IN THIS ISSUE
Goddess Feminism, Samuel H. Dresner
The American Jewish Community in Transition, Simon Greenberg
American Civil Judaism and Israeli Civil Religion, Joseph P. Schultz
Secular Holidays in Modern Israel, Martin Laskin

LC 73-640901
ISBN 0010-6542
ARTICLES
Goddess Feminism
Samuel H. Dresner
Feminism, Judaism and God the Mother
Paula Reimers
The American Jewish Community in Transition
Simon Greenberg, 71
American Civil Judaism and Israeli Civil Religion
Joseph P. Schultz
Secular Holidays in Modern Israel
Martin Laskin
Revelation as Authority
Gordon M. Freeman
Constructions of Religious Symbols and Professional Roles
by Male and Female North American Rabbis
Carie Carter, Michael Merozbaum and Michael J. Strube

REVIEW ESSAY
Precedent, Rules and Ethics in Halakhic Jurisprudence
Aaron Kirschenbaum's Equity in Jewish Law
Daniel H. Gordis

OF THE MAKING OF BOOKS...
Bradley Stavits Arson
Daughters of the King, by Susan Grossman and Rivka Haut
The Rosendorf Quartet, by Nathan Shaham
Precedent, Rules and Ethics in Halakhic Jurisprudence

(Aaron Kirschenbaum’s Equity in Jewish Law)

Daniel H. Gordis

The past several decades of American Jewish life have produced a seeming explosion of English language books on the subject of halakhah. Many of these volumes, such as Isaac Klein’s Guide to Jewish Religious Practice, and J. David Bleich’s series on Contemporary Halakhic Problems assume a reader committed to the authority of Jewish law, and are designed to present concrete halakhic rulings on a variety of subjects. Other works have dealt with subjects as disparate as the role of halakhah in each of the various American denominations and the use of halakhic history as a tool of sociological analysis.1 But in academic circles, no subject of halakhic discourse has been taken more seriously than the attempt to define with some precision the very nature of Jewish jurisprudence.

This academic conversation began with several volumes which sought to describe the basic institutions of Jewish law, the various periods of their development and the fundamental commitments of the halakhic system. A few of these works have already achieved the status of classics. Most important, of course, is Menachem Elon’s Ha-Mishpat Ha-Ivri,2 but Marcus Horowitz’ The Spirit of Jewish Law3 has also reached quasi-canonical status in some circles. In the past decade or so, as the Jewish community has been

1 The classic example is Jacob Katz’ Goy shel Shabbat, now available in translation as The “Shabbes Goy”: A Study in Halakhic Flexibility (Philadelphia: Jewish Publication Society, 1989).
rocked by increasing divisiveness in general and by specific agonizing halakhic questions on matters such as the role of women, "who is a Jew" and the halakhic status of homosexuality, a new breed of work has begun to emerge. Scholars are beginning to ask more pointed questions about halakhic jurisprudence, contributing either implicitly or explicitly to the raging debates in the Jewish community. Eliezer Berkovitz, for example, has assailed what he considers Orthodoxy's refusal to preserve the fluidity of the halakhic process, and Joel Roth has written a philosophically based conceptualization of the task and responsibilities of the poseik. And now, Aaron Kirschenbaum, an Orthodox Israeli scholar, has contributed two impressive new volumes to this ongoing deliberation.

Both of Kirschenbaum's new volumes are entitled Equity in Jewish Law, but each deals with a different dimension of that broad topic. The first volume (the books are independent, and need not be read in any particular order) addresses "Halakhic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law," the second is subtitled "Beyond Equity: Halakhic Aspirationism in Jewish Civil Law." Both volumes are testimony to Kirschenbaum's erudition. Kirschenbaum teaches in the Faculty of Law at Tel Aviv University, and serves as editor-in-chief of Dinei Israel, perhaps Israel's most important law review. His style is eminently readable. Throughout the text and copious footnotes both volumes reveal the methodological clarity and consistent reference to prooftexts that one would expect from a scholar of this background. Although the scholarly community will benefit most from Kirschenbaum's collected sources and his analysis of those texts, much of this material will be navigable for the sophisticated layperson as well; both volumes begin with several pages of bibliographic references to (mostly) secondary sources on the subject of equity in Jewish law. These sources, which cross denominational boundaries, will prove particularly helpful for those seeking a basic introduction to some of the classic papers on the subject and the variety of issues they commonly raise.

