

Building the Set Table: An Introduction to the Jurisprudence of Rabbi Yeḥiel Mikhel Epstein's *Arukh ha-Shulḥan* in Contrast to the *Mishnah Berurah*

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Part I: The Jewish Legal System: Then and Now

Halakhah, or Jewish law, is a system of rules, standards, and practices, texts, traditions, interpretive and methodological principles, and institutions that constitute the behavioral-normative thrust of Judaism.¹ The rabbinic tradition

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This article is dedicated in memory of Rabbi Eitam Henkin ר"ה who was writing, at the time of his murder, a biography of Rabbi Yeḥiel Mikhel Epstein, the author of the *Arukh Hashulḥan*. This work has recently appeared under the title תערוך לפני שלחן ("Set a Table Before Me") and the subtitle זמנו ומפעלו של חייו, הר"מ עפשטיין בעל ערוך השלחן ("The Life, Time, and Work of Rabbi Yeḥiel Mikhel

understands the *halakhah* as being rooted in the divine revelation of both the written text of the Torah—the first five books of the Hebrew Bible—and an oral tradition of explanations, qualifications, and expansions on the relatively sparse legal content of the biblical text.² In rabbinic thought, God communicated both the Oral Torah and Written Torah to Moses, who in turn conveyed these teachings to the Israelites. Subsequently, the text and these traditions were preserved and further developed by generations of prophets and priests, and, beginning in the latter Second Temple period, by rabbis, who studied, taught, interpreted, and applied the Torah’s teachings.³ By the second century C.E., the rabbis—the scholarly heirs of the Pharisees—had become the primary keepers of the Torah’s oral tradition of law, ethics, and theology.⁴

Epstein, Author of the *Arukh HaShulhan*”) (Maggid Press, 2019). We—along with the whole community—deeply mourn his murder and the murder of his wife Naamah on October 1, 2015. We thank the extended Henkin Family, and particularly Rabbi Yehuda Herzl and Rabbanit Chanah Henkin, for sharing the above manuscript with us, and we cite it extensively in sections of this work. Rabbi Eitam Henkin indicated in this above manuscript (at page 309) an intent to address the many topics we discuss in this work and particularly to focus on the comparison of the *Arukh Hashulhan* with the *Mishnah Berurah*, but he sadly did not live to write those sections. We are certain he would have done a better job at this task than we are doing, and it is only with tears in our eyes that we attempt to undertake this task. Furthermore, we extensively used material from his biography in one of the sections of this article. His work was groundbreaking and astonishing for one so young, and pathbreaking in its insights. If we have accomplished anything novel in this work, it is because we are midgets on the shoulders of a young giant taken from our community before he could grow to his full height.

- 1 See generally Chaim Saiman, *Halakhah: The Rabbinic Idea of Law* (Princeton: Princeton University Press, 2018).
- 2 See Aaron Kirschenbaum, *Equity in Jewish Law: Halakhic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law* (Hoboken, N.J.: Ktav Publishing House, 1991), 10. (“The ultimate principle (*Grundnorm*) is the rule that the Torah, the five books of Moses, is of binding authority for the Jewish legal system. Parallel to this Written Torah is the Oral Tradition, which Jewish tradition traces back to Moses [receipt of the tradition from God].”) See also Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), 233.
- 3 See *m. Avot* 1:1.
- 4 See Adin Steinsaltz, *The Essential Talmud*, trans. Chaya Galai (New York: Basic Books, 2010), 22.

In the early centuries of the Common Era, Jews experienced a series of major upheavals including internal political and religious conflicts, the expansion of Roman control over Judea and the Galilee, the destruction of Jerusalem and the Second Temple during the Great Revolt of 66–73 C.E., and the destructive suppression of the Bar Kokhba Revolt of 132–135 C.E.⁵ Largely in response to these events, the rabbis determined that the preservation of Torah knowledge required fixing in formal texts the previously fluid and open-ended tradition.⁶ Rabbi Judah the Prince edited the Mishnah at the beginning of the third century, which provided a topically organized textual outline of the Jewish legal tradition as it then stood. More a digest than a code, the Mishnah includes numerous variant rabbinic opinions on many issues, and typically determines singular standards of halakhic conduct only by implication.⁷ In the subsequent centuries, successive generations of rabbis known as *Amoraim*, who lived and worked in Jewish centers in both Palestine and Persia, subjected the text of the Mishnah to close analysis.⁸ These scholars

5 See Lawrence H. Schiffman, *From Text to Tradition: A History of Second Temple and Rabbinic Judaism* (Hoboken, N.J.: Ktav Publishing House, 1991), 157–76.

6 See Maimonides, *Introduction to Mishneh Torah*:

Why did our holy teacher [Rabbi Judah the Prince] do this [i.e., compose a textual restatement of Jewish law] rather than leaving the matter as it was [with a more fluid orally-transmitted tradition]? This is because he recognized that the number of students was diminishing while new troubles were constantly arising; the Roman Empire was spreading across the world and becoming ever stronger, and the Jewish people were spread in a wandering diaspora across the world. He therefore composed a single text that would be readily available to everyone, and which could be studied quickly and not forgotten.

7 See Schiffman, *From Text to Tradition*, 177–200. The Mishnah was redacted in the Galilee at the end of the second century C.E. by Rabbi Judah the Prince, who served as both religious and political head of the Jewish community at the time. The Mishnah distills the teachings of the Oral Torah into rule-like formulations, some attributed to particular scholars and others left unattributed. Generally, these rules are organized topically, by individual Mishnah (lit. “teaching”), chapter, tractate, and groups of tractates. See Elon, *Jewish Law*, 1048–56. In addition to the Mishnah, a variety of other compilations of Oral-Torah teachings were compiled around the same time, with substantial overlap with the Mishnah itself. See Elon, *Jewish Law*, 1078–79. For a variety of reasons, however, the Mishnah came to be regarded as the most authoritative of these works; a status concretized by the Talmud’s being ultimately formulated as a commentary on the Mishnah. See Elon, *Jewish Law*, 1057, 1061.

8 See Schiffman, *From Text to Tradition*, 214–27.

used the Mishnah as a focal point of interpretation and source of law, and as a framework through which the far more expansive untextualized contents of the halakhic tradition could be recalled, analyzed, and further developed. The content of these rabbinic discussions, called *gemara* (lit. “studies”) were ultimately collected, organized, edited, and appended to the text of the Mishnah.⁹ Together, the Mishnah and *gemara* comprise the Talmud. There are actually two Talmuds; the Jerusalem Talmud is a relatively shorter text compiled in the latter half of the fourth century and reflects the rabbinic learning of Palestinian *Amoraim*, while the Babylonian Talmud is a much longer and generally more authoritative text compiled in the sixth century that records the scholarship of the rabbis living in Persia.¹⁰ Importantly, as a legal text, the Talmud is even less determinative than the Mishnah. The text of the Talmud often reads like a meandering discussion that flexibly incorporates jurisprudence, theology, ethics, and biblical interpretation. Talmudic rabbis debate issues, offer proofs and counter-proofs, and most often these discursive deliberations end without having reached a definitive legal ruling.¹¹

In rabbinic jurisprudence, the redaction of the Babylonian Talmud in the sixth century represents an important watershed event that divides Jewish legal history into talmudic and post-talmudic periods.¹² This event, known as the “sealing” of the Talmud, established the Talmud as the principal and authoritative text of rabbinic Jewish law; subsequent to the sealing of the Talmud, rabbinic scholars read earlier texts and traditions only through a talmudic lens and regarded the Talmud as setting the inviolable boundaries of halakhic practice and discourse.¹³ Post-talmudic developments and

9 See Elon, *Jewish Law*, 1084. See also Steinsaltz, *Essential Talmud*, 3 (“The formal definition of the Talmud is the summary of the oral law that evolved after centuries of scholarly effort by sages who lived in Palestine and Babylonia until the beginning of the Middle Ages”).

10 See Elon, *Jewish Law*, 1095–98.

11 See Steinsaltz, *Essential Talmud*, 57.

12 See *b. B. Meṣ.* 86a.

13 See Maimonides, *Introduction to Mishneh Torah*:

All those things contained in the Babylonian Talmud, all Jews are obligated to follow them. Every town and country must observe all the customs, obey all the decrees, and uphold all the enactments of the talmudic sages, for the entire Jewish people have accepted upon themselves all the things contained in the Talmud. The sages who adopted the enactments and

understandings of Jewish law must be grounded in sound readings of the Talmud and cannot be inconsistent with talmudic standards.¹⁴ Within these wide parameters, however, there was room for the de facto existence and de jure justification of a great diversity of legal opinion and religious practice. The move from abstract halakhic norms to practical standards of religio-legal conduct required substantial analysis and interpretation of talmudic sources. Yet rabbinic scholars disagreed widely about how best to understand discursive and indeterminate talmudic sources, and also about the right methodological principles to be used in reaching conclusive legal rulings.¹⁵ Additionally, the relatively wide normative boundaries established by talmudic materials left substantial room for different Jewish communities to develop a range of customary religious expressions and extra-legal practices.

As Jewish law developed in the centuries following the sealing of the Talmud, rabbinic scholars came to recognize a loose periodization of post-talmudic halakhic development that helped establish further parameters for acceptable Jewish legal practice. The post-talmudic era is conventionally divided into three periods. The period of the Geonim (“brilliant ones”) is generally understood to have lasted from the seventh century until the mid-eleventh century and is characterized by the rabbinic dominance of the Geonim, the heads of the great talmudic academies of Persia, who filled the roles of authoritative transmitters and interpreters of the Talmud.¹⁶ As

decrees, instituted the practices, rendered the rulings, and derived the laws [contained in the Talmud], included all or most of the scholars of Israel. They were the recipients of the tradition of the fundamentals of the Torah in an unbroken chain of transmission back to Moses.

- 14 See, e.g., Rabbi Yitshak Yosef, *Ein Yitshak*, vol. 1 (Jerusalem, 2009), 55; *Be'ur ha-Gra to Shulhan Arukh, Hoshen Mishpat* 25:6; Rabbi Yom Tov Lippman Heller, *Tosafot Yomtov, m. Shev. 4:10* (“Even though the Torah can be interpreted in numerous different ways . . . when it comes to legal rulings, however, a decisor must rely on what the scholars of the Talmud have said”). Cf. Avraham Derbarmdiker, *Seder ha-Din* 305–8 (2010) (discussing the parameters for the base-line legitimacy of halakhic rulings).
- 15 See Saiman, *Halakhah*, 141–62. See also Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* (Cambridge: Harvard University Press, 1997) (describing and explicating three distinct schools of rabbinic thought on how to view and understand the Talmud).
- 16 See generally Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven: Yale University Press, 1998) for an overview of the Geonim, their work, and context. See also Neil S. Hecht, B. S. Jackson, S.

Jewish communities in Franco-Germany, Spain, and North Africa became more established, while the Persian centers of Jewish learning experienced a decline, the era of the Geonim gave way to the period of the *Rishonim* (“first ones”).¹⁷ The period of the *Rishonim* lasted until the end of the fifteenth century and was characterized by furious scholarly activity that produced voluminous talmudic commentaries, codifications of talmudic law, and responsa literature in which rabbis answered legal inquiries posed to them by private individuals and communities.¹⁸ The third period, that of the *Aḥaronim* (“last ones”), is usually dated from Rabbi Joseph Karo’s publication of his seminal code, the *Shulḥan Arukh*, around which nearly all subsequent halakhic developments and discussions revolve. Following the precedent established by the *Arba ‘ah Turim*, a fourteenth century restatement of Jewish law authored by Rabbi Jacob ben Asher, the *Shulḥan Arukh* divided Jewish law into four main branches: *Orah Ḥayyim* addresses the daily ritual routine, including laws governing the observance of the Sabbath and holidays; *Yoreh De ‘ah* deals with those areas of ritual law—such as dietary observances—that do not relate chiefly to one’s daily routine; *Even ha-Ezer* concerns family law matters; and *Ḥoshen Mishpat* addresses torts, contracts, property, and other civil law matters along with judicial procedure.¹⁹ Throughout the period of the *Aḥaronim*, many significant scholars—themselves as important as Rabbi Karo in status and authority—wrote annotations to the *Shulḥan Arukh*, which solidified the place of the work and its surrounding commentaries as the modern touchstone of Jewish law.²⁰

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M. Passamaneck, Daniela Piattelli, and Alfredo Rabello, eds., *An Introduction to the History and Sources of Jewish Law* (New York: Oxford University Press, 1996), 203–14 (discussing the legal literature produced by the Geonim); *ibid.*, 228–34 (describing the lives and works of several major Geonic scholars); *ibid.*, 239–41 (explaining the perceived authority of Geonic rulings within rabbinic jurisprudence).

17 See Hecht et al., *Introduction to the History and Sources of Jewish Law*, 271–358.

18 See *ibid.*, 359–96.

19 See Daniel Mann, ed., *Living the Halakhic Process: Questions and Answers for the Modern Jew* (Jerusalem: Devora Publishing, 2007), 16–18 (providing an overview of the topics covered in each of these four sections of Rabbi Karo’s *Shulḥan Arukh*).

20 See *ibid.*, 18–26 (providing an overview of the major works and commentaries dealing with each of the four sections of Rabbi Karo’s *Shulḥan Arukh*).

