier, quoted the famous talmudic phrase that “the judge has only what his eyes see.” Ben Betzalel expanded upon this idea, emphasizing not only the unique perspective of every judge, but the ever-changing perspective of even the same judge over the course of time and in varying situations:

with even a minor change the entire [legal] matter can shift.... And a person's understanding is not constant, and he may be inclined to rule differently on the matter [today] than he did yesterday. And this involves no inconsistency or shortcoming, indicating that as a result the Torah has—God forbid—split into two Torahs. *Quite the opposite! Thus is precisely the path of Torah, and “These and those are the words of the living God”*³⁹....⁴⁰

Reality is in constant flux, and therefore no two cases are identical. Moreover, even if the judge were to encounter the exact same case at two different points in time, his reasoning process and decision would differ. Ben Betzalel hence appealed to the expert adjudicator, who understands that his perspective as a judge is partial and constantly changing. Furthermore, the authority knows that this lack of constancy indicates not the failure or breakdown of Torah, but rather the very essence of Torah as an instantiation in the finite world of the infinite word of the divine.

³² Ben Betzalel, *Argument*, introduction, sec. 4, p. 94. He goes on to compare works of codification of halacha to medical handbooks that were designed to help doctors in their diagnoses but have a pernicious effect when used by themselves, absent of thorough medical knowledge combined with sound reasoning (sec. 5, p. 95).

³³ Luria, *Shlomo's Ocean*, introduction to Hulin.

³⁴ Ben Betzalel, *Argument*, sec. 7, p. 97.

³⁵ Luria, *Shlomo's Ocean*, introduction to Hulin.

³⁶ Ben Betzalel, *Argument*, sec. 8, p. 97.

³⁷ *Ibid.*, sec. 7, pp. 96–97.

³⁸ The Maharal's and the Maharshah's appeals to the expert are, like Ben Betzalel's, explicit. See, for example, the Maharal's reference to those with “expertise in Talmud” (*Netivot*, p. 59) and the Maharshah's assertion that “the Torah is entrusted to the sages who are planted in every generation” (*Shlomo's Ocean*, introduction to Bava Kama).

³⁹ *Babylonian Talmud*, Eruvin 13b, as cited in note 23, above.

⁴⁰ Ben Betzalel, *Argument*, sec. 7, p. 97. Emphasis in original.

Precisely because "with even a minor change the entire [legal] matter can shift" as a result of the absolute, irreducible uniqueness of each situation, legal discourse can never fully be exhausted. The Maharshah expressed this idea in flowery language:

even if the entire firmament were parchment, and all of the oceans ink—they would not suffice to exhaust one matter [of the law], with all of the doubts that arise in it, and all of the innovations that emerge in its applied meanings by the sages of Israel when they engage in deep, investigative study, plumbing its depths, changing the matter, and adding to it. Just the opposite is the case: were all of these things written in the Torah, there would be an even greater demand for further ramifications, ramification upon ramification. That is to say, it is entirely unavoidable that even the initial ramification would be free of doubts and changes, exhausted by reason, such that there would be no need for an additional ramification, and so forth ad infinitum. The general principle... is that it is utterly impossible to explicate and elucidate all doubts surrounding a matter of Torah without leading to differences [of opinion].... And for this reason the Torah is entrusted to the sages who are planted in every generation, each and every one of them plumbing the depths of his intellect....⁴¹

When we piece together the claims of the Maharshah, the Maharaal, and Ben Betzalel, we find an approach to halacha that emphasizes the indeterminate nature of the process of applying halachic principles—as received from the divine and debated and expounded upon in the (human) discourse of the Talmud—to ever-changing reality. The halachic process continues amidst the ongoing attempt by contemporaneous halachic authorities to engage each other in a discourse that makes halachic determination inseparable from the reasoning through which the authority arrived at his position.

What, then, we may ask, of the unity of the Torah? Did these authorities not present a vision of halacha so fractured that it forgoes any pretense of being a unified legal system? This accusation is especially weighty given that the impulse to codify is animated by the concern, as Karo explicitly expressed in the introduction to the *Beit Yosef*, that over time the Torah has become not merely "like two Torahs, but rather like an infinite number of Torahs."⁴² Karo wrote the *Shulhan Aruch* "because that is our purpose—that we should have one Torah and one law."⁴³ Both

Ben Betzalel and the Maharshah confronted this point explicitly, each offering a slightly different response. Ben Betzalel countered Karo's aspiration to create a unified interpretation and instruction of the law by accusing him of "act[ing] arrogantly vis-à-vis all previous authors, as if they had caused the Torah to be lacking [by adding interpretations and opinions], God forbid, as if it were completed only by his great work."⁴⁴ It is erroneous (as well as arrogant), claimed Ben Betzalel, to think that one can end the ongoing conversation. Indeed, this attitude goes hand in hand with people's folly, noted earlier, in assuming that newer books, or printed opinions, are *ipso facto* authoritative.