Kirschenbaum's goal throughout the two volumes is to argue that Jewish law, for all its attention to the authority of rules and precedent, is deeply concerned with equity, fairness and morality. His argument goes beyond the midrashic claim that since all of halakhah is revealed by God, the faithful application of halakhic standards will inevitably result in moral results. Though Kirschenbaum does refer to this position in an apparently approving manner, he understands full well that there is much more to the matter. After

all, dozens of talmudic sources (as well as hundreds of discussions of those very texts in the *rishonim* and *posekim*) address concepts such as *hesed*, *ifnim mi-shurat ha-din* and *dinei shomayim*, implicitly suggesting that not every halakhic outcome is ethically satisfactory. Kirschenbaum essentially wants to argue that the halakhic system itself appreciates this limitation, and has built into its procedures a variety of mechanisms which afford the *poseik* some leeway in making judicial determinations.

In both volumes, Kirschenbaum uses “legal formalism” as the image of adjudication which is not concerned with equity or fairness, and he amasses an impressive number of sources to suggest that halakhah assists the *poseik* in avoiding the rigidity of formalism. But though Kirschenbaum’s volumes are probably the finest collection of primary source material available on the issue of equity in Jewish law, his analysis of formalism, *per se*, would have been improved significantly had he further refined the very conception of formalism which pervades the two volumes. Even *Formalism and Flexibility*, the volume which purports to address this issue more directly, never fully defines what the author means by formalism. He states at the outset (p. 4) that:

in its passion for uniformity and stability, the law enlists the aid of formalism. Its indifference to persons may produce heartlessness; its impartiality, injustice; its rigid consistency, absurdity. How inadequate may the predictable rule appear!

But this “definition” confuses formalism with its outcomes. Jurisprudential formalism is more than “legalism” (cf. p. 9) or “inordinate insistence upon [one’s] legal rights” (cf. p. 21). It is, in fact, a philosophic claim about how the judge (or, in halakhic instances the *poseik*) ought to use precedent in arriving at a new decision for a case currently under consideration.

Ultimately, formalism claims that the job of the *poseik* is to address new legal questions through the application of the model of a legal syllogism. A standard and non-controversial halakhic syllogism might thus claim:

[Major Premise]—an animal which does not both have split hoofs and chew its cud is not kosher
[Minor Premise]—a babirusa is an animal which (despite appearances to the contrary) does not chew its cud
[Conclusion]—a babirusa is not a kosher animal.

Obviously, the central role that the syllogistic model plays in legal formalism implies a degree of rigidity in the way that judges in such a system arrive at their holdings, and it suggests that conformity to (relatively straightforward) rules is the essential component of what a judge does.

Though the kashrut-status of a new variety of pig hardly raises serious ethical concerns, even casual observers of the legal process are aware that such syllogistic reasoning, at other times, might yield problematic results. The talmudic text clearly shared this concern. Thus, in the famous passage about Rabbah bar bar Ḥana, whose porters broke his winebarrel, that at times a judge has the right to insist upon other standards (*Bava Metzi‘a* 83a). The
application of a syllogism in this case would have suggested that Rabbah bar bar Ḥanah had no obligation to compensate the porters, but Rav insists on a higher plane of conduct and requires that such compensation be made. Judges and poqkim, according to both this text and the many others which Kirschenbaum adduces, need not always follow the results of the syllogism. Halakhic standards such as ifnīm mi-shurat ha-din allow the halakhic judge to side-step the results of the syllogism.

Obviously, any suggestion that a judge can side-step the conclusions of formalist analysis will be troubling to someone who conceives of a legal system as a series of laws, and who sees the halakhic system as a series of God's laws. Therefore, Kirschenbaum time and again insists upon reminding the reader that the sources he has cited which mitigate against formalism must be read in light of the rest of the halakhic tradition. A concluding passage (pp. 281–282) from Formalism and Flexibility merits lengthy quotation:

Any study of equity is fraught with danger. Dwelling upon prescriptions against formalism, focusing on remedies outside the statute, and tracing solutions not in accordance with the establishment [sic] rules, such a study is inevitably one-sided. The emphasis upon deviation, exception, ad hoc jurisprudence, tends to give a distorted impression of the Halakhah and to reduce the judicial process to a game of improvisation.

Nothing could be further from the truth than a picture of equity as solving all legal problems and of the law as embodying soulless rigor. . . . Shall we say that the Halakhah has done away with the adherence to external forms? Of course not. . . . [I]logical consistency and formal rationality remain part and parcel of Jewish legal thinking.

Indeed, the balance between formalism and flexibility, rules and discretion is so delicate that moral excellence is the prime requirement of the judicial magistrate.