According to the rabbinic jurisprudential tradition, long ago, during the biblical and Second Temple periods, Jewish law functioned much like most modern legal systems. Indeed, by many measures, the *halakhah* was very progressive for its time.²¹ As described—perhaps aspirationally—in traditional rabbinic sources, the Jewish legal system had an executive authority, as well as a federalized system of local courts answerable to regional appellate courts. These lower courts operated under the jurisdiction of a high court, known as the *Sanhedrin*,²² which functioned as a joint legislative and judicial assembly that resolved questions of Jewish law by majority vote. The king or other executive authority was ultimately bound to obey the law as determined by the *Sanhedrin*, as were all other subjects.²³ The *Sanhedrin* crafted rules of law that bound all, both by engaging in binding interpretations of the canonical texts of the Torah, and by enacting legislative decrees of many different types, be they fences to protect Torah law, new decrees out of whole cloth to reflect differing realities, or even on rare occasion to suspend the duties of Jewish

- 21 See, e.g., Gerald J. Blidstein, "Capital Punishment – The Classic Jewish Discussion," *Judaism* 14 (1965): 159 (on capital punishment); Samuel J. Levine, *Jewish Law and American Law: A Comparative Study*, vol. 1 (New York: Touro College Press, 2018), 133–39 (on self-incrimination); Ephraim Glatt, "The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight into Modern Legal Theory," *Pace International Law Review* 3 (2013): 316, 321–28; Shlomo Pill, "Recovering Judicial Integrity: Toward a Duty-focused Disqualification Jurisprudence Based on Jewish Law," *Fordham Urban Law Journal* 39 (2011): 511 (on judicial bias); idem, "Jewish Law Antecedents to American Constitutional Thought," *Mississippi Law Journal* 85 (2016): 643 (on checks and balances, equal application of law, government by consent); idem, "The Political Enforcement of Rabbinic Theocracy? Religious Norms in Halakhic Practice," *Studies in Judaism, Humanities, and the Social Sciences* 2 (2018): 23–36 (on religious liberty).
- 22 Commonly thought to be a translation of the Hebrew term "members of the Great Assembly," the term *Sanhedrin* was adopted into Hebrew and Aramaic from the Greek *Synedrion*.
- 23 See *Mishneh Torah, Hilkhoh Melakhim*, 1:1–2:6. See also Hecht et al., *Introduction to the History and Sources of Jewish Law*, 41–43, 127–30, 147–50. *M. Sanh.* 2:3 originally upholds the absolute sovereignty or immunity of the executive from judicial oversight: "The King does not judge and is not judged, does not testify and against whom is not testified." *B. Sanh.* 19a cites opinions limiting the applicability of the Mishnah to non-Davidic kings of Israel, granting them alone immunity from the judiciary, whereas Davidic kings by contrast would be subject to the judiciary. *Mishneh Torah in Hilkhoh Melakhim* (3:7), as in *Hilkhoh Edut* (11:9), codifies this distinction between Davidic and non-Davidic monarchies.

law in response to exigencies.²⁴ Importantly, within this system, disputes and uncertainties about what the law was or required, and about the relevant facts to which the law was to be applied, were ultimately subject to adjudication in the rabbinic courts, and litigants were both obligated and obliged to obey the courts' rulings. In the final instance, the *Sanhedrin* functioned as the court of last-resort; it resolved any persistent doubts about the law by issuing authoritative interpretations of Torah and tradition, and unified Jewish legal practice by resolving inconsistent rulings by lower courts.²⁵ The determinations of the *Sanhedrin* were final, infallible, and binding upon all those subject to the Jewish legal system. In short, the Jewish legal system looked very much like any other legal system.

In rabbinic thought,²⁶ this system began to unravel at the beginning of the Common Era, when a number of factors contributed to the decline of Jewish law continuing to function like any other public law system. As Rome expanded its control over Judea and the Galilee, Jewish legal and political authority eroded rapidly in the early decades of the Common Era. According to the Talmud, the *Sanhedrin's* criminal jurisdiction lapsed around 30 C.E.²⁷ and ceased formally functioning as the supreme judicial and legislative authority of the Jewish legal system altogether following the destruction of Jerusalem in 70 C.E.²⁸ Various rabbinic assemblies and proto-*Sanhedrin* bodies continued to meet in the following centuries in order to debate and determine various pressing issues of Jewish law, but even these august bodies never wielded the kind of top-down juridical authority to determine the law possessed by the legislatures or high courts of other systems.²⁹ The *Sanhedrin* could no longer impose uniformity of practice among the now widely scattered and largely independent communities of the Jewish diaspora, and by the mid-fourth century formal juridical authority to determinately decide the

24 See *Mishneh Torah, Hilkhoh Mamrim* 1:1, 2:1–9. On rabbinic legislation generally, see Elon, *Jewish Law*, 477–544.

25 See *Mishneh Torah, Hilkhoh Mamrim* 1:4.

26 Aaron M. Schreiber, *Jewish Law and Decision Making: A Study Through Time* (Philadelphia: Temple University Press, 1979), 226–77.

27 See *b. Avod. Zar.* 8b.

28 See *b. Sanh.* 37b.

29 See, e.g., Haim Hillel Ben-Sasson, ed., *A History of the Jewish People* (Cambridge, MA: Harvard University Press, 1985), 317–23.

substance and requirements of Jewish law ceased to exist altogether.³⁰ The Mishnah (c. 200 C.E.) bears witness to this phenomenon and illustrates the devolution of the Court by routinely recounting various conflicts among the Sages without attempting to resolve them.

Due to its exilic development since the beginning of the Common Era, without a *Sanhedrin* or centralized system of judicial authority, Jewish law has for the last two thousand years evolved and developed without any clear method for resolving disputes. Talmudic, medieval, and contemporary debates about Jewish law linger, since direct, categorical rules of resolution, such as, for example, majority votes of the Supreme Court in the United States or Papal pronouncements in Canon law, do not exist. The exact reason for this is beyond the scope of this introduction,³¹ yet some methodological explanation will allow the reader to have a better understanding of the relationship of the modern classical work of Jewish law, the *Arukh ha-Shulḥan*, to other jurisprudential approaches to obedience to Jewish law and other legal systems. Frequently, the methodology of Jewish law is unintelligible to those well familiar with other legal systems but lacking a crisp understanding of the functioning of Jewish law on a practical and historical level.³²

From the time of the disbanding of the *Sanhedrin*, through the centuries following the redaction of the two Talmuds, disputes as to what the Jewish law should be in any specific case were resolved by an informal, consensus-based

30 See *b. B. Qam.* 84b.

31 For one account of the intentional multivocality of Jewish law, see Shlomo Pill, "Law as Engagement: A Judeo-Islamic Conception of the Rule of Law for Twenty-First Century America" (Ph.D. diss., Emory University, 2016). See also Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* (London: Continuum, 2007). For historical explanations for rabbinic legal disagreement, see, e.g., *Introduction to Beit Yosef to Arba'ah Turim*.

32 Until the modern era, rabbinic scholars have been relatively unconcerned with producing systematic accounts of the philosophy and methodology of Jewish law. Unlike Islamic law, Canon law, Roman law, and Common law systems, pre-modern rabbinic thinking, with only a few exceptions, never produced systematic accounts of its own jurisprudence and methods of legal decision making. Some indications of specific halakhic scholars' own decision-making methods can be found in the introductions to those rabbis' major halakhic works (for instance in Maimonides's introduction to his code, *Mishneh Torah*, and Joseph Karo's introduction to his *Beit Yosef*), as well as scattered throughout various responsa (see, e.g., *Responsa Mas'at Binyamin*, no. 62) and commentaries (see, e.g., Rabbi Shabtai ha-Kohen, *Kelalei Hora'ah be-Issur ve-Hetter*).

voting process in which the ordained rabbis of the generation participated.³³ Not every dispute, however, reached a resolution, and since there was no consensus on what the normative practice should be, the law was sometimes left open with more than one practice considered reasonable and legitimate.³⁴ Indeed, one who studies Talmud sees that most of the talmudic disputes are left unresolved textually, and most are not resolved through inferential logic even when the text is studied as a whole.³⁵

From the early eighth century until modern times, the process for resolving Jewish legal disputes further deteriorated to the point that even informal consensus was no longer possible. Absent the ability to reach deliberate consensus-based conclusions about what Jewish law should be, diverse halakhic opinions gradually proliferated, and the range of different legal views and practices on many issues steadily expanded. As a result, indeterminacy and disagreement became both an unavoidable fact of Jewish law that made it increasingly difficult to know the correct rule or standard of practice, as well as a serious impediment to the Jewish legal community's ability to settle on any very widely accepted methodology for resolving halakhic disputes. The lack of doubt-resolving institutions and methods made increased legal disagreement inevitable, while at the same time the proliferation of legal disagreement made it impossible to garner widespread acceptance of any particular doubt-resolving institutions or methods.

There are a number of reasons for this substantial deterioration of the rabbinic jurisprudential system's ability to resolve legal doubts and clarify halakhic uncertainties. First, as the Jewish diaspora became more dispersed throughout Europe, Africa, Asia, and eventually the Americas, geography

- 33 Thus, for example, the Talmud sometimes concludes a dispute with the word "*ve-hilkheta*," which is generally understood to mean "and this is the proper practice," denoting the consensus that is mentioned above.
- 34 In some instances, a consensus developed, but uncertainty has since arisen as to what that consensus ruling actually was, or to what extent a consensus had actually formed on certain points of law, which is itself often a matter of talmudic interpretation itself. See generally *Arba'ah Turim*, *Hoshen Mishpat* 25; *Beit Yosef* to *Arba'ah Turim*, *Hoshen Mishpat* 25 (discussing variant views among early medieval authorities on the extent of talmudic consensus).
- 35 See, e.g., R. Moshe ben Yaakov of Coucy, *Introduction to Sefer Mitsvot Gadol* (1547) (noting that the length, complexity, and dialectic nature of Talmudic material prevents it from being a source of determinate legal directives). See generally Pill, "Law as Engagement," ch. 5.

made communication across communities difficult. Building consensus through discourse and interaction is difficult even if all the scholars are in one location and interested in consensus; as the Jewish community became spread out over vast areas of land, it became virtually impossible.³⁶

Second, by the era of the *Rishonim*, increased interest in Talmud study in geographical areas with very diverse living conditions led different Jewish communities and schools of rabbis to very different ways of understanding the legal implications of talmudic texts based on their respective social, cultural, environmental, political, economic, and religious contexts.³⁷ This not only resulted in different ways of thinking about and practicing Jewish law but also meant that even attempts at reaching rabbinic consensus across geographic bounds were stymied by scholars in different contexts speaking very different jurisprudential languages. Consensus remains possible when disputants merely disagree but becomes an increasingly remote possibility when discussants are merely speaking past each other with fundamentally different understandings of the subject matter at issue.³⁸

Third, diverse social and economic conditions began to make it harder to apply the talmudic rules to new realities with consensus. Regionalism became a significant complexity, in climate, community, economy and many other factors. Finally, diversity increased the degree to which classical rabbinic texts became corrupted through copying and printing errors, which lead different communities to be working sometimes with different versions of the authoritative sources of Jewish law. Other texts disappeared entirely from certain regions, while some texts were deemed authentic and binding in some communities and not so in others.³⁹

36 See, e.g., *Introduction to Beit Yosef to Arba'ah Turim*.

37 See, e.g., R. Menahem Meiri, *Introduction to Responsa Meiri Magen Avot* (drawing on the Aristotelian idea that people tend to think and act like those around them to explain the proliferation of rabbinic disagreement over *halakhah*); Rabbi Israel Salanter, *Or Yisrael*, no. 30 (comment arguing that “subjective emotional forces which human beings cannot fully eradicate from their cognitive processes” prevent halakhic scholars from understanding anything more than “what their own eyes see”).

38 For a discussion of the some of the fundamentally different understandings about the nature of Jewish law and the proper methods for reaching halakhic decisions, see generally Halbertal, *People of the Book*.

39 See generally R. Moshe Walter, *The Making of a Halachic Decision: A Comprehensive*

Many other factors and reasons were present as well. The truth is obvious to anyone invested in law: absent a binding mechanism for forcing a consensus, such as voting or a high court of final jurisdiction, legal systems are rarely able to avoid the specters of widespread legal disagreement, indeterminacy, and uncertainty. Ponder for a minute what would happen in the United States with its fifty state supreme courts and thirteen federal circuit courts of appeal if the United States Supreme Court ceased resolving disputes between these various judicial authorities about what federal law is and requires. Even with a functioning Supreme Court, there is substantial diversity in how federal law is understood and applied in the courts of various states and circuits. Absent a final arbiter to, as Chief Justice Marshall put it, “say what the law is,”⁴⁰ grand diversity would take shape in a very short amount of time.⁴¹ In this sense, the Jewish legal tradition is no different than any other; it once functioned with a relatively high degree of legal determinacy, but in the absence of institutions empowered to force uniform legal resolutions and the conditions necessary to support the development of widespread consensus, Jewish law in the medieval and modern periods can be characterized as a complex, messy universe of texts, traditions, authorities, and opinions that make it notoriously difficult to determinatively conclude what the law is and requires on most issues.

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Regardless of the precise reasons, by the early Middle Ages, Jewish legal disputes became common, and in the absence of some widely accepted procedural method or judicial institution for resolving halakhic disagreements, legal decision-making became highly analytical. The principal method for determining legal uncertainties and resolving disputes was to demonstrate that one conclusion or line of reasoning substantially represented the more analytically correct understanding of the Babylonian Talmud. Support for any one halakhic opinion over others rested upon which view was seen by

Analysis and Guide to Halachic Rulings (Brooklyn: Menucha Publishers Inc., 2013), 163–66.

40 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

41 Indeed, many scholars maintain that among the most important jobs the United States Supreme Court does is enforce uniformity of federal law on important matters. For more on this, see Michael J. Broyde, “The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White’s Dissents from Denial of Certiorari During the 1985 Term,” *New York University Law Review* 62 (1987): 610–52.

any particular scholar to be more consistent with accepted and authoritative talmudic sources.⁴² The opinion shown to be a more accurate and analytically persuasive interpretation of talmudic intention, given the particular context in which it was being applied, was accepted as normative. The significance of relying on such an analytic approach to resolving halakhic questions should not be underestimated, nor should its contrast with earlier models of dispute resolution utilized while the *Sanhedrin* still functioned or when widespread consensus remained possible. In earlier eras, Jewish legal normativity rested less on the analytic correctness of a given ruling or determination, and much more on the institutional or procedural provenance of the legal conclusion in question. Judgments of the *Sanhedrin* were per se correct, and rabbinic consensus provided its own self-referential and independent justification for accepted legal conclusions.⁴³ To use Justice Robert Jackson's famous description of the authority of the United States Supreme Court, halakhic rulings determined by consensus or by the *Sanhedrin* were not final because they were infallible, but rather were regarded as infallible because they were final.⁴⁴ In the absence of such institutions and mechanisms, however, the normativity of any claimed rule of Jewish law had to rest on its substantive correctness in analytic terms.

Nevertheless, in many cases, the analytic tools used to evaluate the plausibility of competing talmudic understandings and applications were insufficient to answer halakhic questions or resolve rabbinic disagreements as oftentimes more than one answer was deemed plausibly true within the confines of the talmudic discourses. Indeed, there are many cases where post-talmudic discourse reached an impasse and was unable to provide an intellectually honest determination of which view should be considered more analytically correct. For instance, regarding a talmudic discussion of whether the daughter of a non-Jewish man and a Jewish woman is permitted to marry a *kohen*, a member of the priestly families of the tribe of Levi, three equally legitimate readings (and rulings) emerge among the post-talmudic

42 See *Rema to Shulhan Arukh, Hoshen Mishpat* 25:1–2.

43 Consider the rabbinic dictum that the rulings of the *Sanhedrin* (and possibly of other courts staffed by judges possessing biblical ordination) were authoritative, binding, and “correct,” even when they may be analytically “wrong,” e.g., “Even when they tell you that right is left and left is right” (*Sifre Deut.* 17:11).