If the mistake lies in trying to end the conversation, then the solution to the threat of a fractured Torah is to be found at the opposite end of the spectrum, namely, in the *beginning* of the conversation. What prevents the Torah from splintering, despite the diversity of stances that its arbiters take, is precisely the shared starting point to which they constantly return, the Talmud. As the Maharshah stated:

I found that the Rosh writes in his responsa that Nahmanides was very great in his wisdom... but that he had a received tradition that Rabbeinu Tam [R. Yaakov ben Meir] and the Ri [R. Yitzhak ben Shmuel the Elder] and the French [Tosafists] were greater than Nahmanides in wisdom and in number, and therefore a litigant can disagree [with the judgment] and claim that he has a received tradition according to one of the sides,⁴⁵ the Sefaradi as the Sefaradim, each one making his own determination, each nation in its own language, holding that the Torah is its familial inheritance. But this is surely not the way! For since the days of Ravina and R. Ashi⁴⁶ there is no such thing as a received tradition to hold according to a specific authority, whether one of the Gaonim or Aharonim,⁴⁷ but instead [the decision is according to him] whose words are qualified to be made into a thoroughgoing, incisive proof according to the [Babylonian] Talmud—or, in instances in which there is no clear

⁴⁴ Ben Betzalel, *Argument*, introduction, sec. 4, p. 95.

⁴⁵ This is a reference to the phrase "*kim li*" (roughly translated as "I have a tradition"), which has its origin in the Talmud but whose use was greatly expanded in the Middle Ages. In its later use (to which the Maharshah is referring), a litigant can claim that he is in the right according to his own received halachic tradition, even if this position contradicts local custom or the "received tradition" of the opposing litigant. See Hanania Ben-Menahem, "The *Kim Li* Claim: Toward a Jurisprudential Analysis," in *Jewish Law Annual* 6–7 (1980), pp. 45–60 [Hebrew].

⁴⁶ Traditionally held as the editors of the Babylonian Talmud.

⁴⁷ The Maharshah called "Aharonim" the group of authorities that we call "Rishonim."

⁴¹ Luria, *Shlomo's Ocean*, introduction to Bava Kama. Emphasis added.

⁴² Karo, "Introduction to *Beit Yosef*."

⁴³ *Ibid.*

conclusion in the [Babylonian] Talmud, the Jerusalem [Talmud], and the Tosefta and the Tosefta.⁴⁸

In response to the danger of the halacha's fracturing according to ethnic or even familial lines, the Maharshah prescribed, quite simply, a return to the Babylonian Talmud. By implication, what assures the unity of the halachic discourse is that all subsequent authorities hark back to the same authoritative text.

In his critique of the Rema,⁴⁹ Ben Betzalel offered a different resolution to the quandary of the Torah's breaking into disparate parts. In a case in which earlier halachic authorities stood in disagreement, suggested Ben Betzalel, the Rema should not have codified by declaring the halacha as being according to one of the positions (and thus dismissing the alternative view). Rather, he should have presented both opinions, placing them before the halachic arbiter, who "will choose in keeping with the instructions he receives from the heavens, for he receives permission to instruct, and no one is forced to accept his opinion...."⁵⁰ We have here a claim slightly different from that shared by the Maharal and the Maharshah: Ben Betzalel appealed to a sanctioned master of the tradition who will determine the halacha in each case, but he added that "no one is forced to accept his opinion." This is not only a statement regarding the central place of persuasion, as opposed to coercion, in the halachic tradition. It is also an acknowledgment, upon which he will elaborate at length, of the community's determinative power in establishing local custom—itself an authoritative constituent element of halacha.