Kirschenbaum recognizes the potentially unsettling conclusions which could be derived from his analysis, and he ends this volume with a plea that his argument not be understood out of context. But this very plea hints at one of the most profound weaknesses of Kirschenbaum's work. For Kirschenbaum's fear of a halakhah unfettered by rules and standards leads him not only to conclude his book with the passage cited above, it completely precludes his addressing the more interesting question of statutes which are, by their very nature, either ethically questionable or even blatantly immoral. These two volumes, in their entirety, address instances in which normally moral rules and statutes might have disturbing consequences. But nowhere does Kirschenbaum raise the issue of a potential conflict between morality and a statute itself. What would Kirschenbaum have us do if the very halakhah under consideration—and not just its implications in a handful of cases—were immoral? In almost six hundred pages on "equity in Jewish law," we neither confront nor receive an answer to that question.

Kirschenbaum's insistence upon avoiding the issue of immoral halakhot should be surprising to neither careful readers of his title nor to seasoned
observers of the community from which he hails. Above the English title on the cover of both volumes, we find the phrase, in Hebrew letters, *lifnim mi-*
*shurat ha-din.* This is anything but false advertising. In fact, it is a telling
description of what these books are about. For *lifnim mi-shurat ha-din,* as it
is used in talmudic literature, addresses instances in which an individual might
wish (or possibly be commanded?) to act even more generously than the
halakhah requires. But the crucial point is that *lifnim mi-shurat ha-din* is
especially an extra-halakhic criterion; it may not be relevant to an analysis of
the role of ethics in Jewish law, and it certainly does not have the capacity to
permit action in contravention of the law. Thus, though Rav could require
Rabbah bar bar Ḥana to act more generously than the law required, he could
never have commanded him actually to violate a halakhah. There is an
obvious and profound difference between supererogation and civil disobedience,
which Kirschenbaum never acknowledges.

Failing to acknowledge this distinction is a common characteristic of the
Orthodox scholarly community. Shubert Spero, whose *Morality, Halakhah
and the Jewish Tradition* is part of the same Library of Jewish Law and Ethics
series as Kirschenbaum’s two new books, also never raises the issue. In Chap-
ter Six of his book, devoted to “Morality and Halakhah,” Spero addresses such
topics as *lifnim mi-shurat ha-din,* the tension between *din* and *rahamim*
and supererogation. But never does the notion of an immoral halakhah surface.
Similarly, in his now classic paper “Does Jewish Tradition Recognize an Ethnic
Independent of Halakhah?” Aharon Lichtenstein addresses that tantalizing
and powerful question only through an examination of whether or not *lifnim
mi-shurat ha-din* is legally actionable. In fact, he fails to resolve even that more
limited question, and concludes his paper with the now famous passage, “for
those who prefer definitive answers, let me conclude by saying: Does the tradition
recognize an ethic independent of Halakhah? You define your terms and
take your choice.” Even David Weiss Halivni, in his essay, “Can a Jewish Law
be Immoral?” ultimately cannot make a definitive claim on this matter. For
these scholars, the overwhelmingly problematic nature of a claim that revealed
law could possibly be immoral effectively precludes anything beyond a token
discussion of this profound and crucially relevant issue.

---

7 There are a number of sources which suggest that *lifnim mi-shurat ha-din* is, in fact,
actionable law. Cf., *inter alia,* the view of Rabbi Eleazar of Modī‘im in *Mekhilta Tītev,

8 This sugya and its implications have been discussed widely in secondary literature. Cf.,
*inter alia,* Moshe Silberg’s *Talmudic Law and the Jewish State,* trans. by B.Z. Bolker (New

9 Shubert Spero, *Morality, Halakhah and the Jewish Tradition* (New York: Ktav

10 Aharon Lichtenstein, “Does Jewish Tradition Recognize an Ethnic Independent of
Halakhah?” in Menachem M. Kellner, ed., *Contemporary Jewish Ethics* (New York: Sanhedrin