44 See *Brown v. Allen*, 344 U.S. 443, 540 (1953).

jurists.⁴⁵ The variances depend on whether one considers the authority of the talmudic statements in question to be of equal weight or not. The inability to draw a single, unequivocal ruling is partially the result of the open-textual nature of the Talmud which, while allowing flexibility for adaptation, may also at times create ambiguity by permitting two or three positions to be seen as reasonable.⁴⁶ Determining which of those reasonable positions ought, in fact, to be normatively followed cannot be done in many cases through the use of first-tier principles of analytical jurisprudence alone; close talmudic analysis simply fails to determine a single most-correct result. Indeed, anyone with a reasonable familiarity with the Talmud could quickly provide dozens of examples of such.

To further complicate matters, determining Jewish law analytically on the basis of a close study of relevant talmudic sources is only possible where the Talmud does in fact speak to the issue in question. On very many issues the Talmud remains silent, thus making any analytic determination of the correct halakhic standard impossible. Even when some talmudic sources like the Jerusalem Talmud, *Midrash Halakhah*, or other mishnaic and talmudic materials outside the Babylonian Talmud do speak to an issue, the Babylonian Talmud itself is sometimes silent or cryptic. This too made analytic resolutions difficult and rendered disputes largely intractable since there was little agreement among rabbinic scholars about the proper normative weight that should be accorded to these other primary rabbinic texts.⁴⁷

The limitations of analytically determining Jewish law induced rabbinic decision makers, talmudic commentators, and codifiers to develop various second-order rules of decision that provided guidelines for reaching halakhic conclusions in the very many cases in which textual analysis and logical reasoning alone could not adequately indicate the correctness of one opinion

45 *B. Yev.* 44a–45b. It is worth noting that conflicting conclusions may be reached in this case, despite the appearance of the term *vehilkheta*, discussed in *supra* n. 33.

46 See H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), 121–32 (describing the nature of open-textual nature of law); idem, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 593, 607 (providing examples of what is meant by the “open-textual nature of laws”).

47 See Michael J. Broyde, “The Yerushalmi as a Source of Halacha,” *TorahMusings.com*, May 3, 2011, accessed December 25, 2018, <https://www.torahmusings.com/2011/05/the-yerushalmi-as-a-source-of-halacha/>.

over others.⁴⁸ As may be intuited from our previous discussion of first-order analytic approaches to determining Jewish law, these second-order principles once again shifted the focus of legal decision making from finding the right talmudic norm to reaching some singular legal determination regardless of its substantive correctness in light of talmudic precedents. To paraphrase Justice Brandeis, these second-order rules of decision recognized and responded to the fact that it is sometimes more important that legal questions be clearly and definitively resolved than that they be resolved correctly.⁴⁹ Rather than purporting to ascertain which competing halakhic viewpoint is right, these second-order guidelines offer a framework for cutting through analytically unresolvable doubts to reach clear and determinative halakhic conclusions. These second-order guidelines include many nuanced and complex principles directing halakhic judgments in cases of doubt about biblical or rabbinic obligations, about ritual or civil duties, and about which rabbis and authorities should be followed regarding which kinds of issues, and so on.⁵⁰

It may be helpful to think about the foregoing discussion in terms of the following hierarchy of jurisprudential ideas that have been used to determine specific rules of *halakhah*. Some disputes are resolved and some uncertainties are clarified by groups of specially appointed scholars and jurists determining the correct legal standard, either individually, or collectively through formal procedures and majority votes. This was generally the way Jewish law disagreements were addressed prior to the destruction of the Second Temple, where officially ordained rabbinic decision makers, courts, and ultimately the *Sanhedrin* itself had the judicial authority to determinatively say what the law was. Even in the absence of such institutional frameworks, however, legal questions may be resolved by formal or informal consensus among recognized scholars whose reputations, constituencies, and affiliations with important centers of rabbinic learning are sufficient to command popular respect for their collective judgments. This was roughly the way Jewish law was determined following the demise of the *Sanhedrin* until after the sealing of the Talmud, with the talmudic text itself representing the last instance of such

48 For compendia of such rules, see, e.g., R. Malakhi HaKohen, *Yad Malakhi*; Rabbi Yitshak Yosef, *Ein Yitshak*, 3 vols. (Jerusalem: Mishor, 2009).

49 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

50 See *Shulhan Arukh, Yoreh De'ah* 110–11, 242 and *Shulhan Arukh, Hoshen Mishpat* 25, each of which codifies many of these rules. For a one-volume review of these rules, see Hayyim Hizkiyah Medini, *Sedei Hemed, Kelalei ha-Posekim*.

rabbinic consensus determining the acceptable parameters of halakhic practice and discourse. In the absence of these formal and informal mechanisms for determining halakhic norms, some legal disputes are resolved analytically, by determining which possible solution reflects the best analytic understanding of the primary sources—the Torah, Babylonian Talmud, and other talmudic sources. In some instances, particular analytic legal conclusions may be buttressed and further legitimated as over time rabbinic consensus gradually builds around and endorses some rulings while marginalizing others. Many halakhic issues are not fully determinable analytically, however, because oftentimes primary rabbinic sources are multivocal and speak ambiguously, lending themselves to numerous equally reasonable interpretations.

Additionally, even when a scholar concludes that a particular viewpoint is in fact analytically compelling, many others are likely to disagree. As the thirteenth-century rabbinic scholar Naḥmanides famously observed, Jewish law is not like math or the natural sciences; it is quite light on determinative proofs and far more dependent on arguments.⁵¹ In some such cases, questions may be resolved by resorting to doubt-resolving, second-order guidelines that establish decisional preferences based on a variety of different factors: doubts about biblical laws are resolved strictly to avoid any possible violation, while doubts regarding rabbinic obligations are resolved leniently; the rulings of locally appointed rabbinic authorities and courts determine local practice; the law follows the more recent scholars; doubts in litigious disputes are resolved in favor of the defendant; and so on. In many cases, however, even these secondary doubt-resolving principles are insufficient to reach a single conclusive result. Sometimes, competing secondary-rules urge different results in the same cases. Other times, the strict rules of law determined through talmudic analytics or second-order principles come into conflict with other important religious values or social, economic, and pragmatic concerns. In such instances, reaching determinative halakhic prescriptions requires mediating such tensions in principled and consistent ways that support the integrity, workability, and objectives of Jewish law.

Two Models of Codification

The lack of central organization and decision making authority, and the legal indeterminacy and uncertainty it engenders, is a direct and substantial hindrance to the ability of Jews—and even of rabbis—to easily know and

51 Introduction to *Milḥamot ha-Shem to Rif*.

properly observe Jewish law.⁵² In response to this challenge, with the start of the medieval era, as halakhic decision making gradually moved away from the relatively centralized authority of the Babylonian Geonim to the widely dispersed rabbinic authorities across the Jewish diaspora, various scholars sought to produce codifications, restatements, and other kinds of secondary sources designed to make halakhic norms more clear and consistent, and to make observance more feasible.⁵³ Broadly speaking, two general approaches to codifying *halakhah* developed in the early Middle Ages that roughly paralleled the two different models of recording Jewish tradition utilized during the talmudic era—the Mishnah and the *gemara*.⁵⁴

One school of thought, which arose principally among the Sephardic Jewish scholars of medieval Spain and North Africa, advocated the production of codes of Jewish law in which indeterminate and ambiguous talmudic discourses would be distilled into clear-cut, accessible rules of law.⁵⁵ In an important sense, this approach followed the precedent of the Mishnah. While the Mishnah does often include several variant opinions on any given issue and routinely avoids clearly prescribing a particular course of conduct, it presents Jewish law in relative terse rule-statements. In a similar vein, the Sephardic codifiers sought to distill the complex dialectics of the Talmud into definitive statements of halakhic rules and standards devoid of excessive argumentation, proof texts, and extra-legal discussions. This process of codification began with the work of the Moroccan jurist Rabbi Isaac Alfasi (1013–1103), who was the first to attempt to craft a complete code of Jewish law. Rabbi Alfasi, also known as the *Rif*, started this process by deleting all the sections of the Talmud he thought to be non-normative or non-legal stories, as well as discursive materials that he viewed as merely the Talmud's

52 See *b. Hag.* 3b:

“The masters of the assemblies” (Eccl 12:11): These are the students of the wise scholars who sit in many different assemblies and are engaged with the Torah. Some pronounce [the subject of legal inquiry] unclean, while others pronounce it clean; some prohibit, while others permit; some disqualify it, while others rule it fit. A person might say, “How can I study the Torah under these circumstances [where the law is so uncertain]?”

See generally Elon, *Jewish Law*, 1144–49.

53 See generally Elon, *Jewish Law*, 1149–79.

54 See Walter, *Making of a Halachic Decision*, 39–64.

55 See Halbertal, *People of the Book*, 73.

means of reaching halakhic conclusions. He also occasionally shifted talmudic texts from one place to another, and even more rarely incorporated into his work texts that are not found in the Babylonian Talmud. He combined this with writing minimal, terse notes that help explain the talmudic rules as he understood them.⁵⁶ The resulting work, consisting of what was left of the text of the Babylonian Talmud, less Rabbi Alfasi's deletions and together with his new additions, amounted to a substantially abridged version of the Talmud that could be read containing only normative law.⁵⁷

The *Rif's* work was widely admired and served as the intellectual catalyst for Maimonides's legal magnum opus, the *Mishneh Torah*.⁵⁸ Maimonides (1135–1204) was a preeminent philosopher, jurist, and physician, and is universally acknowledged as one of the foremost arbiters of rabbinic law in all of Jewish history. By building on the conceptual goals of halakhic codification developed by Rabbi Alfasi, and then actively writing an independent, self-standing, and complete codification of Jewish legal rules that is distinct from the Talmud, Maimonides sought to change the basic structure of *halakhah* into an ordered, hierarchical system in which every question has one, and only one, correct answer. He organized this code around fourteen volumes, 84 sub-volumes, and 1000 chapters in total. Had this approach alone taken hold, Jewish law could have conceivably developed into a law code similar, at some level, to many other legal systems.⁵⁹

At the same time as the *Rif* was embarking on his project of simplification and codification of talmudic law, however, another school of thought on the matter was emerging among the Ashkenazic Jews of Franco-Germany. This approach, led by the prominent French rabbinic scholar Rabbi Shlomo

56 See Elon, *Jewish Law*, 1167–73.

57 We would not claim that the *Rif* was the first to ponder such a code. Handbooks of legal rules and practical directives culled from talmudic discussions existed in a few areas of Jewish law prior to the *Rif*, such as those written by Rabbi Saadyah Gaon and Rabbi Hefets Gaon. See Elon, *Jewish Law*, 1150–66. These works were incomplete, however, and addressed only specific narrow areas. The *Rif* undertook to write a systemic talmudic code.

58 Literally “Repetition of the Torah,” subtitled *Sefer ha-Yad ha-Hazakah*, or “The Book of the Strong Hand.” Compiled between 1170 and 1180, the *Mishneh Torah* consists of fourteen books, subdivided into sections, chapters, and paragraphs. It is the only Medieval-era work that details *all* of Jewish observance, including those laws that are only applicable when the Temple is in existence.

59 See generally Elon, *Jewish Law*, 1180–1215.

Yitshaki (1040–1105), also known as *Rashi*,⁶⁰ and his disciples and descendants, rejected the priority of taking a systematic approach and creating a clearly delineated code of determinative halakhic rulings. Instead, proponents of this school focused on creating coherence and harmony throughout the Talmud but without attempting to supplant the Talmud's own dialectics with their own conclusory understandings of its normative import. This school's major endeavor was to write commentaries and super-commentaries to explain the Talmud page by page, issue by issue, in an attempt to harmonize the diverse strands of thought found within its often meandering, ambiguous debates.⁶¹ When it came to these scholars' discussing practical halakhic rulings, they tended to emphasize legal discourse—as distinct from determinate legal conclusions—as an important halakhic value in and of itself, and thus tended to prefer preserving a plurality of rabbinic opinions, all kept in conversation with each other, to the prescription of singular rules of law.⁶² This approach, of course, recalls the rabbinic model of *gemara*, where, unlike the Mishnah, the focus is on the meandering give-and-take of halakhic disputation and discussion rather than on the determination of clear-cut rules of conduct.⁶³

While in theory this approach sought to make sense of the complex and often uncertain dialectics of the Talmud, it largely gave rise to the opposite conclusion. Instead of clarity, even more confusion arose. In attempting to unify the Talmud, diverse theories and approaches to creating harmony developed. Within this approach, the Tosafists, a group of Franco-German scholars who lived and worked in the two centuries following *Rashi's* death, and who included several of *Rashi's* own descendants, created a style of legal discourse that flourished under diverse models of analytical thought with only the occasional narrowing of focus. Frequently, these scholars posited modes of talmudic and halakhic analysis that, instead of contracting, vastly

60 Rabbi Shlomo Yitshaki authored comprehensive commentaries on both the Hebrew Bible and the Talmud. *Rashi's* prominence and wide acceptance has made his work the point of departure for much of talmudic scholarship over the last nine hundred plus years.

61 See Elon, *Jewish Law*, 1118–22.

62 See, e.g., R. Solomon Luria, *Introduction to Yam Shel Shelomoh to Hullin*.

63 See Walter, *Making of a Halachic Decision*, 40; R. Yom Tov Lippman Heller, *Introduction to Ma'adanei Yom Tov*.

expanded many of the substantive disagreements in Jewish law into even greater and even more irresolvable disputes.⁶⁴

Despite Maimonides's great influence, many—indeed most—of the great commentators who followed forsook Maimonides's approach to systematically codifying Jewish law. Instead, rabbinic luminaries, including Rabbi Asher ben Yeḥiel, or the *Rosh*,⁶⁵ Rabbi Yom Tov Assevilli, known as the *Ritva*,⁶⁶ Naḥmanides,⁶⁷ Rabbi Solomon ben Aderet, or the *Rashba*,⁶⁸ and Rabbi Menaḥem Meiri,⁶⁹ adopted the model of the Tosafists over that of Maimonides, by expressing legal views in the medium of talmudic novella or commentaries rather than in codifications of talmudic conclusions. These scholars frequently concluded that more than one approach was viable on any given issue and as a result steadfastly refused to write definitive conclusions to talmudic matters. By the fourteenth century, one who wished to determine what Jewish law was on a given topic would have encountered the problem that there was not one definitive legal book to consult to answer that question. Rather, there was a compendium of opinions which one would

64 See generally Warren Zev Harvey, "Law in Medieval Judaism," in *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (Cambridge: Cambridge University Press, 2017), 157.

65 R. Asher ben Yeḥiel (Ashkenazi) was born in Germany and died in Spain, where he served as a prominent rabbi for the latter half of his life. His abstract of talmudic law focuses only on the legal (non-aggadic) portions of the text and specifies the final, practical *halakhah*, leaving out the intermediate discussions and entirely omitting areas of law that are limited to the Land of Israel.

66 R. Yom Tov ben Avraham Asevilli of Spain is known for his clarity of thought and his commentary on the Talmud, which is extremely concise and remains one of the most frequently referred to talmudic works today.