The halachic system, understood as a whole, includes a dynamic and intricate relationship between various elements: the textual tradition; the rabbinic authority who issues a halachic decision; the community's acceptance (either implicit or explicit) of the authoritative stature of his decision; and the community's forms of behavior and customs, which themselves form part of the input for the rabbi's decision-making process. Ben Betzalel claimed that the codification impulse gnaws away at the status of communal behavior and custom. To the famous dictum "The custom of our ancestors is itself Torah," Ben Betzalel added: "and one

must not deviate from it."⁵¹ Distinguishing between halachic positions based on reasoning and those based on custom (and favoring the latter), he paraphrased the Jerusalem Talmud's ascription of elevated status to actions of the community vis-à-vis the reasoned positions of halachic authorities:

As the Jerusalem Talmud states: "If your hold on the halacha is loose, simply let the children of Israel be, for even though they are not prophets, they are children of prophets."⁵² But the halacha⁵³ cannot serve as a proof for the custom, for if he wishes to hold according to a stricter, minority position—who can oppose him? Therefore, I say that even in those instances in which we accept the rabbi's [the Rema's] positions, we should accept them only as halacha, but not as custom.⁵⁴

His phrasing, in criticizing the Rema, was extreme indeed: he would accept the Rema's positions "only" as halacha, but not as custom. That is, local custom—by virtue of its organic, "bottom-up" nature—has greater legal standing than the reasoned position of a halachic arbiter.

In fact, Ben Betzalel noted that, before serving as a halachic authority in two communities in Ashkenaz, he himself had, like the Rema, grown up in Poland and learned in the yeshiva of R. Shalom Shachnai; they both shared the same local custom. He testified further, however, that when he assumed his positions of authority in Ashkenazic communities, "I always asked about, inquired as to, and thoroughly investigated that area's local custom, in such a way that the custom of Ashkenaz did not escape me...."⁵⁵ By contrast, Ben Betzalel argues, the Rema, in his *Mapa*, attempted to "establish [new customs] by using the phrase 'such is customary'—instead of writing, 'such we hold,' or 'such is the halacha'—thus

⁵¹ Ibid., sec. 9, p. 97.

⁵² This represents a paraphrase of two passages in the *Jerusalem Talmud*: Shabbat, ch. 19, 17a; and Pesachim, ch. 6, 33a. It is worth noting that in both cases Hillel's grasp of the halacha was not merely "loose": when asked a halachic question, he admitted to having forgotten the answer he had received, so he advised determining the halacha by observing the behavior of Israel. In both cases, therefore, Hillel had received a teaching that he then forgot—and in such instances he cast his glance to the de facto behavior of the children of Israel (who presumably acted according to received tradition). Ben Betzalel's claim was more extreme because he widened its scope: according to Ben Betzalel, the behavior of the community is more authoritative than reasoned halacha not only when the sage has forgotten the halacha, but any time his hold on the halachic tradition is "loose"—by which Ben Betzalel meant, I think, based on reasoning that can be refuted or significantly challenged.

⁵³ That is, a reasoned halachic position.

⁵⁴ Ben Betzalel, *Argument*, sec. 10, p. 98.

⁵⁵ Ibid., sec. 9, p. 98.

⁴⁸ Luria, *Shlomo's Ocean*, introduction to Hulin.

⁴⁹ Ben Betzalel's *Argument* was explicitly aimed at the Rema's *Torat Hatai*, a book primarily about issues surrounding the dietary laws. As we have seen, however, Ben Betzalel articulated in *Argument* his broader opposition to codification per se—the Rema's, but Karo's as well.

⁵⁰ Ben Betzalel, *Argument*, introduction, sec. 6, p. 96. This entire quotation is emphasized in the original.

leading to the fact that in twenty or thirty years, most of [his] book will become established customary practice."⁵⁶

Codification, then, offers an approach to the law diametrically opposite to local custom: while the latter creates law from the bottom up, sometimes forcing those on top (the halachic authorities) to take it into account in issuing a ruling, the code works from the top down, with an undeniable ability to become authoritative enough to "create" (or perhaps dictate) local custom by unifying practice. Ben Betzalel, as we saw, did not view this acknowledgment of the determinative nature of local practice as a begrudging concession that the halachic authority must make; rather, he found that the sanctity of local practice constitutes one of the fundamental characteristics of halacha. The threat of the dissolution of halacha into many "Torahs," therefore, finds an additional resolution. Not only do the heavens grant today's halachic authorities direction in their Talmud-based decision-making process, as we saw the Maharshal claim, but they also grant legitimacy and privileged status to local custom, for even if the children of Israel are not prophets, they are "children of prophets."