11 David W. Halivni, “Can a Religious Law Be Immoral?,” in Arthur A. Chiel, ed., *Perspec-
One would have imagined that in the Conservative movement, in which halakhic seriousness has been coupled with an openness to biblical criticism and historical analysis of text, such theological questions would be much less threatening and more progress would have been made in the analysis of the issues which Kirschenbaum, Spero and Lichtenstein all assiduously avoid. Sadly, however, that is simply not the case. The ideologues who helped to shape the past generation of Conservative Judaism struggled valiantly to articulate some relatively well defined mechanism for addressing the occasional conflicts between morality and Jewish law. Seymour Siegel12 and Robert Gordis,13 for example, made powerful claims of this nature. In the final analysis, however, these men were accused—with some justification—of citing only well-known examples of talmudic rabbis reacting to the call of morality, without having philosophically defined the parameters which did or should constrain such judicial activism. Instances such as prookhal, the evolving law of the “stubborn and rebellious son,” Rabbinic limitations on capital punishment and altered testimony requirements in the case of the agunah all supported their contention. But the incomplete resolution of the agunah’s plight and the continued institution of mamzerut despite the poignant cry of Daniel Hayata14 undermined their wider claims. As a result, Emmanuel Rackman responded to the work of the Conservative thinkers by noting that “what begs for more research and analysis is precisely what the posik does when he walks the tight rope between the poles [of dynamic change and adherence to precedent] and arrives at a position.”15 Marvin Fox made a similar observation, claiming that “what we miss . . . is . . . clear analysis of the way in which the forces of the tradition and the forces of change interact.”16

The call for more systematic thinking about the work of the posik has been directly addressed by Joel Roth’s masterful book, The Halakhic Process: A Systemic Analysis.17 Roth’s unprecedented attempt to describe the work of the posik, coupled with his vast erudition, has taken the Conservative discussion of Jewish law a major step further. Nonetheless, because he is a committed jurisprudential positivist (his book is heavily dependent upon the thinking of Salmond and Kelsen, two classic positivists), the philosophy of halakhic adjudication which pervades both his book and his teshuvot can ultimately provide only a very limited response to the question of the relationship between halakhah and morality. Positivists, after all, insist that the existence of a law is a matter of social fact. They claim that as long as a law

14 Cf. Midrash Kohellet Rabbah, IV:1 § 1.
17 Cf. note above.
entered the legal system through legitimate means it is legitimate, and no moral criteria can act to undermine it, no matter how immoral or reprehensible the law might be.\textsuperscript{18} Even H.L.A. Hart and Joseph Raz,\textsuperscript{19} positivists more recent than those Roth cites, agree with this claim. And in Roth’s endorsement of this position we begin to see the basic affinities between his work and that of Kirschenbaum. Roth, through a careful analysis of a different set of halakhic maxims and judicial guidelines, has also pointed to mechanisms within the halakhic system that afford the poseik a good deal of flexibility, but again, as is true with Kirschenbaum, he does not address head-on the question of whether moral criteria have the capacity to overrule a law in the first place. He is at least consistent, for this position is entirely in consonance with the jurisprudential positivism that he endorses in the first chapter of his book.

But jurisprudential positivism, certainly not the only philosophic conception of law, is seriously suspect, particularly as a philosophy of a \textit{religious} legal system.\textsuperscript{20} It seems difficult, though not unimaginable, to claim that the halakhic system demands that human beings suspend their moral sensibilities and treat positive Jewish law as simple “social fact.” That claim, ethically troublesome though it might be, makes a certain amount of sense for those who adhere to the theological position that the entire Torah is the literal word of God. But for those Conservative thinkers not committed to that position, the implications of jurisprudential positivism seem tremendously difficult. If one acknowledges (at least) the possibility that human beings had a part in the creation of the document which lies at the core of the halakhic system, why should modern day human moral sensitivities be suddenly irrelevant? Is that what a moral God would want?

Kirschenbaum does not have to answer this question, for he would reject outright the results of modern critical biblical scholarship. But Roth, who accepts the conclusions of these scholars, and the documentary hypothesis which their work has suggested,\textsuperscript{21} is on less stable ground. We must ask, therefore, why someone committed to the premise that the Torah may reflect God’s will as mediated through human beings, would nonetheless insist that


\textsuperscript{21} Cf., eg, \textit{The Halakhic Process}, pp. 9-10. Roth is not unaware of this issue, and seeks to redefine the halakhic \textit{Grundnorm} with this matter in mind. But the redefinition is problematic, since it seems to intentionally deny facts which we claim to know. Ultimately, Roth is forced into this corner by his desire to have his halakhic theory conform to the structure dictated by Kelsen’s positivism.
morality cannot supplant any of the Torah’s laws. The answer is that Roth—
to his great credit—is concerned with what he calls “halakhic seriousness.”22
By “halakhic seriousness” Roth means that if moral claims can be accommodated in halakhah by working within the “rules,” fine. But ultimately, he suggests, “halakhic seriousness” means that there is no escape from the syllogistic model.23 If the rules prevent such accommodation, the authority of the rules must, by definition, “trump” morality. Thus, he was able to advocate the ordination of women because he felt that, within the rules of the system, one could create a means by which women could fulfill all the ritual obligations they would no doubt have to assume.24 However, had he not been successful in locating and defending that “loophole,” it is obvious from Roth’s description of his jurisprudential philosophy that he would have had no choice but to say that the ordination of women could not be sanctioned by a halakhic community. For many halakhic Conservative Jews, that is a most troubling claim. Many others find Roth’s more recent statement that there can be no halakhic justification for anything other than abstinence on the part of a constitutional homosexual equally troubling. But again, we must appreciate that Roth’s rulings on these matters stem not from any moral insensitivity, but from his attempt to consistently follow the philosophy which he feels “halakhic seriousness” mandates. The question is whether he is correct that “halakhic seriousness” demands the philosophic approach he has adopted.