67 R. Moses ben Naḥman Girondi, also known as Naḥmanides, was born in Gerona, Spain and died in Israel. A leading medieval philosopher, physician, Kabbalist, and commentator, his commentary to the Talmud, *Hiddushei ha-Ramban*, often provides a different perspective on a variety of issues addressed by the French Tosafists.

68 Rabbi Solomon ben Aderet of Spain was the author of thousands of responsa, various halakhic works, and the *Hiddushei ha-Rashba*, his commentary on the Talmud.

69 R. Menaḥem Meiri of Barcelona authored his commentary, the *Beit ha-Beḥirah*, which is arranged in a manner similar to the Talmud, presenting first the Mishnah and then the discussions and issues that arise from it. He focuses on the final upshot of the discussion and presents the differing views of that upshot and conclusion.

have to consider, and this compendium was not organized by topic but was found in various places as commentary to the talmudic sources.⁷⁰ Of course, Maimonides's code could be consulted, but even if it was regarded as a useful starting point for halakhic inquiry, its conclusions were rarely viewed as the final word on any given topic, and its rulings were not widely followed in many communities.

Rabbi Asher ben Yehiel's son, Rabbi Jacob ben Asher (1270–1340), recognized this lacuna and sought to fill it by writing another, different type of restatement of Jewish law that sought to blend the very best of Maimonides's innovative systemizations while also maintaining the Tosafist preference for preserving rabbinic discourse and recognizing a plurality of different but reasonable talmudic understandings on most issues. Unlike the *Mishneh Torah*, which was much broader in that it attempted to restate all of Jewish law—including both those laws which could be practiced absent a Temple and those which needed a Temple and Davidic monarchy to function—Rabbi Jacob covered only those areas of *halakhah* that were in force in his contemporary, pre-messianic times. It was written to be a practical and convenient halakhic guide for Jews living in a time when there is no Temple or Jewish king. His four-volume work, the *Arba'ah Turim* (“Four Pillars”), divided all of Jewish law into four broad subject areas: daily life, including the laws of Sabbath and festivals, family law, commercial law, and ritual law.⁷¹

Another major difference between the *Arba'ah Turim* and the *Mishneh Torah* is that the former work, unlike the latter, was not written as a definitive, univocal legal code. While Maimonides approached legal questions with the assumption that there was only one right answer, Rabbi Jacob ben Asher wrote a compendium in which every legal question admitted a number of reasonable answers, which he culled from the various talmudic commentaries and Maimonides's code. As such, while the book is extremely useful, it rarely resolved disputes. The reader of the *Arba'ah Turim* finds that the work greatly assists in the task of collecting and organizing the many opinions on any topic, but it does not prescribe a single correct rule of law. Rabbi Joseph Karo's classic sixteenth-century commentary on the *Arba'ah Turim*, the *Beit Yosef*, is an expansion of Rabbi Jacob ben Asher's methodology. It embellishes the *Arba'ah Turim*'s relatively laconic text by recording the views of many early

70 For a bibliography of such major medieval rabbinic legal works, see Elon, *Jewish Law*, 1236–1308.

71 See Elon, *Jewish Law*, 1277–1302.

scholars and decisors that Rabbi Jacob ben Asher did not directly reference, and also connects these various opinions to their talmudic sources. The *Beit Yosef* does not, however, systematically provide a mandate as to what the normative law should be. The same can be said for other major commentaries on the *Arba'ah Turim*, including Rabbi Joel Serkes's *Bayit H'adash* and Rabbi Joshua Falk-Kohen's dual commentary, *Derishah* and *Perishah*. Although both Serkes and Falk-Kohen broadly seek to defend the classical practices of the Ashkenazic communities of Europe from the intellectual challenges of Maimonides and his followers, the reader of their works immediately senses that these are not codes but intricate talmudic discourses on law and theory which only sometimes reach a conclusion of law. They are unreadable to all but the best trained scholars as well and serve mainly to complicate and further obscure efforts to cut through rabbinic disagreements and assert definitive halakhic conclusions on most questions.⁷²

Building the Set Table: Rabbi Joseph Karo's *Shulḥan Arukh*

To rectify this situation and to return to the code model, Rabbi Joseph Karo undertook the responsibility of writing yet another legal code, the *Shulḥan Arukh*, which was meant to follow the organizational structure of the *Arba'ah Turim* but use the methodology of Maimonides.⁷³ In other words, Rabbi Karo set out to write a work that provides one—and almost always only one—answer to questions of Jewish law in the areas covered by the *Arba'ah Turim*.⁷⁴ In fact, the *Shulḥan Arukh* derives most of its rules from Maimonides's earlier code, though it does frequently deviate from Maimonides's rulings, especially when a unanimous consensus from other authorities rejects those views. Significantly, Rabbi Karo chose to call his work the *Shulḥan Arukh*,

72 See *ibid.*, 1302–8.

73 See generally *ibid.*, 1319–41.

74 There are instances in the *Shulḥan Arukh* where Rabbi Karo will give a ruling and will then give another opinion using the phrase, “There are those who say,” or something to that effect. When this occurs, Rabbi Karo is not seeking to avoid giving a definitive normative position. Rather, he does this in circumstances where he concluded that, due to the historical difficulties of the time, as discussed above, a truly definitive decision has not been reached. Therefore, Rabbi Karo tries to account for veritable alternatives even while indicating the position he deems normative.

or “Set Table,”⁷⁵ to suggest that everything was prepared for its user. Here,

75 As noted by Michael J. Broyde and Ira J. Bedzow, *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura* (Brighton: Academic Studies Press, 2014), 379–81, a note on the names of Jewish books is needed, if for no other reason than to explain why the single most significant work of Jewish law written in the last 500 years, the *Shulḥan Arukh*, should have a name which translates into English as “The Set Table.”

Unlike the tradition of most Western law, in which the titles to scholarly publications reflect the topics of the works (consider John T. Noonan, Jr. and Edward McGlynn Gaffney, *Religious Freedom: History, Cases and Other Materials on the Interaction of Religion and Government*, 3rd. ed. [New York: Foundation Press, 2010]), the tradition in Jewish legal literature is that a title rarely names the relevant subject or subjects. Instead, the title usually consists either of a pun based on the title of an earlier work on which the current writing comments, or a literary phrase, into which the authors’ names have been worked (sometimes in reliance on literary license), or some other literary device.

A few examples demonstrate each phenomenon. Rabbi Jacob ben Asher’s classical treatise on Jewish law was entitled “The Four Pillars” (*Arba’ah Turim*) because it classified all of Jewish law into one of four areas. A major commentary on this work that, to a great extent, supersedes the work itself is called “The House of Joseph” (*Beit Yosef*), since it was written by Rabbi Joseph Karo. Once Karo’s commentary (i.e., the house) was completed, one could hardly see “The Four Pillars” on which it was built. A reply commentary by Rabbi Joel Sirkes, designed to defend “The Four Pillars” from Karo’s criticisms, is called “The New House” (*Bayit Hadaash*). Sirkes proposed his work (i.e., the new house) as a replacement for Karo’s prior house.

When Rabbi Karo wrote his own treatise on Jewish law, he called it “The Set Table” (*Shulḥan Arukh*), which was based on (i.e., located in) “The House of Joseph,” his previous commentary on Jewish law. Rabbi Moses Isserles’s glosses to Rabbi Karo’s “Set Table”—which were really intended vastly to expand “The Set Table”—are called “The Tablecloth” (*ha-Mappah*) because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table. Rabbi David ha-Levi’s commentary on the *Shulḥan Arukh* was named the “Golden Pillars” (*Turei Zahav*), denoting an embellishment on the “legs” of the “Set Table.” This type of humorous interaction continues to this day in terms of titles of commentaries on the classical Jewish law work, the *Shulḥan Arukh*.

Additionally, there are book titles that are mixed literary puns and biblical verses. For example, R. Shabtai ben Meir ha-Kohen wrote a very sharp critique on the above-mentioned *Turei Zahav* (Golden Pillars), which he entitled *Nekudat ha-Kesef*, “Spots of Silver,” a veiled misquote of the verse in Song of Songs 1:11, which states “we will add bands of gold to your spots of silver.” Thus, ha-Kohen’s work is really “The Silver Spots on the Golden Pillars,” with the understanding that it is the silver that appears majestic when placed against an entirely gold background.

Rabbi Karo was playing off a famous rabbinic interpretation of the biblical verse that introduces one of the Torah's main recitations of the law: "These are the laws that you [Moses] shall place before them [the people]."⁷⁶ The mishnaic sage Rabbi Akiva understood that the verse's seemingly superfluous instruction to "place" the law in front of the people should be understood as an exhortation to make the law readily understandable to those who are expected to practice and observe it. It should be taught thoroughly, so that it will be "systematically organized in their mouths" and presented "like a set table" from which the people may consume the law without need for further analysis.⁷⁷ Rabbi Karo set out to do the same. Drawing on his more elaborate and analytically involved work in the *Beit Yosef* commentary on the *Arba'ah Turim*, he sought to produce a comprehensive codification of Jewish legal rules and principles ready-made for easy use.

Rabbi Karo describes his reasons for writing the book as follows:

I saw in my heart that it would be good to put the numerous statements [in the *Beit Yosef*] in a condensed form and in a precise language so that the Torah of God will be continuous and fluent in the mouth of every Jew . . . so that any practical ruling about which he may question will be clear to him when

Other works follow the model of incorporating the name of the scholar into the work. For example, the above-mentioned Rabbi Shabtai ben Meir ha-Kohen's commentary on the *Shulḥan Arukh* itself is entitled *Sifteï Kohen*, "The Lips of the Kohen," a literary embellishment of "Shabtai ha-Kohen," the author's name, as well as a veiled reference to Malakhi 2:7, which reads, "*Ki sifteï kohen yishmeru da'at*," or "the lips of the Kohen [priest] guard knowledge." Rabbi Moses Feinstein's collection of responsa is called *Iggerot Moshe*, "Letters from Moses." Hundreds of normative works of Jewish law follow this model.

Of course, a few leading works of Jewish law are entitled in a manner that informs the reader of their content. Thus, the thirteenth-century Spanish sage Naḥmanides wrote a work on issues in causation titled "Indirect Causation in [Jewish] Tort Law" (*Gerama be-Nezikin*), and the modern Jewish law scholar Eliav Schochetman's classical work on civil procedure in Jewish law is called "Arranging the Case," a modern Hebrew synonym for civil procedure (Eliav Schochetman, *Seder Ha-dyn: Le'or Meqōrōt Ha-Mišpat Ha-'Ivry, Taqanōt Ha-Dyūn We-psyqat Batey- Ha-Dyn Ha-Rabanyym Be-Yiśra'el* [Jerusalem: Sfryat Ha-Mišpat Ha-'ivry, 1988]).

76 Exod 21:1.

77 See *Mekhilta de-Rabbi Shimon Bar Yoḥai* 21:1. Original manuscripts bear the title *Mekhilta de-Rabbi Shimon Ben Yoḥai*.

this magnificent book which covers everything is fluent in his mouth. . . . Moreover, young students will study it continuously so that they memorize it. Its clear language regarding the practical *halakhah* will be set on their young lips, so that when they get older they will not deviate from it. Also, scholars will take care of it as if it was light from the Heavens easing them from their troubles, and their souls will be recreated when studying this book which contains all the sweet *halakhot*, decided without controversy.⁷⁸

According to Rabbi Karo, those who would read the *Shulḥan Arukh* would be able to discern the laws of daily living and would not need to consult other opinions. He accomplished his goal. The *Shulḥan Arukh* is written in a fairly simple Hebrew and is in a simple rule-based manner understandable to people who have neither studied Talmud nor learned law. It is a code book similar in style to Maimonides's *Mishneh Torah*. The codification, however, succeeded only if the underlying assumption for its commentators was that it was in fact a "set table" and needed only a few minor adornments or adjustments.

This was not to be. Consistent with the historical development of Jewish law, immediately after the publication of the *Shulḥan Arukh*, other Jewish law authorities began to write extensive commentaries on it, both to explain Rabbi Karo's relatively terse text and, more frequently, to correct what these scholars saw as its errors.⁷⁹

The first to comment was Rabbi Moses Isserles (1520–72), who appended his own views—which reflected the Ashkenazic halakhic traditions in contrast to Rabbi Karo's nearly exclusive presentation of accepted rules and practices of Sephardic Jewry—to the *Shulḥan Arukh*, so as to provide alternative positions.⁸⁰ Rabbi Isserles, known as the *Rema*, also authored a commentary on the *Arba'ah Turim* titled *Darkhei Moshe* that paralleled Rabbi Karo's *Beit Yosef*, supplementing and embellishing the *Arba'ah Turim*'s restatement of Jewish law without systematically providing the normative *halakhah*. Additionally, Rabbi Isserles wrote a legal work called *Torat Ḥattat*, which was more similar to a code, albeit only on a few areas of Jewish law.⁸¹ In his

78 Introduction to *Shulḥan Arukh*.

79 For a review of these commentaries, see Elon, *Jewish Law*, 1423–43.

80 See Rabbi Moses Isserles, *Introduction to Darkhei Moshe*.

81 Elon, *Jewish Law*, 1357–59.

thousands of glosses on Rabbi Karo's *Shulḥan Arukh* titled *ha-Mappah*, Rabbi Isserles incorporated Ashkenazic Jewry's practices into the predominantly Sephardic-oriented work.⁸² These glosses, however, revert back to the practice of accepting juridical ambiguity. The *Rema* is inclined to cite more than one opinion as normative, both in theory and in practice, and frequently cites conflicting views without offering any clear direction about how to resolve such contradictions.⁸³ Unlike Rabbi Karo, who generally follows a secondary rule of decision that prefers any halakhic position adopted by the majority of his preferred precedential decisors—the *Rosh*, Maimonides, and Rabbi Alfasi⁸⁴—Rabbi Isserles never provides a clear set of rules as to how he decides matters of Jewish law. Indeed, the *Rema* criticizes Rabbi Karo's reliance on this secondary rule for resolving halakhic disputes in his introduction to the *Rema* itself, and he explains his criticism of Rabbi Karo in this exact way in his *Darkhei Moshe*. After advancing two different reasons for his work, he explains:

The third and primary reason for writing this work, is, as is known, that the author of the *Beit Yosef* was enamored with the giants of Jewish law and ruled normatively like two or three of the great Jewish law scholars testified: these are the beloved *Rif*, Maimonides, and *Rosh*, so that when all three of them adopted one approach, then he paid no attention to other great scholars of Torah at all. In the place of other scholars, he would rule like two of them . . . and based on this he discarded all of the customs of our communities . . .

82 See *ibid.*, 1360. See also Rabbi Moses Isserles, *Introduction to Rema to Shulḥan Arukh*:

[Rabbi Joseph Karo's] books are full of rulings that do not follow the interpretations of the [Ashkenazic] scholars from whose waters we drink—the important authorities among the Ashkenazic Jews, who have long been our eyes, and upon whom the earlier generations relied . . . which are built upon the words of the Tosafists and the French scholars from whom we are descended.