We have seen, then, that the opponents of codification shared many elements in their approaches to halacha. Foremost among these was a call for halachic authorities to arrive at their determinations directly from the Talmud. They may, of course, appeal to later halachic authorities and talmudic commentators as they seek to determine meaning and judgment, but the only authoritative text to which they are unconditionally bound is the Talmud. This appeal to the Talmud was not simply a function of its authoritative status in the canon; rather, the nature of the talmudic discourse itself constituted one of the bases of its import. In it our thinkers discovered the central role of reasoned discourse alongside the decision itself; furthermore, its oft-indeterminate style was found to echo the complex nature of the legal decision-making process.

The Maharshal, the Maharshah, and Ben Betzalel all placed this intricate task of teasing ideas out of the talmudic discourse and then bringing them into conversation with the situation at hand into the custody of

the halachic authority. Because each situation is unique, because even the slightest of changes in circumstances can so fundamentally alter the halachic outcome, issuing a decision from within a code is a deeply flawed endeavor *from the perspective of halacha itself*.⁵⁷ For halacha by its very nature resists unity of expression: the law was issued by one shepherd, but its elaboration in human discourse and its instantiation in human reality are necessarily diverse. Faced, then, with the same fear that confronted those who codified—namely, the threat of the Torah's being fractured into multiple parts—these authorities stressed the shared *source* of the discourse, the Talmud, as well as the unique status of existent, diverse communal practices that constitute Torah.

4. SIMILARITIES TO THE COMMON LAW

In this section, I place the previous discussion in a broader jurisprudential context. My aim is to show that the conceptual approach shared by these three authorities who opposed codification shares a great deal with common law theory, thus allowing this discussion of halacha to resonate with a wider audience.

Any attempt to bridge the gap between halacha *qua* religious law and broader legal theory inevitably encounters difficulty, given that the legal authority of the former is divine in origin, and that of the latter, human.⁵⁸ The centrality of the Talmud, however, in constituting the "religious" authority of halacha mitigates this tension, for, as expressed in the well-known passage in tractate Bava Metzia quoted by the Maharshal, it is immersed in the realm of rational human discourse: divinely inspired or justified positions simply have no standing.

This aspect of the Talmud simplifies our task of placing the discussion at hand in a wider context of jurisprudence, for, as we have seen, fundamental to all three of our central figures was the call to issue halachic decisions based directly on the Talmud. For the Maharshal, the Maharshah, and Ben Betzalel, then, the Talmud may be depicted as having served as a kind of constitution in light of which subsequent halachic authorities must issue their judgments. If this is the case, it would seem ill-advised to claim that the legal approach shared by these thinkers resonates in the common law theory. Even scholars with diverse understandings of the common law agree on a rudimentary definition of it as a legal corpus

⁵⁶ Ibid., sec. 10, p. 98. Ben Betzalel noted, with a generous dose of caustic criticism, that the introduction to the *Mappa*, added by the publishers, makes allowances for the existence of various local customs: "Indeed the rabbi himself [the Rema] mentioned in the introduction only the customs of his area, not mentioning Ashkenaz at all. But in his introduction, the editor mentions Poland, Russia [and others]... writing, and perhaps every place where the language of Ashkenaz is spoken amongst Jews." But it is doubtful whether or not the matters pertain to [the customs] of Ashkenaz. For while it is true that the publisher did indeed mention Ashkenaz on his own on the first page [of the introduction, this is] because the purchaser's eyes always examine the beginning of the book—so that by [mentioning Ashkenaz] he can increase the number of purchases in all provinces" (ibid., sec. 9, p. 98).

⁵⁷ That the code is accessible to anyone, expert and layperson alike, exacerbates this problem, for only those authorities with proper training know to be wary of the subtle changes that can substantially alter the ruling.

⁵⁸ This is especially true, of course, for legal positivists, who demand that what is constitutive of law is its clear formulation by the sanctioned legal authority.

produced by judges through their articulated opinions.⁵⁹ These opinions may, of course, be based on interpretation of authoritative legal documents such as a constitution, legislation, or prior legal decisions; or they may be based on understandings of unarticulated legal tenets⁶⁰ or social propositions. But in all cases, the judgments themselves *constitute* new law—bound, for sure, to a particular time and place, but nonetheless more than a mere articulation, interpretation, or application of existent law. Does not the refrain to issue halacha on the basis of the Talmud imply that the judge is merely applying his interpretation of the Talmud to the present situation?