Were jurisprudential positivism the only defensible extant philosophy of law, those Conservative Jews who consider themselves “halakhically serious” might have no alternative other than the one advocated by Kirschenbaum, Spero, Lichtenstein and Roth. After all, Roth is absolutely correct in suggesting that merely pointing to the development of the legal status of the ben sofer u-morelo25 or the Rabbinic exegesis of ayin talas ayin26 will not suffice. At all costs, he seems determined not to fall into the trap into which some observers believe the likes of Seymour Siegel and Robert Gordis fell. He understands that some greater degree of systematization is necessary for a serious theory of halakhah; for that he is to be commended. What Roth does

22 Cf., eg., his comment in Francine Klagsbrun, “3080 Broadway,” in Moment Magazine, Vol. 12, No. 4 (June, 1987), p. 14, in which he states that “[e]thics is not the issue, nor is egalitarianism. Being halakhically serious is.” Cf. the text that follows for a sense of what Roth means by this comment. It is clear that he is not discounting the importance of morality, per se.

23 Obviously, Roth is not trying to suggest that the process of halakhic adjudication is nearly as simple as the example of the syllogism provided above. In fact, what is important about his analysis in The Halakhic Process is the success with which he shows the degree to which the halakhic system takes seriously the personal insights and subjective considerations of the pa’sek. Nonetheless, if we include all the subjectivity-introducing elements which Roth cites into the formula, we effectively return to nothing more than a complicated syllogism. Nothing about Roth’s analysis allows judges to side-step “black letter law.” In that sense, the syllogism reigns supreme even in his more sophisticated account.


25 Cf., eg., Deuteronomy 20:18–21, Mishnah Sanhedrin 8:1, Sanhedrin 7:1a ff.

not appreciate, however, is that there exist other models of "legal seriousness" which do not require the formalistic tendencies of the legal positivism to which he has attached himself.

Space does not permit a full discussion of any of these competing theories. But alternatives to positivism abound. One could refer, for example, to Lon Fuller’s discussion of the eight criteria which a legal system must exhibit to be legitimate,27 which include the requirements of "knowability" and "performability."28 Robert Cover’s work on the role of narrative in jurisprudence29 and Michael Moore’s conception of judging as the discovery of "moral realities"30 provide other possible avenues for avoiding positivism. But perhaps more than any other scholar it is Ronald Dworkin—a faculty member at Oxford and New York University—who has articulated two primary components of a theory of judging which students of halakhah might do well to begin studying in earnest. As we will see, the potential value of Ronald Dworkin’s work for halakhic jurisprudence is that it allows the judge to take precedent seriously, without having to resort to the syllogistic model which lies at the root of legal formalism.

Seeking to identify the role that judges ought to ascribe to precedent, Dworkin is committed to finding a means by which judges can incorporate