83 See, e.g., *Rema to Shulḥan Arukh, Oraḥ Ḥayyim* 111:1, 332:2, 467:12; *Rema to Shulḥan Arukh, Yoreh Deah* 89:1, 391:2; *Rema to Shulḥan Arukh, Even ha-Ezer* 27:1, 165:1.

84 See *Beit Yosef to Arba 'ah Turim, Introduction to Oraḥ Ḥayyim*.

Indeed, it is quite common for the *Rema* to cite—with no clear indication which view he adopts—more than one reasonable view, even when these views are completely contradictory.⁸⁵

Upending the Set Table: The Rise of the Commentators

In the century and a half following the appearance of the *Shulḥan Arukh*, many additional commentaries to Rabbi Karo's code appeared.⁸⁶ These works provided the talmudic and early rabbinic bases for Rabbi Karo's clear-cut rulings, suggested rationales for his decisions, applied the *Shulḥan Arukh*'s rules to new cases, and voiced disagreement with Rabbi Karo's conclusions. Very often, these various commentaries disagreed with each other as well, and as a result they added to the uncertainty about how to determine normative rules of Jewish law.

The most significant early commentaries that grew up around the *Shulḥan Arukh* include Rabbi Mordechai ben Abraham Yaffe of Prague's (1530–1612) *Levush*;⁸⁷ Polish Rabbi David ha-Levi Segal's (1586–1667) *Turei Zahav*, or *Taz*; Rabbi Samuel Feibush's (1650–1706) *Beit Shmuel*; Rabbi Shabtai ha-Kohen's (1621–62) *Siftei Kohen*, or *Shakh*; Rabbi Joshua Falk's (1555–1614) *Sefer Me'irat Einayim*, or *Sema*; Rabbi Moses ben Isaac Judah Lima's (1615–70) *Ḥelkat Meḥokek*; and Rabbi Abraham ha-Levi's (1633–83) *Magen Avraham*. Within a relatively short time, many of these texts were printed on the same page alongside the text of Rabbi Karo's *Shulḥan Arukh* and the *Rema*'s glosses.⁸⁸ In particular, on the *Oraḥ Ḥayyim* section of the *Shulḥan Arukh*, which deals with daily laws and which is the subject of our forthcoming book and this article, the *Taz* and the *Magen Avraham* wrote detailed commentaries that incorporate a variety of positions found neither in the *Shulḥan Arukh* nor in *Rema*'s glosses. These include citations from the Talmud, the mystical traditions embodied in the

85 For an excellent example of this, see the simple rule found in *Shulḥan Arukh*, *Even ha-Ezer* 21:5, where the *Rema* cites five views, some stricter and some more lenient than the view of the *Shulḥan Arukh*. In truth, many cases such as this abound, and thus the *Rema* is much less of a “code” than *Shulḥan Arukh*.

86 See generally Elon, *Jewish Law*, 1423–43.

87 The claim could be made that the *Levush* is a rival code and not a true commentary, but this strikes us as incorrect for the purposes of this work, since the *Levush* assumes that the reader has read the *Shulḥan Arukh* and the *Rema* and is referring to his work as an additional source of information.

88 See Elon, *Jewish Law*, 1417–19.

text of the *Zohar*,⁸⁹ opinions of many additional early rabbinic authorities, and religious customs practiced in Central and Eastern Europe. The *Shulḥan Arukh*, along with its commentaries, was transformed over the relatively short period of time of a century from a set table to a crowded one, in which the right answer was no longer clear.⁹⁰

Precisely by adopting the *Shulḥan Arukh* as a central organizational model of Jewish law—and not the Mishnah, Talmud, or *Mishneh Torah*—the authors of these voluminous commentaries insured that the *Shulḥan Arukh*

89 Meaning literally, “Splendor,” the *Zohar* is the foundational work in Kabbalistic literature. The *Zohar* first appeared in Spain in the 13th century, and was published by a Jewish writer named Moses de Leon. De Leon ascribed the work to Rabbi Shimon bar Yoḥai, a second-century *Tanna* (rabbi), who hid in a cave for thirteen years studying the Torah to escape Roman persecution and, according to legend, was inspired by the Prophet Elijah to write the *Zohar*.

90 Of course, there were always those Jewish law authorities who highlighted the de-codification and insisted that this was a—or even the—central feature of Jewish law. This school of thought was pressed most vigorously by Rabbi Solomon Luria in his anti-*Shulḥan Arukh* polemic in the beginning of his commentary, *Yam Shel Shelomoh*, to both Talmud tractates *Bava Kamma* and *Hullin*. Rabbi Luria makes three important points. First, he states that diversity is a central feature of the talmudic discourse and that searches for the “correct” answer are methodologically fruitless because there is frequently no single correct answer. Second, he argues that even when a single answer could be correct, the process of following the majority of a group of decisions—even as great as the *Rif*, Maimonides, and the *Rosh*—is methodologically invalid. All opinions need to be considered. Third, he claims that talmudic discourse is central, while codes serve as shortcuts for weaker authorities to defer to putatively greater authorities without directly confronting the central talmudic texts in order to determine which answer is actually most suited for the question in front of them.

But, we think that, whatever the objective merits of this argument, this controversy is long since over—and both sides won. Rabbi Luria lost the battle against codification, although he might have won the war in his observation that the codes are not “binding” (in the same way that the United State Code is binding). Thus, while the *Shulḥan Arukh* and the glosses of the *Rema* have become both a canonical text (and the *Yam Shel Shelomoh* remains an important but marginal text), neither of these texts—nor any other code, including Maimonides’s code—is generally binding: they are just a starting point in the development of Jewish law. As we show in this work, frequently the code is just a format, and the author—in this case, the *Arukḥ ha-Shulḥan*—sees neither the formulation of the *Shulḥan Arukh* nor the *Rema* as binding at all. Rather, the organizational framework of the *Shulḥan Arukh* is a valuable one through which to ponder questions of normative Jewish law.

would become the central touchstone document of Jewish law. However, by adopting the model of writing commentaries on Rabbi Karo's code, and by declining to venerate the substantive rules adopted by the *Shulḥan Arukh*, the commentators ensured the continued relevance—even primacy—of the Tosafist tradition of diverse and confusing Jewish law, with no certain rules and no clear processes for determining what to do in practice.⁹¹ The *Shulḥan Arukh* thus made a deep and lasting contribution to Jewish law, but it was not at all the contribution that Rabbi Karo hoped for. Instead, he and Rabbi Isserles contributed an organizational structure for Jewish law that has stood the test of five hundred years. Ever since the publication of the *Shulḥan Arukh* in the mid-1500s, virtually all major and comprehensive treatments of Jewish law have been organized around, responsive to, and founded upon both the structure and content of Rabbi Karo's text—even as they often vigorously disagree with his and each other's halakhic conclusions.⁹² Jewish law is divided into four basic groupings—daily law, family law, commercial law, and ritual law, and each of these basic groupings is divided into many different topic subgroups to allow ease of access and understanding. This division is itself a basic contribution.

Consider the rules of daily ritual law, which is the focus of this work. The *Orah Ḥayyim* section of the *Shulḥan Arukh* is divided into six hundred and ninety-six smaller chapters, grouped into twenty-nine topical sections that address common topics in a common theme—for example, laws of morning prayers, the laws of *tsitsit*, and so on—which allow the reader

91 This point is worthy of emphasis. When an American law scholar writes a commentary on the United States Code, its starting point is to explain the U.S.C., which is always “correct” in the sense that it is truly “the law” but which is sometimes in need of explanation or even resolution of conflicts. When a modern Catholic scholar writes a commentary on the 1983 (most recent) Code of Canon Law, it is to explain the Code; the author will never and cannot argue that the Code is not “the law.” Such is not the case in commentaries on the *Shulḥan Arukh*, each of which repeatedly argues for the incorrectness of the code in specific cases. Rabbi Karo's commentary on Maimonides's *Mishneh Torah*, entitled *Kesef Mishneh*, is closer to the model of defending a canonized code. In certain ways the modern Sephardic Code, *Yalkut Yosef* by Rabbi Yitshak Yosef, is an attempt to treat the *Shulḥan Arukh* as a canonized text, although a more detailed study would reveal this to be a woefully incomplete explanation of that work.

92 But, see also Rabbi Solomon Ganzfried's *Kitsur Shulḥan Arukh*, which provides extremely abbreviated and clear-cut rules on those areas of Jewish law that relate to the ordinary lives of lay people, and which is a stand-alone work.

to readily find the exact topic desired. This reference type access, with an intuitive organization reflective of the sequence in which topics naturally arise in a home governed by Jewish law, have made the *Shulḥan Arukh* a simple work to use.⁹³ A huge proportion of all subsequent works of Jewish law are organized around its practical organizational system, but Rabbi Karo's text is not, on its own, formally binding.

Even as Jewish law became organizationally simpler, it became legally much more complex with every passing year. After the first wave of commentaries on the *Shulḥan Arukh* was completed in the early eighteenth century, a new generation of scholars began to produce super-commentaries on these earlier commentaries. Rabbi Joseph ben Meir Teomim (1727–92) authored the *Peri Megadim* commentary on the *Shulḥan Arukh* itself, as well as the *Mishbetsot Zahav* and *Eshel Avraham* as super-commentaries on the *Taz* and *Magen Avraham*, respectively. These works created yet another layer of new analysis and elaboration on many areas of Jewish law and life. Indeed, the list of important super-commentators who lived from the late seventeenth century through the early nineteenth century is both long and impressive. It includes Rabbi Judah Ashkenazi (1730–70), author of the well-known *Ba'er Heitev*; Rabbi Hezekiah de Silva (1659–98), who wrote the *Peri Ḥadash*; Rabbi Ḥayyim Margoliyot (1780–1823), author of *Sha'arei Teshuvah*; Rabbi Samuel ben Nathan ha-Levi Loew (1720–1806), who wrote *Maḥatsit ha-Shekel*; and many others who wrote derivative commentaries⁹⁴ on the *Shulḥan Arukh*.

93 This is a frequently missed idea. Maimonides's work is hard to use and deeply counter-intuitive in its organizational structure. The Talmud is even more disorganized. Such is not the case for the *Shulḥan Arukh*. Its first section, *Orah Ḥayyim*, follows the simple three cycles approach. The first 241 chapters codifies all of daily Jewish law, starting from when a person wakes up and concluding with when a person goes to sleep. Topics are covered in the order a person would encounter them during the day. Chapters 242 to 417 cover the Sabbath laws, starting with bringing in the Sabbath and concluding with the rituals that one does to end the Sabbath, followed then by the very technical rules related to building an *eruv*. The third cycle is the festival cycle, which starts with the most common and routine monthly new-moon festival, and then discusses Passover, Shavuot, Sukkot, the Fast Days, the New Year celebration, Yom Kippur, Sukkot and Lulav, Ḥanukkah, and then Purim, exactly in the order one would encounter them if one started the year with the first Hebrew month, Nissan. Ease of use is a central feature.

94 By this term, we mean that the writer of the commentary assumes that the reader has seen other earlier commentaries and is looking for further explanation.

Rabbinic legal scholarship was flourishing, but these new works left Jewish law more confused, rather than less. It grew harder and harder to determine what Jewish law really mandated of its adherents as the commentaries grew longer, more nuanced and less clear. Furthermore, deciding which commentary was “correct” became almost impossible for even well-trained rabbis to do, never mind for lay people who could read Hebrew and were interested in topics of Jewish law and practice.

By 1830, three detailed additions to the *Orah Hayyim* section of the *Shulḥan Arukh* had appeared. These were the *Be‘ur ha-Gra* by Rabbi Elijah Kramer (1720–97), also known as the Vilna Gaon; the *Shulḥan Arukh ha-Rav*, written by Rabbi Shneur Zalman of Liadi (1745–1813), the first Lubavitcher Rebbe; and Rabbi Akiva Eiger’s (1761–1837) *Hagahot*. The methodological gaps between these three works is wide, but all three substantially contributed to the further complication and multivocality of Jewish law and jurisprudence that made discerning the “right” halakhic rule on any given issue even more difficult and uncertain. The Vilna Gaon’s *Be‘ur ha-Gra* consists of a combination of reference notes and brief comments appended directly to the text of Rabbi Karo’s *Shulḥan Arukh*. It focuses on citing talmudic texts, including the Jerusalem Talmud, that constitute the jurisprudential foundations of the topics discussed by Rabbi Karo in his own work in a style that is at once concise, cryptic, and not deferential to the precedent of post-talmudic authorities that came before it. The *Shulḥan Arukh ha-Rav* by the first Lubavitcher Rebbe is a classic synthesis of prior codes, albeit with a slight Hassidic slant. Importantly, while Rabbi Shneur Zalman of Liadi’s work is organized around the general structure used by Rabbi Karo, it is fundamentally a stand-alone text that in some circles rivals even the *Shulḥan Arukh* itself as a basic text of Jewish law. Rabbi Akiva Eiger’s *Hagahot*, written as a super-commentary on the prior works of the *Magen Avraham* and *Taz*, brought the sharp insights and the methodology of the Tosafists back into the legal discussion. On complex and nuanced questions, these three important authorities on the *Shulḥan Arukh* rarely agree. The reasons are obvious: One of them is reaching back into the whole of the talmudic rabbinic corpus; one is reaching back only to the traditions of *Rashi* and his disciples while adding a Hasidic outlook; and one is continuing the work of the *Magen Avraham* and *Taz*, commenting and complicating the work of the last generation of commentators. There is no reason to assume that complex matters would be resolved identically by each of these three works.

By the mid-1800s, two additional short but important self-standing legal codes had become popular—the *Hayyei Adam* by Rabbi Abraham ben Yehiel Mikhel of Danzig (1748–1820) and Rabbi Solomon Ganzfried’s (1804–86) *Kitsur Shulḥan Arukh*—which attempted to resolve all disputes and provide a singularly correct halakhic directive that could be easily comprehended and observed by laypeople. While both of these works of Jewish law were written by eminent Jewish scholars, each has a totally different style and approach to codification. The *Kitsur Shulḥan Arukh* is both simple to use and practically strict, whereas the *Hayyei Adam*, whose author was a disciple of the Vilna Gaon, is deeply analytical in its approach to Jewish law. Both, however, were revolutionary for their time in that they abandoned the organizational structure of the *Shulḥan Arukh* and crafted their own structure while aiming for simplicity in codifying Jewish law. These were an attempt to “set a new table” so that their readers would not be confused by the crowded table that Rabbi Karo’s *Shulḥan Arukh* had become. That these two new codes were well received despite—or perhaps because of—the fact that neither of them even followed the basic organizational structure of the “Set Table” of the *Shulḥan Arukh* was reflective of the problems that the commentators’ cluttering of Rabbi Karo’s table had engendered.