In order to understand why this is *not* the case—why, in fact, the call to issue judgment based on the Talmud casts the judge in a role akin to legislator and not merely adjudicator—we must recall that the Talmud was offered as an alternative to codified halacha (as well as to later, binding interpretations of the Talmud, though our focus is on the former). And what distinguishes, more than anything else, the Talmud from the codes is the indeterminate nature of the former as contrasted with the determinate nature of the latter. As we will recall, the Maharshal's return to the Talmud went hand in hand with his assertion that even if everything on a given legal issue were written in the Torah, "there would be an even greater demand for further ramifications—ramification upon ramification."⁶¹ The "demand" to return to the Talmud, therefore, was and remains an *invitation* to judicial freedom that points to the constitutive nature of judicial decisions in the continued evolution of halacha.

⁵⁹ Melvin Eisenberg states succinctly: "By the common law, I mean judge-made law, and by judge-made law, I mean law made by the courts taken as a whole." Melvin Eisenberg, "The Principles of Legal Reasoning in the Common Law," in Douglas E. Edlin, ed., *Common Law Theory* (New York: Cambridge University Press, 2007), p. 81. Compare the definitions of the common law in the same volume: in Douglas Edlin, introduction, pp. 1–2; Gerald Postema, "A *Similitus ad Similia*: Analogical Thinking in Law," p. 103; Larry Alexander and Emily Sherwin, "Judges as Rule Makers," p. 27; and John Gardner, "Some Types of Law," pp. 72–75. Compare also the introduction to Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988), pp. 1–3.

⁶⁰ Such tenets may be extremely broad and fundamental to the legal system, such as Hart's "rule of recognition" (H.L.A. Hart, *The Concept of Law*, 2nd ed. [New York: Oxford University Press, 1998], pp. 94–99, 100–110) or what Ronald Dworkin conceives of as the animating moral principles of a legal system: "an interpretation of any body or division of law... must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve" (Ronald Dworkin, "How Law Is Like Literature," in Dworkin, *A Matter of Principle* [Cambridge, Mass.: Harvard University Press, 1985], p. 160). See Dworkin's entire essay. See also his "Is There Really No Right Answer in Hard Cases?" in that same volume, pp. 119–145; and the foreword to that essay, "Hard Cases," in Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1980), pp. 81–130.

⁶¹ Luria, *Shlomo's Ocean*, introduction to Bava Kama.

Similarly, one of the "foundational ideas" of the common law, argues Melvin A. Eisenberg, is that legislation can never be entirely exhaustive; it necessarily beckons judicial decisions: "Our society has an enormous demand for legal rules that private actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited."⁶² The law is ever-expansive, and, according to both the common law and those who opposed the codification of halacha, it is the job of judges, through their decisions, to carry forward the work of the canonical law, adding to it.⁶³

⁶² Eisenberg, "Principles," p. 81. It is important to note that this argument is *not* coterminous with the doctrine of *stare decisis*. The privileged (or unprivileged) status of precedent regards the relationship between earlier and later courts, but that question is distinct from the matter of whether the judgment, when issued, augments the law. For a succinct, nuanced discussion of what is, and what is not, involved in the doctrine of *stare decisis* in the context of the common law, see Gardner, "Some Types of Law," p. 74.

⁶³ James Boyd White characterizes legal texts as containing a future-oriented, aspirational appeal to—and indeed a dependence upon—an interpretive audience for the establishment of their authority: "The legal speaker must always look outside himself for his source of authority... his every action rests upon a claimed interpretation of those sources of authority; and... these interpretations, of necessity, are compositions to which he asks that authority be given." James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1994), p. 96. White argues for a concept of judicial opinion as "translation" in a strong sense—that is, as a response to earlier texts within a new social context, in an effort to provide those texts with new and expanded meaning. This is reminiscent of Dworkin's model of judicial interpretation as a kind of chain novel in which each author must demonstrate a degree of loyalty to the previous authors and the work as a whole (see Dworkin, "How Law Is Like Literature," pp. 158–162). However, in contrast to Dworkin's emphasis on loyalty to the past (that is, the written chapters), White stresses the indeterminate, forward-looking, and aspirational aspect of the process: "Certain language is broken out of its original context, set aside, and given special authority, so that it can be given a new range of significances, in new and in principle unknowable contexts, for it is meant to reach not only what is but what might be" (Dworkin, "How Law Is Like Literature," p. 156; emphasis added).

White's view of the future orientation of legal texts—though true, I think, in all cases—is especially true vis-à-vis the Talmud. For the Talmud, as I have already pointed out, embraces its own indeterminacy in both style and content—making its appeal to and dependence upon its exegete one of its fundamental qualities. Thus, the appeal to the "authoritative" nature of the Talmud on the part of the opponents of codification in a sense points through and beyond the Talmud itself—to its interpreter.