28 This language is not Fuller’s. It is taken from Margaret Jane Radin’s “Reconsidering the Rule of Law,” Boston University Law Review, Vol. 69, No. 4 (July, 1989), p. 787. Given the fact that Fuller considers his criteria a necessary moral component of law, it would be interesting to reflect on whether the requirement which Radin calls “performability” and to which Fuller refers as “compatibility” would suggest that Roth’s insistence upon abstinence for the constitutional homosexual is morally illegitimate. Roth, of course, denies that, and within a positivist framework, such a denial might be defensible. Whether or not Fuller’s conception of law would change that is not clear; but the mere question would make for productive and useful conversation.
Cover, though Jewish and extraordinarily conversant with rabbinic texts, does not seem to have done much work on the nature of Jewish jurisprudence. His “Obligation: A Jewish Jurisprudence of the Social Order” in The Journal of Law and Religion (Vol. 5, No. 1, 1987) is a beginning, but it does not explore any material not already discussed by Moshe Silberg’s “Law and Morals in Jewish Jurisprudence” in The Harvard Law Review (1961). He does not appear to have discussed the theoretical role of narrative in halakhah at all, though he had he not died unexpectedly and at a young age he might well have done so. I have sought to begin the application of Cover’s work on narrative to halakhah in Chapter Six of a forthcoming dissertation on the legal philosophy underlying the responsa of Rabbi David Zevi Hoffman.
30 Michael Moore, “A Natural Law Theory of Interpretation” in Southern California Law Review, Vol. 58 (1985). Particularly in a religious legal system predicated on some form of revelation, it is doubtful that Moore’s theory would be entirely applicable. Nonetheless, it represents a thoughtful alternative to jurisprudential positivism that ought to be seriously considered, if for no other reasons than the productive questions that it raises.
moral principle (as opposed to precedent alone) into their work. Dworkin thus makes clear that his theory is distinctly non-positivist. He analogizes the judge to an author writing a chapter in a chain-novel, in which previous chapters were each written by other authors. Just as the responsibility of the author is to write a chapter that “fits” into the context created by the previous material, so too, the judge must seek to issue rulings that show the previous material in their best light.

Dworkin thus assumes a view of interpretation which sees the reading of a legal tradition as an “attempt to show which way of reading ... the text reveals it as the best work of art.” The judge is interested in the meaning of the work as a whole, not in hermeneutic arguments about specific passages. Dworkin describes the process in this way:

Deciding hard cases at law is rather like this strange literary exercise. The similarity is most evident when judges consider and decide common law cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principle of law “underlie” the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not only to discover what these judges have said, or their state of mind when they said it, but to teach an opinion about what these judges have collectively done, in the way that each of our novelists forms an opinion about the collective novel so far written. Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies or procedural and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner

---

31 Dworkin is actually not interested so much in moral principle as he is in political principle. Cf., inter alia, his discussion of rights as “trumps” in Taking Rights Seriously (Cambridge: Harvard University Press, 1978). But the point that Dworkin is ultimately making centers around the claim that the act of judging (or, in halakhic terms, serving as a posin) should concern itself with issues beyond precedent and policy, and should search for the deeper commitments of the legal system. He believes that those deeper commitments, in American law, are rights. One could make a sound argument, I believe, that in Jewish law those deeper commitments center around a sense of right and wrong, or morality.


33 Ibid., p. 159.

34 In jurisprudential circles, “hard cases” are those about which there exists no clear black letter law. In other words, the judge cannot simply “look the answer up,” but must either interpret the precedent or legislate in order to issue some ruling. Positivists argue that since the only criterion for law is that it be legislated according to the means provided by the legal system at hand, if no precedent exists, then the judge is completely unfettered, and can rule as she wishes. Moore and Dworkin, who suggest that other factors govern the legitimacy of law, believe that the judge is more constrained even when there is no clear precedent.

It is true that Dworkin limits the following description to hard cases. But his definition of “hard cases” is much more expansive than that of Hart. As a result, this description will apply even to cases in which readily apparent and relevant precedent exists.
in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on that day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgement, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

Dworkin notes that reasonable minds could differ as to whether his view of interpretation (portraying the prior material in the best possible light) is an appropriate one, but he remains committed to this position throughout his corpus on the chain-novel. He makes several distinct points about this issue of interpretation. First, he notes that the goal of the type of interpretation he advocates is unrelated to the author's original intention. Original intention on the part of the author, Dworkin insists, does not necessarily have bearing on seeing the material as the best possible work of art.\textsuperscript{35} Interpretation, he argues, is inevitable, and the positivist notion of the rather mechanical application of rules to cases in the core is both unrealistic and undesirable. In this latter respect, of course, Dworkin's model conforms nicely to that of some rather well-known sugyot, in which the Amoraim seem to have had no concern for the "original intent" of the verses involved.\textsuperscript{36}

Second, and perhaps more important for our purposes, Dworkin asserts that the process of interpretation in legal matters is ultimately a matter of principle. While in literature, the notion of "showing material in its best light" might make some aesthetic sense, that notion is all but meaningless in jurisprudential discussions. Therefore, Dworkin offers what he believes is the parallel notion for legalists:\textsuperscript{37}

Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these. . . . So 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.

\textsuperscript{35} In a fascinating digression, Dworkin cites John Fowles on the process of his having written \textit{The French Lieutenant's Woman}, in which Fowles notes that his own intentions about that particular piece of literature changed as the characters seemed to take on a life of their own. Original intent, Dworkin argues, may therefore not even exist. For a fascinating discussion of the challenges of adjudicating in the obvious absence of any original intent, cf. \textit{Ulman v. Eastern Airlines}, 581 F.Supp. 821 (1983) and 742 F.2d 1081 (1984).