This approximately three-hundred-year period of “crowding the table” also saw the rejuvenation and development of responsa literature, which was a separate genre from the commentaries. The responsa literature, which consisted of questions and answers on matters of *halakhah* collected into volumes, formed an alternative to the model of discerning normative law through codes and talmudic commentaries. While the genre had been dormant—though not extinct—for many years in acquiescence to the focus on writing commentaries, by the 1700s the responsa literature was the primary vehicle used by some rabbinic authorities for determining and communicating halakhic norms.⁹⁵ For instance, Rabbis Ezekiel Landau (1713–93) and Moses Sofer (1762–1839), as well as many other highly regarded and important European scholars and decision makers, chose to write responsa rather than commentaries or stand-alone codes as their primary vehicle for sharing their views of Jewish law, adding a whole other set of literature to the melting pot

95 Rabbinic authorities had always written responsa to answer halakhic questions. The difference is that at this time writing responsa went from being a practical method of discerning *halakhah* for individuals to being the primary genre used by rabbis to demonstrate what the normative *halakhah* should be in general.

of Jewish law. This literature also rarely followed the set table organizational model and contributed further to the complication and indeterminacy of halakhic jurisprudence.⁹⁶

Conclusion: The Table in Disarray

By the year 1880, a little more than three hundred years after the initial 1577 publication of Rabbi Karo's *Shulḥan Arukh* with the *Rema's* glosses, Jewish law in Eastern Europe was anything but clear. There were more than a dozen significant codes, commentaries, and other texts illuminating a myriad of topics, from minor customs and practices to major matters of Torah law. It was difficult for a legal scholar, let alone a layperson, to discern what was normative halakhic practice on even simple matters. Needless to say, it was much harder to find where to turn when deciding complicated issues.

Indeed, it was not just the number of works but the variety of literature that made determining the correct result nearly impossible. Painting with a broad brush, one can say that until the late 1800s, works of Jewish law generally fell into one of five categories. First, there were the major restatements like the *Arba 'ah Turim* and *Beit Yosef*, which provided broad, comprehensive surveys of rabbinic opinions spanning across particular geographic and temporal spaces, often ruling based on minimal rules of authority and provenance.⁹⁷ The second category, exemplified by the *Shulḥan Arukh* and Maimonides's *Mishneh Torah*, consists of works which clearly delineate the laws without commentary or explanation. Rabbi Ganzfried's *Kitsur Shulḥan Arukh*—though much smaller and less influential—falls into the category as well. The intention of these works is to provide an easy guidebook for proper action. Some, like the *Mishneh Torah*, were meant to stand independent of any other work;⁹⁸ others, such as the *Kitsur Shulḥan Arukh*, are meant for younger students and for quick review and presuppose that their audience will look elsewhere for greater in-depth analysis.

96 Two indices to the responsa literature—*Pithei Teshuvah* and *Sha 'arei Teshuvah*—are an attempt to organize the responsa literature around the organizational structure of the set table. Of course, both further crowd the table.

97 For Rabbi Yaakov ben Asher, the final decision is that of his father Rabbi Asher ben Yehiel (if one is selected); for Rabbi Karo, the decision is determined by the majority opinion cited.

98 Whether such is the actual case or not is irrelevant to the author's intention.

The third category includes works like the *Rema's* glosses on the *Shulḥan Arukh*, Rabbi Abraham ben David of Posquieres's (1125–98) glosses on the *Mishneh Torah*, as well as the many other commentaries that grew up around the *Shulḥan Arukh*. These texts are primarily editorial or commentative works that add to, update, or correct information contained in foundational works written by others.⁹⁹ The fourth category contains works, such as Rabbi Solomon Luria's (1519–73) *Yam Shel Shelomoh*, which attempt to collect all relevant information on a topic, from the Talmud to contemporary times, in order to evaluate the subject properly and determine the correct decision independent of the structure and substance of the major codes and commentaries. Finally, a fifth category includes the voluminous responsa literature which, rather than seeking to systematize Jewish law and determine halakhic norms from within some conceptual framework, focused instead on providing concrete answers and directions on how to legally address specific real-world questions on discrete topics in rabbinic jurisprudence. Of course, these categories are not always so distinct such that a work need only fit into one of them. For example, works like those of the *Magen Avraham*, *Taz*, and *Shakh* use a hybrid method of commentary, such that they can fit into more than one category, while some writers wrote responsa which they turned into commentary on the codes.¹⁰⁰

Part II:

Rabbi Yeḥiel Mikhel Epstein's *Arukh ha-Shulḥan*

Introduction

The Jewish legal landscape in the second half of the nineteenth century was thus a veritable quagmire of competing opinions, and conflicting texts, commentaries, and authorities that made determining the correct course of conduct on any particular question difficult for laypeople and scholars alike. The halakhic uncertainty engendered by the state of rabbinic jurisprudence was further exacerbated by the fact that by the late 1800s, the Jewish world was undergoing sustained and cataclysmic changes. The Enlightenment had

99 In the *Rema's* case, additions are meant to include the local practices of Ashkenaz, which are omitted in the *Shulḥan Arukh*. In the *Rabad's* case, additions are meant to correct what are seen as errors.

100 *Noda be-Yehudah* being a prime example.

posed substantial challenges to many aspects of traditional rabbinic thought, and Emancipation and the gradual transformation of Jews into members of European civil society during the nineteenth century raised new questions about the interaction of Jewish legal norms with the prevailing cultural mores and practices of the general societies into which Jews sought to integrate. New modes of thinking and ideologies—secularism, historical criticism, nationalism, socialism, and liberalism, among others—made substantial inroads into various aspects of Jewish life and into various segments of the Jewish community. All this served to challenge many traditional rabbinic responses to legal and theological question, and indeed raised many new and unprecedented questions that for traditional Jews often demanded halakhic answers.

The stage was thus set for a fresh reconsideration of the great body of diverse halakhic thought and opinion that had grown up around Rabbi Karo's *Shulḥan Arukh* during the preceding centuries. In much the same vein as Maimonides's *Mishneh Torah* attempted to cut through the mass of rabbinic thinking that had accumulated from the close of the talmudic era up to his own time,¹⁰¹ and similarly to how both the *Arba'ah Turim* and *Shulḥan Arukh* served to take stock of and systematize the messy expanse of conflicting halakhic literature that had developed in the preceding centuries,¹⁰² by the end of the 1800s the state of Jewish law demanded a fresh attempt to reorder the by then very crowded and disordered table.

In fact, in response to this exigency, two different new codifications of Jewish law were produced around the turn of the twentieth century. Importantly, and perhaps not surprisingly, these two works reflect and continue the two different but longstanding and well-established traditions of halakhic codification discussed in the previous part. One work, Rabbi Israel Meir Kagan's (1839–1933) *Mishnah Berurah* follows the mishnaic model of offering relatively simple and clear-cut legal prescriptions that attempt to cut through and are unencumbered by the multivocality and complexity of rabbinic discourse and disputation.¹⁰³ Published between 1884 and 1906, the *Mishnah Berurah* is a halakhic work of relatively limited scope and is written as a super-commentary on the *Oraḥ Ḥayyim* section of Rabbi Karo's *Shulḥan*

101 See generally Elon, *Jewish Law*, 1180–1215.

102 See generally *ibid.*, 1319–41.

103 Brojde and Bedzow, *Codification of Jewish Law*, 21.

Arukh. In it, Rabbi Kagan collects and summarizes the halakhic conclusions of the many important commentaries and other legal works that had sprung up around the *Shulḥan Arukh* in the preceding centuries and provides clear, practical instruction to his readers about what norms they should observe in practice.¹⁰⁴ The other major restatement of Jewish law to appear at this time was Rabbi Yeḥiel Mikhel Epstein's (1829–1908) *Arukh ha-Shulḥan*, the principal subject of our forthcoming book. Written between 1873 and 1903, Rabbi Epstein's work covers the full expanse of Jewish law topics dealt with in Rabbi Karo's *Shulḥan Arukh*, and follows the *gemara* model of Jewish law codification, which traces the development of halakhic rules and doctrines through biblical, talmudic, and later rabbinic sources without shying away from the complexities and uncertainties engendered by legal disagreement.¹⁰⁵ Significantly, both texts sought to signal their attempts to clarify Jewish law in an uncertain age. Rabbi Kagan titled his work *Mishnah Berurah*, or "Clear Teaching"; and Rabbi Epstein made his intent to recover the clarity of Rabbi Karo's *Shulḥan Arukh* amidst the messiness of accumulated commentaries by calling his restatement *Arukh ha-Shulḥan*—"Setting the Table."¹⁰⁶

This part focuses on Rabbi Epstein's life and career, as well as on a preliminary introduction to the *Arukh ha-Shulḥan* itself. The next section, however, also draws attention to the similarities and differences between Rabbi Epstein's halakhic magnum opus and the *Mishnah Berurah*. As both are seminal attempts to clarify the complexity and diversity of *halakhah* written at roughly the same time and in response to very similar concerns, the significance and importance of Rabbi Epstein's *Arukh ha-Shulḥan* and its place within the ongoing development and periodic codification of Jewish

104 For analyses and discussions of the *Mishnah Berurah*, see *ibid.*; Simcha Fishbane, *The Method and Meaning of the Mishnah Berurah* (Hoboken, N.J.: Ktav Publishing House, 1991); *idem*, *An Analysis of the Literary and Substantive Traits of Israel Mayer Hacohen Kagan's Mishnah Berurah, Sections 243-247, 252* (Ottawa: National Library of Canada, 1988).

105 For discussions and analyses of the *Arukh ha-Shulḥan*, see Simcha Fishbane, *The Boldness of an Halakhist: An Analysis of the Writings of Rabbi Yecheil Mechel Halevi Epstein the Arukh Hashulhan* (Boston: Academic Studies Press, 2008); see also Rabbi Eitam Henkin's exhaustively researched and recently published biography of Rabbi Epstein, *Ta'arokh Lefanai Shulḥan: Ḥayyav, Zemanu, u-Mif'alo Shel Harav Yecheil Mikhel Epstein Ba'al Arukh ha-Shulḥan* (Jerusalem: Magid, Hotsa'at Koren, 2019).

106 See *Arukh ha-Shulḥan, Introduction to Hoshen Mishpat*; Henkin, *Ta'arokh Lefanai Shulḥan*, 232–34 (discussing the provenance and meaning of the work's title).

law can be better understood in comparison with its principal alternative work. In particular, as this article and the forthcoming book focuses on the jurisprudential methodology of the *Arukh ha-Shulḥan* and the principles and guidelines Rabbi Epstein used to reach halakhic conclusions in the face of a vast diversity of rabbinic opinion and indeterminacy of legal sources, a very general analysis of the chief differences between the methodological approaches of the *Mishnah Berurah* and *Arukh ha-Shulḥan* can help highlight the significance of Rabbi Epstein's jurisprudential approach to deciding Jewish law.

The Life and Times of Rabbi Yeḥiel Mikhel Epstein

Rabbi Yeḥiel Mikhel Epstein was born into a relatively wealthy family on January 24, 1829 in Bobriusk, Russia (present-day Belarus). Rabbi Epstein's father was a successful businessman and competent Torah scholar who made sure that his son—who by many accounts demonstrated intelligence and aptitude for talmudic studies at a young age—received a thorough rabbinic education.¹⁰⁷ Rabbi Epstein spent his formative years studying Torah under the direction of Rabbi Elijah Goldberg, the Chief Rabbi of Bobriusk, as well as a brief stint in the famous Volozhin Yeshivah from 1842 through 1843.¹⁰⁸ While Rabbi Epstein briefly pursued a business career,¹⁰⁹ he was appointed a rabbinical judge and assisted his teacher, Rabbi Goldberg, in his hometown of Bobriusk and ultimately decided to become a communal rabbi.¹¹⁰ He received his first appointment in 1865 when he was selected to become the rabbi of Novosybkov, a Russian town in which a few thousand Jews—Orthodox, Secular, *Ḥasidim*, and *Mitnaggedim*—lived.

At some point prior to his first rabbinical appointment at the age of 35, Rabbi Epstein married Roshka Berlin, the daughter of Rabbi Jacob Berlin and sister of the famous Rabbi Naftali Tsevi Yehudah Berlin, who would later become head of the Volozhin Yeshivah.¹¹¹ The couple ultimately had five children: Rabbi Barukh Epstein (1860–1941), a bookkeeper by trade and

107 See Henkin, *Ta'arokh Lefanai Shulḥan*, 37–43; Simcha Fishbane, *Boldness of an Halakhist*, 2–4.

108 See Fishbane, *Boldness of an Halakhist*, 5. On Rabbi Epstein's time in the Volozhin Yeshivah, see Henkin, *Ta'arokh Lefanai Shulḥan*, 57–58, 321–22, 349–51.