Here I must stress a difference in attitude toward codified law between the opponents of the *Shulhan Aruch* and proponents of common law. The latter may view codified legislation and the common law as perfectly capable of co-existing in the same system; they do not (necessarily) oppose codification. But the opponents of the *Shulhan Aruch*, as we saw, were less tolerant—and sometimes wholly intolerant—of codification as such, for they deemed it antagonistic to the very nature of the halachic process, which for them the Talmud embodied.

If the judges are the legislative agents, the legislation itself consists of their reasoned opinions.⁶⁴ Here, too, we see a strong similarity between the common law and the philosophy of halacha embraced by those who opposed codification. Legal scholars of very diverse approaches emphasize the essential role of the judicial opinion in the context of the common law.⁶⁵ The judicial opinion assumes such a central role precisely because "the common law tradition seems committed to rejecting what we can call a command conception of authority, or authority by fiat, because its conception is reason-based... the common law exhibits what we will refer to as the pull of justification...."⁶⁶ The critics of halachic codes were no less wary of fiat; in fact, that is precisely what they criticized in suggesting that Karo—as Maimonides before him—wrote as if having received the law from on high. So central is the reasoning process to halacha that we saw the Maharal express the most extreme of stances when he said that it is preferable that the judge arrive at an erroneous, reasoned opinion on the basis of the Talmud than that he rule correctly solely on the basis of a code.⁶⁷

Beyond the *function* of the judicial opinion in the common law tradition, we can also add something regarding its *nature*. One of the salient characteristics of common law reasoning is the prevalent use of analogy. Analogy, of course, plays an important role in legal reasoning in general,

⁶⁴ Interesting to note, however, is the historical fact that in its earliest stages, the common law consisted solely of a record of oral decisions made by judges—with no written opinion accompanying the decision and explaining its underpinnings. See David Dyzenhaus and Michael Taggart, "Reasoned Decisions and Legal Theory," in Edlin, ed., *Common Law Theory*, p. 138. To be precise, I must stress that I am comparing the movement against codification with common law theory as it developed, and not in its original form according to this account. In fact, in today's common law regimes, it is the legal treatise, or hornbook, that offers a summary of the judicial decisions themselves, erasure that arose toward the end of the fourteenth century, some aimed at summarizing the Tosafot's halachic conclusions, others at organizing established halachic positions based on themes.)

⁶⁵ See, for example, Richard Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), p. 248 and, more generally, pp. 247–261; White, *Justice as Translation*, p. 174; and Dworkin, *A Matter of Principle*, pp. 158–159.

⁶⁶ Dyzenhaus and Taggart, "Reasoned Decisions and Legal Theory," p. 152.

⁶⁷ Maharal, *Pathos*, p. 59. One could, of course, argue that precisely the lack of a reasoned opinion (as was the case with the common law in its origins) provides the judge with greater flexibility and leeway. But in the end this is only an illusory freedom. Precisely on this point Maimonides' opponents criticized him for eliminating all references to the sources of his decisions in the *Mishneh Torah*, because the absence of a reasoned opinion, in the context of a judicial decision, becomes paramount to a decree; its authority emergent not from the persuasiveness of the position but merely from the status of the judge.

and a proper treatment of the subject is beyond the scope of this paper.⁶⁸ Nonetheless, we can note two qualities of analogy as a mode of argumentation⁶⁹ that explain its prevalence in the common law, both of which will reveal further affinity between the common law and the approach to halacha articulated by the opponents of codification. Firstly, however one understands the connection that analogical reasoning weaves between the case at hand, the past case to which it is compared, and the respective rules of each case,⁷⁰ the very appeal to analogy stems from each situation being viewed as irreducibly unique. Analogical reasoning "takes the general form of an inference from observed similarities among precedent and novel cases to the appropriateness of, or warrant for, deciding the novel case in the same way as its analogues."⁷¹ We can understand this emphasis on the "novelty" of the situation at hand in light of Eisenberg's description of one of the foundational underpinnings of the common law: "Formal logic can tell us that, and only that, the different treatment of identical cases is inconsistent. However, no two cases are identical, and

⁶⁸ Worthy of mention here is Richard Posner's incisive attack on the use of analogy in the legal world (in judicial opinions, in conversation among lawyers, and in legal training). See Posner, *Problems of Jurisprudence*, pp. 84–100. Advocating a pragmatic approach to the law, Posner argues that, properly speaking, it is impossible to construct an argument on the basis of analogy. Conversants employ analogy, he argues, at precisely those moments when they lack scientific knowledge of the subject matter. Despite his concession that human beings "have an innate capacity for recognizing patterns, an innate standard of similarity" (p. 91), Posner stresses that analogy "is not actually a method of reasoning" (p. 93; emphasis in original). No less worthy of attention is Gerald Postema's well-argued counterattack in "Analogical Thinking," pp. 102–133. Postema offers a rigorous philosophical defense of the use of analogy, enlisting support from the discipline of cognitive science, and he also explicates the ways in which analogy functions in legal discourse.