\textsuperscript{36} I am consciously avoiding here the claim of some biblical scholars who argue that the pedot of ayin tahat ayin is mason. That argument is complicated, and not immediately germane to this discussion. Even those biblical scholars would have to readily admit that the Talmud is filled with rabbinic midrash which is not concerned with the "original intent" of the verse.

\textsuperscript{37} Dworkin, \textit{A Matter of Principle}, p. 160.
In Jewish law, the claim might well be that “law is a moral enterprise,” and that good halakhic adjudication involves showing the value of the halakhic tradition by demonstrating the best moral commitments it can be taken to serve. That claim certainly makes implicit sense given the centrality of the traditional claim that the system was somehow revealed by a just and moral God.

A crucial point here, and one which Dworkin does not articulate as specifically as one might have expected that he would, is that his definition of the judicial enterprise radically alters the classic distinction between hard and easy cases. Whereas for H.L.A. Hart and other positivists, easy cases are those for which readily applicable precedent exists, for Dworkin easy cases are those in which the judge’s theory of “fit” as described above produces one, unique interpretation. For Hart, hard cases are those in which the judge cannot rely on precedent, and therefore, to Hart’s mind, must legislate herself. But for Dworkin, hard cases are those in which more than one possible interpretation of the precedent achieves a reasonable degree of “fit.” Thus, the number of cases described as “hard” in Dworkin’s system has the potential to increase exponentially. And when that happens, Dworkin believes, the judge decides between the various competing interpretations by employing “substantive political theory” (or for the halakhic system, substantive moral theory). The process of adjudication, therefore, is highly political, controversial and inexact. Positivists, for whom demonstrability is key, obviously find Dworkin unacceptable for this as well as a host of other reasons. Dworkin, for whom law is fundamentally about a community’s underlying political and moral commitments, sees the lack of demonstrability as necessary. Rather matter-of-factly, he notes:

Any judge’s opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share . . . If we insist on a high order of neutrality in our description of legal interpretation, therefore, we cannot make our description of the nature of legal interpretation much more concrete than I have.

When Hart defends his thesis against his critics, he describes the position he obviously considers the inevitable, but unacceptable, implication of Dworkin’s theory. Since Kirschenbaum’s and Roth’s positions are so akin to Hart’s, it is worth quoting Hart at length, to show precisely the degree to which he and Dworkin disagree:

Clearly, if the demonstration of the errors of formalism is to show the utilitarian distinction to be wrong, the point must be drastically restated. The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought

---

38 He alludes to this issue in A Matter of Principle, p. 161, but does not pursue it.
39 Ibid., p. 161.
40 Ibid., p. 162.
to be, but that the aims, the social policies and purpose to which judges should appear if their decisions are to be rational, are themselves to be considered as part of the law in some . . . sense of “law” which is held to be more illuminating than that used by the Utilitarians. This restatement of the point would have the following consequence: instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judge’s choice are in a sense there for them to discover; the judges are only “drawing out” of the rule what . . . is “latent” within it.

Dworkin, ironically, would agree wholeheartedly42 The difference in attitude in these two conceptions of the role of the judge could therefore not be more stark.

When Kirschenbaum reminds his readers that a “logical consistency and formal rationality [are] part and parcel of Jewish legal thinking,” and when Roth insists on “halakhic seriousness,” part of what they are insisting upon is predictability and the serious treatment of precedent. And Kirschenbaum and Roth, when confronted with this alternative to their sense of halakhah, might argue that Dworkin vitiates any hope for predictability. Dworkin would probably not deny that. He himself seems to suggest that judges can even disagree about how much of the previous material must be subsumable under their interpretation to determine that they have a “fit.”43

Any judge’s sense of the point or function of law, on which every aspect of his approach to interpretation will depend, will include or imply some conception of the integrity and coherence of law as an institution, and this conception will both tutor and constrain his working theory of fit—that is, his convictions about how much of the prior law an interpretation must fit, and which of it, and how.

But what about the use of precedent? Is what Dworkin describes a fair appraisal of the halakhic process? No legitimate halakhic theory, critics will respond, can deny the importance of precedent. And that claim is true. But it is important that we not take Dworkin out of context. In parts of his corpus, Dworkin seeks to accommodate precedent, even uncomfortable precedent, by expanding his notion of principle to include the importance and binding quality of previous rulings. The passage in question is crucial.44

42 Moore would also concur with the claim that moral realities are “out there” to be discovered. His epistemology, with which Dworkin disagrees, is formulated largely in A Natural Law Theory of Interpretation. Cf. note above.
A naturalist judge must show the facts of history in the best light he can, and this means that he must not show that history as unprincipled chaos.