109 See Henkin, *Ta'arokh Lefanai Shulḥan*, 43–44.

110 See Henkin, *Ta'arokh Lefanai Shulḥan*, 349–61 (for more on Rabbi Goldberg).

111 See Fishbane, *Boldness of an Halakhist*, 6.

an accomplished Torah scholar and author in his own right;¹¹² Rabbi Dov Ber Epstein, who became an important communal figure in Jerusalem after moving to Palestine in 1902;¹¹³ Braynah Velbrinski, who was twice widowed before settling into her parents' home and managing the publication and distribution of the *Arukh ha-Shulḥan*;¹¹⁴ Batyah Miriam Berlin, who divorced her first husband after only a few months of marriage and subsequently married her uncle, Rabbi Naftali Tsvi Yehudah Berlin;¹¹⁵ and Eidel Kahanov, who married into a wealthy family of Jewish merchants from Odessa, Russia.¹¹⁶

Rabbi Epstein spent ten years as rabbi of Novosybkov. During this time, he spent some time in Lyubavichi visiting with Rabbi Menachem Mendel Schneerson of Lubavitch, the third Rebbe of the Ḥabad Hasidic court.¹¹⁷ According to Rabbi Epstein's son, Barukh, the trip was made on Rabbi Epstein's own initiative; he wished to meet and study with Rabbi Schneerson, who was an important scholar and halakhic decisor in his own right, and who led the Ḥabad Hasidic group to which many of Rabbi Epstein's Novosybkov constituents belonged.¹¹⁸ While it is unclear how long Rabbi Epstein spent in Lyubavichi, it is known that he studied with Rabbi Schneerson and received an additional rabbinic ordination from him.¹¹⁹ Later, when writing his *Arukh ha-Shulḥan*, Rabbi Epstein would often quote the *Shulḥan Arukh ha-Rav*, a code written by Rabbi Schneerson's grandfather, Rabbi Shneur Zalman of Liadi, and he took seriously the Kabbalistic traditions so central to much of Hasidic thought.¹²⁰ Also during this time, Rabbi Epstein published his first book, *Or la-Yesharim*, a commentary on the medieval text, *Sefer ha-Yashar*, by the Tosafist Rabbeinu Tam. While the *Sefer ha-Yashar* itself is a relatively obscure and not well-studied work, Rabbi Epstein's commentary gained the

112 See Henkin, *Ta'arokh Lefanai Shulḥan*, 198–204.

113 See *ibid.*, 204–7.

114 See *ibid.*, 207–13.

115 See *ibid.*, 213–18.

116 See *ibid.*, 218.

117 See *ibid.*, 55–58.

118 See Rabbi Barukh ha-Levi Epstein, *Mekor Barukh* (New York: Hayil, 1953), 1234.

119 See Fishbane, *Boldness of an Halakhist*, 7.

120 See, e.g., *Arukh ha-Shulḥan, Oraḥ Ḥayyim* 442:23.

attention of many important Eastern European rabbis, many of whom gave the book fine reviews.¹²¹

The publication of *Or la-Yesharim* improved Rabbi Epstein's rabbinic reputation, and in 1874 he accepted a position as Rabbi of Lubcha, a small town on the outskirts of Novogrudok, in southern Lithuania. Shortly after arriving in Lubcha, the communal leaders of Novogrudok offered the recently vacant position of city rabbi of their own community to Rabbi Epstein. At this time, and indeed until the city's Jewish population was almost completely annihilated during the Second World War, Novogrudok was an important center of Lithuanian Jewish life.¹²² Novogrudok was home to several thousand Jews; numerous synagogues and study halls; the important Novogrudok Yeshivah headed by Rabbi Joseph Yozel Horowitz, a student of Rabbi Israel Salanter and a major figure of the *Mussar* Movement;¹²³ and a city whose previous rabbis included the famed Rabbi Isaac Elhanan Spektor.¹²⁴ Rabbi Epstein continued to serve as Rabbi of Novogrudok until his death in 1908. During this time, he led the community, delivered sermons, answered halakhic questions posed by local residents and, increasingly over time, from Jews throughout Europe, Palestine, and the United States, ran the local rabbinical court, and interacted with Russian authorities on behalf of the Jewish community.¹²⁵ Most importantly, it was during his time in Novogrudok that Rabbi Epstein wrote his magnum opus, the multi-volume restatement of Jewish law, the *Arukh ha-Shulhan*.

121 See Henkin, *Ta'arokh Lefanai Shulhan*, 259–62.

122 On the significance of Jewish life in Novogrudok, see generally Rabbi Yehudah Leib Nekritz, "Yeshivot Beit Yosef Novaredok," in *Mosedot Torah Be-Iropah: be-Binyanam uve-Ḥurbanam*, ed. Samuel Kalman Mirsky (New York: Ogen, 1956); Henkin, *Ta'arokh Lefanai Shulhan*, 51–63; Eliezer Yerushalmi, *Pinkas Navaredok: Memorial Book* (Tel Aviv: Alexander Harkavy Navaredker Relief Committee in U.S.A. and Navaredker Committee in Israel, 1963).

123 An eighteenth-century movement among non-Hasidic Lithuanian Jews who sought to achieve personal moral refinement by means of a variety of disciplined practices.

124 See Henkin, *Ta'arokh Lefanai Shulhan*, 65–93, 162–66 (particularly about Rabbi Yozel Horowitz).

125 See Fishbane, *Boldness of an Halakhist*, 8–13. For an overview of Rabbi Epstein's rabbinic activities in Novogrudok based on allusions to his work in the *Arukh ha-Shulhan* itself, see generally Henkin, *Ta'arokh Lefanai Shulhan*, 83–93.

Setting the Table: The *Arukh ha-Shulḥan*

Rabbi Epstein's crowning literary achievement is his monumental compendium of Jewish law titled *Arukh ha-Shulḥan*, or "Setting the Table." As explained earlier, by the second half of the nineteenth century, nearly three hundred years after the widespread publication of Rabbi Karo's *Shulḥan Arukh*, Jewish law had once again become a very complex field. Rabbis Karo and Isserles's relatively straightforward prescriptions were still central, but primarily as the hub around which an ever-expanding universe of multivocal, discursive, and often contradictory commentaries, responsa, and other halakhic texts revolved. Rabbi Karo's once pristine table needed to be reset, and Rabbi Epstein was determined to fill this need.¹²⁶

In his *Introduction* to the first published volume of the *Arukh ha-Shulḥan*, Rabbi Epstein noted that the complexity and diversity of thought in rabbinic jurisprudence had led earlier scholars—specifically Rabbis Joseph Karo and Moses Isserles—to collect and analyze the diverse views of their predecessors so as to determine clear standards of halakhic conduct.¹²⁷ Rabbi Karo recorded his own rulings drawn from the Sephardic tradition of rabbinic jurisprudence and heavily reliant on the pillars of Sephardic halakhic thought and practice, and Rabbi Isserles contributed his own conclusions, which drew on the texts, traditions, and customs viewed as fundamentally important among Ashkenazic Jewry.¹²⁸ "Together," Rabbi Epstein writes, "the two built the entire house of Israel with [their clarifications] of the laws that apply in contemporary times."¹²⁹ However, Rabbi Epstein argues, the *Shulḥan Arukh* was never meant to be the last word on Jewish law and was instead meant to serve as a helpful framework for studying the law in depth using primary sources in the Talmud and earlier codes and commentaries.¹³⁰ Consequently and unsurprisingly then, the publication of the *Shulḥan Arukh* engendered the production of voluminous commentaries and halakhic texts that utilized the framework and guidance of Rabbi Karo and the *Rema's* works to further explain, analyze, and apply Jewish legal norms and principles.¹³¹ As a result,

126 See *Arukh ha-Shulḥan, Introduction to Ḥoshen Mishpat*.

127 See *ibid.*

128 See *ibid.*

129 *Ibid.*

130 See *ibid.*

131 See *ibid.*

Rabbi Epstein writes, “in the current generation . . . the uncertainty and confusion [about the law] have returned.”¹³² Observing this state of affairs, Rabbi Epstein took upon himself to try to rectify and clarify what he saw as the proper rules and standards of halakhic practice by, as he says, “writing this book entitled *Setting the Table*, which I have set with all manner of delicacies.”¹³³ Thus, the purpose of the *Arukh ha-Shulḥan* is simple: it aims to clarify the confused state of Jewish law at the end of the nineteenth century by resetting the crowded and messy table built by earlier scholars.

The *Arukh ha-Shulḥan* was not written to replace the *Shulḥan Arukh*; indeed, Rabbi Epstein recognizes the central and esteemed place occupied by the organizing structure of Rabbi Karo’s *Shulḥan Arukh* in modern *halakhah*.¹³⁴ Instead, the *Arukh ha-Shulḥan* seeks to reset Rabbis Karo and Isserles’s table, presenting both prior and subsequent developments in rabbinic literature in a clear, comprehensible manner that lends itself to use as a tool for knowing and practice of Jewish law. To accomplish this end, Rabbi Epstein did not set out to write a true *code* of Jewish law in the same vein as the largely determinate rule prescriptions of the *Shulḥan Arukh*.¹³⁵ The *Arukh ha-Shulḥan* follows the same four-part division of *halakhah*, created by the *Arba’ah Turim* and confirmed by the *Shulḥan Arukh*, into daily observances (*Orah Hayyim*), ritual practices (*Yoreh De’ah*), family law (*Even ha-Ezer*), and civil law (*Hoshen Mishpat*). Likewise, within each section, the *Arukh ha-Shulḥan* utilizes the subject headings of the *Shulḥan Arukh* and generally follows the same chapter numbering system utilized by Rabbi Karo, such that the content of each chapter of the *Arukh ha-Shulḥan* broadly corresponds to the substantive issues addressed in each corresponding chapter of the *Shulḥan Arukh*. However, while the *Shulḥan Arukh* and Rabbi Moses Isserles’s glosses present Jewish legal norms in terse, determinate rule-like formulations, utilizing the mishnaic model of halakhic codification discussed earlier, Rabbi Epstein’s work takes the alternative talmudic approach.¹³⁶

In addressing each legal issue, Rabbi Epstein begins by presenting the foundational sources for the rule or doctrine under discussion in the Torah

132 Ibid.

133 Ibid.

134 Ibid.

135 Ibid.

136 See Walter, *Making of a Halachic Decision*, 39–64.

and Talmud and traces early understandings of the topic and rabbinic interpretations of those primary talmudic sources through Maimonides, other scholars of the period of the *Rishonim*, the *Arba'ah Turim*, *Shulḥan Arukh*, and later commentaries as well. In doing so, Rabbi Epstein analyzes these views, presents his own questions and counterarguments and his own alternative interpretations of the Talmud and other primary rabbinic sources; records points of rabbinic disagreement and often resolves such disputes; takes note of customary practices; and ultimately reaches and defends his own halakhic determinations.¹³⁷ Thus, rather than a code like Rabbi Karo's *Shulḥan Arukh*, the *Arukḥ ha-Shulḥan* reads as a compressive review and analysis of rabbinic legal literature on every topic covered, but, importantly, as one ultimately interested in reaching practical legal conclusions rather than just offering a digest of rabbinic opinions or learned study of talmudic dialectics.

Rabbi Epstein began writing the *Arukḥ ha-Shulḥan* in late 1869 or early 1870, shortly after establishing himself in the rabbinate of Novogradok, and he continued working on writing and publishing the work for the next thirty-seven years, with the final published volume of the *Arukḥ ha-Shulḥan* finally appearing shortly after his death in February 1908.¹³⁸ According to Rabbi Epstein's grandson, Rabbi Meir Bar-Ilan, the former worked on this major project systematically and incessantly:

My grandfather sat each day in the room designated as the local rabbinic courtroom together with his two rabbinic judge colleagues from morning until night, save for two hours in the afternoons . . . He sat at his table with a chair next to him upon which he kept four books related to the topic he was currently dealing with: a volume of Maimonides's *Mishneh Torah*, a volume of the *Arba'ah Turim*, the *Shulḥan Arukh*, and a small edition of the Talmud. And thus, looking here and there, he wrote his book, *Arukḥ ha-Shulḥan*, page after page. Occasionally, he would get up and take out another book to look at . . . This book, the *Arukḥ ha-Shulḥan*, which is foremost in its genre, was printed directly from the first draft manuscripts, exactly as they were

137 *Arukḥ ha-Shulḥan, Introduction to Ḥoshen Mishpat.*

138 For a history, see Henkin, *Ta'arokh Lefanai Shulḥan*, 229–30.

initially produced by the author . . . without edits, erasures, or rewrites.¹³⁹

Despite the pace and quality of Rabbi Epstein's work described above, it took some thirty-seven years to finally complete the publication of the ten original volumes of the *Arukh ha-Shulḥan*.¹⁴⁰ There are two primary reasons for this very long publication schedule. First, the high cost of publishing and Rabbi Epstein's own commitment to fund the publication of his books on his own meant that funds were often lacking and publication delayed.¹⁴¹ As Rabbi Epstein himself wrote in an 1886 letter, "To my great distress, I am unable to publish [the next installment of the *Arukh ha-Shulḥan*] due to the lack of funding . . . publishing is exceedingly expensive."¹⁴² The high cost of publishing and limited funding actually led to Rabbi Epstein's initially publishing the *Arukh ha-Shulḥan* in numerous short pamphlets each covering just a few of the *Shulḥan Arukh's* topic headings, rather than in larger volumes. Eventually, as funds became available, these pamphlets were combined into larger volumes organized around the "four-pillars" framework of *halakhah* used by other rabbinic jurists since Rabbi Karo.¹⁴³

The second reason for the long and often delayed publication schedule of the *Arukh ha-Shulḥan* was the intense process of scrutiny and censorship by the Russian government that manuscripts were required to undergo before they could be published and distributed within the Russian Empire.¹⁴⁴ Rabbi Epstein began his work on the *Arukh ha-Shulḥan* with *Hoshen Mishpat*, the last of the four main sections of the *Shulḥan Arukh*, dealing with civil and criminal law and rabbinic court procedure. In his introduction to the *Arukh ha-Shulḥan*, Rabbi Epstein explains that he began his restatement of Jewish

139 Rabbi Meir Bar-Ilan, *Mi-Vholozhin 'ad Yerushalayim: Zikhronot* (Tel Aviv: Yalkhuth, 1939), 269–71.

140 Two additional volumes were published in the four years following Rabbi Epstein's death, and a thirteenth volume—the third of four volumes covering the *Yoreh De'ah* section of the *Shulḥan Arukh*—was not published at all during this period, and it was only rediscovered in manuscript form and published along with Rabbi Epstein's written sermons by Simcha Fishbane in 1992.

141 See Henkin, *Ta'arokh Lefanai Shulḥan*, 229–57 for a detailed discussion of the publication difficulties and schedule of the *Arukh ha-Shulḥan*.

142 *Kitvei ha-Arukh ha-Shulḥan*, no. 104.

143 See Henkin, *Ta'arokh Lefanai Shulḥan*, 234–35.

144 See Henkin, *Ta'arokh Lefanai Shulḥan*, 236–37.

law with *Hoshen Mishpat* specifically because its treatment of Jewish civil and criminal law is particularly complex and because it had received less sustained rabbinic attention than other sections of the *Shulḥan Arukh* that address ritual laws, giving him a greater opportunity to say something significant and new and to make a mark on rabbinic jurisprudence.¹⁴⁵ However, one of the reasons why *Hoshen Mishpat* seemed to be less thoroughly treated in rabbinic legal literature was because in much of Eastern Europe it was a good deal more difficult to obtain publication permits from the government for writings on Jewish civil and criminal law than for works dealing with halakhic ritual. Since *Hoshen Mishpat* addresses areas of law also covered by the laws of secular government, the Russian imperial authorities in particular were suspicious of legal works purporting to expound and explain a competing system of public law and regulation.¹⁴⁶ Many rabbinic works on *Hoshen Mishpat* were banned, heavily edited by government censors, and in any case subject to exhaustive and lengthy reviews by Russian bureaucrats.¹⁴⁷ Rabbi Epstein's works were no different, and thus nearly thirteen years elapsed from the time that Rabbi Epstein began writing his first volume of the *Arukh ha-Shulḥan* on *Hoshen Mishpat* until the text was finally published in 1883.¹⁴⁸ Another decade elapsed before the second volume of *Hoshen Mishpat* appeared, and Rabbi Epstein himself noted in a letter to Rabbi Ḥayyim Berlin that the delay was due to the manuscript's being held up in the government censor's office in St. Petersburg.¹⁴⁹ Ultimately, however, Rabbi Epstein's manuscripts gradually received government approval—though sometimes only after some

145 See *Arukh ha-Shulḥan*, Introduction to *Hoshen Mishpat*.

146 On the practices of Czarist censorship of Jewish religious publications in the nineteenth century, see generally Richard Gottheil, "Censorship of Hebrew Books," in *The Jewish Encyclopedia* 3 (New York: Funk & Wagnalls, 1906), 650–52; Ben-Tzion Katz, "Le-Toledot ha-Tsenzurah Shel ha-Sifrut ha-Yisraelit: Reshamim ve-Zikhronot," *Ha-Toren* 9 (1923): 41–48; idem, "Le-Toledot ha-Tsenzurah Shel ha-Sifrut ha-Yisraelit: Reshamim ve-Zikhronot," *Ha-Toren* 10 (1923): 43–51; idem, "Le-Toledot ha-Tsenzurah Shel ha-Sifrut ha-Yisraelit: Reshamim VeZikhronot," *Ha-Toren* 12 (1923): 48–60; John D. Klier, "1855–1894: Censorship of the Press in Russia and the Jewish Question," *Jewish Social Studies* 48 (1986): 257–68.