⁶⁹ "Strictly speaking, there is no such thing as *argument from analogy*, but only *reasoning with analogy*, or rather *analogical reasoning*. (Of course... while analogical reasoning is not a *form of argument*, it is a *mode of argumentation*.)" Postema, "Analogical Thinking," p. 121. Emphasis in original.

⁷⁰ Eisenberg, for example, understands analogical reasoning to lean heavily on the use of rules. Briefly stated, his argument is as follows: In case X, the judge's decision yields rule "r." Later, case Y arises, and the judge of this case notes similarities between it and case X, along with the inapplicability of rule r in its present form. He therefore refines rule r, making it into rule R, so that it will now apply to cases X and Y. See Eisenberg, "Principles," pp. 96–101; and Eisenberg, *Nature of the Common Law*, pp. 83–96. Note that this transformation from r to R may be an expansion or a narrowing of the rule, depending on whether the judge of case Y deems determinative the similarities or the differences between the cases. Either way, however, the judge—as Eisenberg understands it—appeals to a rule in his analogical reasoning. Postema, by contrast, thinks that analogical reasoning "does not necessarily involve applying a general rule to a specific case.... This is not to say that articulation of a rule plays no role in analogical thinking... but only that any such general rule will be a *product* of the identified analogy, not its precondition" (Postema, "Analogical Thinking," p. 106; emphasis added).

⁷¹ Postema, "Analogical Thinking," p. 106.

formal logic cannot determine what differences between cases justify different results."⁷² These elucidations of the common law's emphasis on the uniqueness of each case echo Ben Betzalel's statement that "with even a minor change the entire [legal] matter can shift"⁷³ in his admonition of the use of codes.

We arrive at the second relevant quality of analogy by returning to Eisenberg's recently quoted argument. Because formal logic fails to explain what differences between two cases are relevant, we must appeal to what he calls "social propositions."⁷⁴ As he argues:

For purposes of legal reasoning [in the common law], two precedents are consistent if they reach the same results on the same relevant facts.... What facts are relevant turns on social propositions. For example, as a matter of social propositions—and only as a matter of social propositions—it is often relevant in determining liability for causing an accident that the defendant was intoxicated, but seldom if ever relevant that the defendant was wearing a red hat.⁷⁵

These social propositions are not something that the judge invents or constructs on his own (though, to be sure, judicial decisions can and do play a significant role in a society's ongoing conversations that elucidate its values). Rather, he takes the lead from the society in which he operates. As Gerald Postema explains, the common law's practical, analogical reasoning is public in nature, "anchoring deliberation and justification of decisions and actions to past decisions and actions of the community."⁷⁶ He proceeds to describe the "public and collaborative nature of analogical reasoning in law.... [Judges] proceed as members of a group, participants in a social practice: and even when the reasoning is carried on, as it were, in their own heads, it is an interior vision of an essentially exterior, interpersonal, public enterprise."⁷⁷ Put otherwise, the judges, in their decision-making process itself, give expression to—but also glean

⁷² Eisenberg, "Principles," p. 84. Emphasis in original.

⁷³ Ben Betzalel, *Argument*, sec. 7, p. 97.

⁷⁴ Eisenberg, "Principles," pp. 82–84. See also Eisenberg, *Nature of the Common Law*, pp. 14–42.

⁷⁵ Eisenberg, "Principles," p. 84.

⁷⁶ Postema, "Analogical Thinking," p. 125.