Of course this responsibility, for judges as well as novelists, may best be fulfilled by a dramatic reinterpretation that both unifies what has gone before and gives it new meaning or point. This explains why a naturalist decision, though it is in this way tied to the past, may yet seem radical. A naturalist judge might find, in some principle that has not yet been recognized in judicial argument, a brilliantly unifying account of past decisions that shows them in a better light than ever before.

Nevertheless the constraint, that a judge must continue that past and not invent a better past, will often have the consequence that a naturalist judge cannot reach decisions that he would otherwise, given his own political theory, want to reach. It is in one way misleading to say, however, that he will then be forced to make decisions at variance with his political convictions. The principle that judges should decide consistently with principle, and that law should be coherent, is part of his convictions, and it is this principle that makes the decision he otherwise opposes necessary.

Translated into halakhic terms, this effectively amounts to the claim that even a poteik seriously committed to the role of morality in the determination of halakhah will not always be able to issue the ruling to which his moral commitments lead him.46

Is Dworkin “hedging his bets?” Perhaps. But rather than assume that what we confront in this latest set of passages are signs of disingenuousness, I prefer the view that we are confronted here with a still emerging conception of the role of the judge. While Dworkin’s own conception may be emerging, he certainly describes the judge’s as a constantly emerging conception. “[A]ny truly hard case,” he reminds us, “develops as well as engages a judge’s style of adjudication.”47 Judges bring their principled commitments to bear on their reading of other cases, but that process of reading should also impact the very principles to which they are committed.

Judges are not the only ones who should be impacted by confrontation with “hard cases.” The “hard cases” which the Jewish community now confronts would serve the most important purpose possible if they ultimately engendered a serious conversation about the nature of halakhah, and forced

---

45 Both Dworkin and Moore use the term “naturalist” to refer to non-positivist positions. There is no implicit suggestion that their position has any obvious connection to the classical Thomistic notion of natural law.
46 Might this explain the fact that despite their legal activism, the rabbis of the Babylonian Talmud were ultimately unable to resolve the problems of the agnunah and the mamzer? David Weiss Halivni (cf. note above) makes a different, and somewhat troubling claim. The question deserves some greater attention.
us to ask aloud whether positivism is really the best model of how Jewish law
does or should operate. Such a conversation would require a broad based re-
examination of halakhic sources of all sorts. And a multitude of questions
would have to be addressed to these texts. When halakhic texts quote prece-
dent, which they obviously often do, do they do so as if they are looking for a
precedent to "plug" into a syllogism, or are they seeking a sense of "fit" with
broader principles? Are the cases which the rabbis treat as "hard" cases more
akin to those which positivists consider "hard" cases, or are they cases that do
seem to have precedent, and which therefore might fall more neatly within
the definition that Dworkin uses for such cases? Do classic halakhic sources
say anything which seems to reflect the sensibilities implicit in the "chain
novel" idea? Do we find any sense of an "unfolding" tale in classic responsa?
Are there "halakhically serious" rulings which seem to treat some central
principle—as opposed to precedent—as inviolable?

These are profoundly difficult questions to answer, and their implications
are ponderous. But there is an urgency to these issues, and to the examina-
tion of philosophers like Fuller, Moore, Cover and Dworkin, which we can
no longer deny. The two volumes that Aaron Kirschenbaum has recently
completed will become invaluable additions to all substantive halakhic
libraries. But when books as complete, balanced and well-reasoned as
Kirschenbaum’s address the issue of equity in Jewish law without ever feeling
comfortable about raising the question of intrinsically immoral law, serious
reflection about the nature of halakhah has become suppressed. Perhaps part
of that suppression is due to our sense that outside of the positivism of
Kirschenbaum, Lichtenstein, Spero and Roth, there exist no "halakhically
serious" alternatives. The work of Dworkin, introduced only cursorily here,
suggests that there are. To the extent that the views of these philosophers
may help us better understand what it is that we do when we think about
posak, their work may well be crucial in helping both Conservative and
Orthodox Jews—the "halakhically serious" world, for all intents and pur-
poses—come to grips with what Jewish law really is.

Daniel H. Gordin, Dean of Student Affairs and Assistant to the President at the University of
Judaism, teaches in the Department of Rabbinic Literature there.