⁷⁷ *Ibid.* In the next sentence, Postema continues: "They deliberate, as Hart put it, not for their own part only, but as members of a larger whole," citing Hart, *Concept of Law*, p. 116. Postema's claim is solid, although I think that enlisting support from Hart for this passage is problematic, for there the author is making a more general statement about the judicial process as such, with no reference to the tool of analogical reasoning or to the context of the common law.

from and participate in—what is (already) happening outside of their chambers, in the communal context. The community, as it were, is primary, and their opinions reflect expressions of how communal practice may, and belief foster a certain vision of the case at hand. In this sense, it is difficult not to hear, in this, an echo of Ben Betzalel's critique of the Rema. Admonishing the Rema's attempt to establish custom through codification, Ben Betzalel countered that a halachic authority, when he arrives at a new community, must first observe local custom and defer to it, for communal practice itself constitutes Torah. This, as we saw, was the reason that Ben Betzalel cited the Jerusalem Talmud's encouragement of determining halacha not through reasoned discourse, but by observing the existent practice of the children of Israel.

5. CONCLUSION

As we have seen, the Maharshah, the Maharah, and Ben Betzalel argued for a concept of halacha that emphasized three central claims: the exclusive authority of the Talmud, the emphasis on the irreducible uniqueness of each case, and the constitutive power of communal practice. Examining these three claims in an historical perspective reveals an ironic twist of fate: two of the three have actually been employed by the halachic community, broadly conceived, to support the bestowal of canonical status upon the *Shulhan Aruch*. That is, they have been used to undermine the position of our thinkers against codification. Let us recall that the appeal of the Talmud for those opposing codification stemmed from its multi-vocal, indeterminate nature. Yet it is precisely this characteristic that allows post-talmudic authorities to offer a variety of readings of the text, including the interpretation that indeterminacy is circumstantial and not inherent to the Talmud and, by extension, to the development of halacha. This, of course, is the claim that both Maimonides and Karo made in justifying their codification efforts, and they had no trouble enlisting narratives from within the Talmud to support their claims (just as the Maharshah, the Maharah, and Ben Betzalel easily found talmudic support for their positions).

Here we arrive at the second irony: determining which of these competing readings of the Talmud became authoritative takes place through communal practice—that same communal practice exalted by the opponents of codification. This aspect of the halachic system is what Avi Sagi terms "the principle of acceptance,"⁷⁸ and it reflects precisely what we

⁷⁸ Avi Sagi, "The Problem of the Halachic Determination and the Halachic Truth," *Dinei Yisrael* 15 (1990), pp. 7–38 [Hebrew].

saw that Ben Betzalel claimed repeatedly: that the halachic system grants its adherents great power in establishing its norms. So it is ironic that in this particular case, the halachic community has opted for an interpretation of halacha that establishes the codes as authoritative (even if Ben Betzalel was correct in his assessment that the codes themselves represent a challenge to communal authority).⁷⁹

These ironies notwithstanding, the main claim of the Maharshal regarding halacha—one we heard echoed clearly in the justification for common law—cannot be denied: namely, that no code of legislation can ever arrive at a level of detail sufficient to end the ongoing legal conversation that consists of the judge's attempt to meaningfully articulate how to apply the authoritative values of the law to ever-changing situations that demand address.

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⁷⁹ It is worth adding that this bestowal of canonical status on the *Shulhan Aruch* (and, to a lesser extent, the *Mishneh Torah*) has one (significant) qualification: around each of these texts a formidable array of commentaries and supercommentaries has emerged, some of which work against the authors' positions. In the case of the *Mishneh Torah*, for example, many commentaries cite the talmudic sources for Maimonides' position, thus achieving exactly the opposite of his explicit aim as outlined in the introduction—namely, to make superfluous reference to the Talmud in an effort to determine the halacha. Or, to take an example from the literature surrounding the *Shulhan Aruch*, R. Yehoshua Falk—a student of both the Rema and the Maharshal—accepted the *Beit Yosef* but was an outspoken opponent of issuing halacha directly from the *Shulhan Aruch*. That said, not only did he write a commentary on the *Darkei Moshe* (the Rema's commentary on the *Arba'a Turim*, parallel to the *Beit Yosef*), but he also authored the *Perisha* and *Derisha* commentaries on the *Shulhan Aruch*, in an effort to provide depth and context to Karo's halachic "bottom-line" positions in the *Shulhan Aruch*—and these commentaries appear alongside the text of the *Shulhan Aruch* in most editions. The mass of commentaries on the codes, therefore, has worked simultaneously in two directions: through the mere act of commenting on the codes they express and further establish the code's central status; and yet at the same time commentaries add complexity, nuance, and multi-vocality that the author wished to avoid in writing an authoritative code. Viewed thus, the granting of canonical status to the *Shulhan Aruch*, while incontrovertible, is not unequivocal, and it has been done in a way that transforms the work from a simple codification of the halacha as Karo intended.