147 See, e.g., *Arukh ha-Shulḥan*, *Hoshen Mishpat* 388:7 (discussing the impact of censorship on formulations of rules governing the turning over of Jewish criminals to non-Jewish authorities in the *Shulḥan Arukh*). See also Henkin, *Ta'arokh Lefanai Shulḥan*, 236.

148 See Henkin, *Ta'arokh Lefanai Shulḥan*, 231–34.

149 *Kitvei ha-Arukh ha-Shulḥan*, no. 56.

necessary editing—and as funds were procured to finance the printing and distribution of the books, ten volumes of the *Arukh ha-Shulḥan* were published before the author's death in 1908, with another two volumes appearing in 1908 and 1911. An additional volume was published using Rabbi Epstein's manuscripts in 1992.

The *Arukh ha-Shulḥan* seems to have been generally well received during and in the years following Rabbi Epstein's life.¹⁵⁰ At the very least, the *Arukh ha-Shulḥan*'s comprehensive overviews of the halakhic topics it addresses, as well as Rabbi Epstein's own juristic independence and willingness to disagree with his predecessors and draw his own legal conclusions, quickly made the *Arukh ha-Shulḥan* a relevant and important text—and Rabbi Epstein himself an important authority—in rabbinic discourses. There are to date no firm figures for the numbers of copies of each volume of the *Arukh ha-Shulḥan* that were printed or distributed in the late nineteenth and early twentieth centuries. However, the fact that four of the ten volumes of the *Arukh ha-Shulḥan* were reprinted in two or three editions during Rabbi Epstein's lifetime is indicative of the demand for these books.¹⁵¹ Rabbi Epstein noted in a letter to Rabbi Ḥayyim Berlin that “the work [*Arukh ha-Shulḥan*] is found in many places, so that anyone who wishes can examine them,”¹⁵² and he made similar observations in other correspondence.¹⁵³ Rabbi Epstein's daughter, Braynah, who after being twice widowed returned to her father's house around 1900 and thereafter managed the continued publication of the *Arukh ha-Shulḥan*, wrote in 1911 that “the *Arukh ha-Shulḥan* has spread throughout the diaspora; it has been sold in the tens of thousands throughout Europe, Asia, and America.”¹⁵⁴ Even if this last description may be hyperbolic or not based on hard data of the *Arukh ha-Shulḥan*'s actual distribution, it is clear that Rabbi Epstein's work became a common feature of rabbinic libraries and writings.

Since it was not a simple code of clear-cut rules of halakhic behavior but a complex restatement and analysis of the state of Jewish legal discourse at the end of the nineteenth century, the *Arukh ha-Shulḥan* was not a widely

150 See generally Henkin, *Ta'arokh Lefanai Shulḥan*, 248–49.

151 See *ibid.*, 287–309 (listing the printing dates of various editions of the *Arukh ha-Shulḥan*).

152 *Kitvei ha-Arukh ha-Shulḥan*, no. 20.

153 See *ibid.*, no. 96.

154 Ben-Tzion Katz, ed., “B’H,” Advertisement in *HaZman*, Sec. 2:68 (1912), 6 (Newspaper in St. Petersburg-Vilna, published 19 Nissan 5672).

popular text among the laity. It was geared toward those who were at least competent students of Talmud and *halakhah*. Evidence of its reception and impact is thus most evident in the scholarly discourses of Rabbi Epstein's contemporaries as well as those of latter generations of rabbinic decisors. The *Arukh ha-Shulḥan* is referenced numerous times in late nineteenth and early-twentieth-century *halakhic* writings produced both in Rabbi Epstein's own Russia as well as in other parts of Eastern and Western Europe, England, the United States, and Palestine.¹⁵⁵ Of course, not all references to the *Arukh ha-Shulḥan* were positive; many scholars took issue with Rabbi Epstein's tendency to ignore precedent and independently suggest alternative rulings based on his understandings of the Talmud and other primary sources. In such cases, some rabbinic decisors leveled harsh criticism against both Rabbi Epstein and his approach to halakhic decision making.¹⁵⁶ Being the subject of strong rabbinic pushback, however, only indicates that other rabbis—even those who fundamentally disagreed with Rabbi Epstein's methodology and conclusions—viewed the *Arukh ha-Shulḥan* as a work with which they had to contend and account for in their legal deliberations. It was sufficiently well-regarded that it could not simply be ignored or dismissed as to those issues of ongoing halakhic discussion to which it spoke. In the decades after Rabbi Epstein's death, the impact and reputation of the *Arukh ha-Shulḥan* within the rabbinic community continued to grow, especially in relation to its main competitor, another late-nineteenth-century evaluation of Jewish law, the *Mishnah Berurah*.

Part III: Competing Models: The *Arukh ha-Shulḥan* and *Mishnah Berurah*

The remainder of this article highlights the differences in halakhic methodology between Rabbi Epstein's *Arukh ha-Shulḥan* and Rabbi Kagan's *Mishnah Berurah*. This contrast is particularly valuable as a preface to the more detailed consideration of Rabbi Epstein's halakhic jurisprudence in the *Orah Ḥayyim* section of the *Arukh ha-Shulḥan* because these two important and influential

155 For an exhaustive list of references to the *Arukh ha-Shulḥan* in Jewish legal literature of this period, see Henkin, *Ta'arokh Lefanai Shulḥan*, 248–54.

156 See *ibid.*, 254.

Jewish law authorities—Rabbi Epstein and Rabbi Kagan—shared much in common yet produced two starkly different kinds of codifications of Jewish law. Consider that both Rabbis Epstein and Kagan lived and worked in Eastern Europe during the nineteenth century and wrote their major halakhic restatements during the same overlapping decades.¹⁵⁷ While the two seem to have never met in person, they lived only about sixty-five miles apart for most of their lives under the same secular government, in the same Jewish and general culture, and spoke the same languages. The two had access to nearly identical libraries of rabbinic texts, though they made very different choices about how to weigh and prioritize the importance of these texts in halakhic decision making. They also understood the general hierarchy of these works from within the same general religious frame of reference—unlike, say, a Sephardic jurist who may have given special preference to the writings of Maimonides, or a Hasidic rabbi who would have assigned more significant weight to the rulings of Rabbi Shneur Zalman of Liadi’s *Shullhan Arukh ha-Rav*. They confronted very similar issues and problems of Jewish law and served similar constituencies. Despite the impressive and extensive

157 The *Mishnah Berurah* was published in six distinctly different times from 1884 to 1906. According to Henkin, *Ta’arokh Lefanai Shullhan*, 242, the first volume of the *Arukh ha-Shullhan* on *Orach Hayyim* (chapters 1–241) was published in 1903, the second (chapters 242–428) was published in 1907, and the third was published right after the death of Rabbi Epstein in 1909.

Although there is an aspect of speculation in these next sentences, we suspect that Rabbi Epstein wrote his work much before its publication and was delayed in publication for economic reasons, as Rabbi Eitam Henkin notes. Volume one of the *Mishnah Berurah* was published in 1884, and the *Arukh ha-Shullhan* cites it and uses it. The third volume of the *Mishnah Berurah*, which was published six years later, is cited as well by the *Arukh ha-Shullhan* on occasion, but he cites none of the other four volumes, which suggests that he did not have them. That, together with the fact that the *Mishnah Berurah* published his volumes out of order, with volumes one and three published first, suggests that the *Arukh ha-Shullhan* wrote his work before 1885, when volume two of the *Mishnah Berurah* (the third to be printed), which the *Arukh ha-Shullhan* does not have, was published. There are 36 (or 37, if one counts the double reference in 11:22) references to the *Mishnah Berurah* in the *Arukh ha-Shullhan*, none of which are particularly important to the work, and only in one of them (319:22) does the *Arukh ha-Shullhan* seem to be actually reacting to something that the *Mishnah Berurah* directly cited in his own name. We discuss this issue at some length in Michael J. Broyde and Shlomo C. Pill, “Reflecting on When the Arukh HaShulhan on Orach Chaim was Actually Written,” at <https://seforimblog.com/2019/05/arukh-hashulhan/>.

commonalities, Rabbis Epstein and Kagan approached matters of Jewish law completely differently in their respective codes.

Rabbi Yehiel Mikhel Epstein's *Arukh ha-Shulḥan* is very widely acknowledged to be a remarkable and singularly important work. As discussed earlier, the *Arukh ha-Shulḥan* is a comprehensive restatement of rabbinic law that is firmly grounded in the Talmud, codes, and commentary literature, which seeks not merely to present a dispassionate survey of the state of halakhic literature—in the style of the *Beit Yosef*—but also to provide concrete determinations of the correct rules and standards of Jewish practice as Rabbi Epstein understood them to be. While the *Arukh ha-Shulḥan* follows the familiar organizational structure of Rabbi Karo's *Shulḥan Arukh*, it is a stand-alone work rather than a commentary on Rabbi Karo's code; and, in truth, Rabbi Epstein does much more. His discussion of each topic begins with a summary of the biblical, talmudic, and post-talmudic code sources on the issue and further surveys the views of the important major commentators on these primary sources. Like the Vilna Gaon, Rabbi Epstein seeks to ground any halakhic discussion or determination in the relevant talmudic literature; and like Maimonides, he sought to comprehensively organize and address the full breadth of halakhic topics. Indeed, in testament to his awesome breadth, he and Maimonides are the only two writers in the last two thousand years who undertook to provide a comprehensive code of Jewish law, one which would encompass both contemporary halakhic issues as well as those that will arise in the Messianic Age. Perhaps most importantly, the *Arukh ha-Shulḥan* proceeds with its treatment of Jewish law with the implicit assumption that, despite the tumultuous sea of rabbinic discourse and disagreement on virtually all topics, the vast majority of halakhic questions can be correctly resolved analytically—that is, by correctly discerning which views accord more with the best understanding of the relevant talmudic sources.

Rabbi Israel Meir Kagan's *Mishnah Berurah* is a very different kind of work. At the foundational level, the *Mishnah Berurah* assumes that virtually all disputes of Jewish law and talmudic understanding are analytically irresolvable.¹⁵⁸ Whereas Rabbi Epstein considers most halakhic questions susceptible to analytically correct resolutions, Rabbi Kagan rarely does so. For the latter, determining correct legal practice is a matter of mediating between the myriad of discordant views that have been expressed by post-talmudic—and especially post-*Shulḥan Arukh*—scholars and commentators using

158 Broyde and Bedzow, *Codification of Jewish Law*, 27.

second-order rules of decision, rather than determining which existing (or new) opinion is analytically correct through a talmudic lens. According to Rabbi Kagan, even the *Shulḥan Arukh*, the supposed “set table of easily understood rulings for daily practice,” is not really as clear-cut as Rabbi Karo asserted, even without the multitude of commentaries and other works associated with it. Thus, when explaining the primary reason for choosing to write the *Mishnah Berurah*, Rabbi Kagan writes:

The *Shulḥan Arukh*, even when one also learns the *Arba ‘ah Turim* along with it, is an obscure book, since when [Rabbi Karo] ordered the *Shulḥan Arukh* his intention was that one would first learn the essential laws and their sources from the *Arba ‘ah Turim* and the *Beit Yosef*, in order to understand the rulings, each one according to its reasoning. Since the *Arba ‘ah Turim* and *Beit Yosef* bring numerous differing opinions for each law, he thus decided to write the *Shulḥan Arukh* to make known the ruling in practice for each issue. It was not his intention, however, that we would learn it alone, since the law is not able to sit well with a person unless he understands the reasoning behind it.¹⁵⁹

The *Mishnah Berurah* is thus Rabbi Kagan’s attempt to elucidate for the Hebrew-reading educated layperson, and not only for the legal scholar, both what should be the normative halakhic practice and why it should be so, for complicated halakhic matters and for simple daily life alike.

In undertaking this task, the *Mishnah Berurah*’s approach to addressing and resolving a halakhic dispute was to first ask four central questions: First, what is the spectrum of answers provided by prior halakhic decisors to the question at hand? Second, what is the common halakhic practice of the community on this issue? Does the general religious practice accord with any one of the existing rabbinic views on the questions? Does more than one custom exist? Third, what are the minimum halakhic requirements one should try to fulfill when seeking to observe the law in question? Fourth, how can one maximize observance in order to enhance his relationship with God?¹⁶⁰

Note that there is one seemingly critical and obvious question that does not actually feature in Rabbi Kagan’s framework: what is the right legal standard? The *Mishnah Berurah* did not seek to answer this question and

159 As cited by Broyde and Bedzow, *Codification of Jewish Law*, 16.

160 *Ibid.*, 27.

did not seriously attempt to reach a single, unequivocally correct ruling on most issues because Rabbi Kagan was methodologically committed not to resolve rabbinic disputes analytically. In truth, while such an approach to legal decision making may appear strange and counterintuitive, it is well grounded in the rabbinic tradition of respect for the stature, capabilities, and judgment of the great scholars of the past. If veritable legends of halakhic decision making and talmudic learning could not settle on an analytically clear conclusion, who am I to presume to assert the truth of the matter? Or, to use a famous rabbinic aphorism, “shall I stick my head between the mountains?” Declining to assert analytically correct resolutions to questions that vexed and divided generations of scholars would be to hubristically disrespect them, and thus Rabbi Kagan preferred to seek ways of cutting through the confusing quagmire of rabbinic disputations to reach practical directives for halakhic observance without taking a strong position on which view is correct in an analytic sense.

To do so, Rabbi Kagan developed a complex set of second-order guidelines of decision making, which would allow him to determine what to do in a given situation without having to answer the fundamental question: which rabbinic opinion on the issue is *right*? The following are the *Mishnah Berurah*'s second-order methodological rules for determining normative halakhic practice in the face of entrenched rabbinic disagreement:¹⁶¹

1. When a settled ruling no longer seems to fit the current reality, the *Mishnah Berurah* provides alternative explanations for the ruling, changes its language, or adapts practices so that they fit with the ruling's spirit.
2. When the codes record both lenient and strict positions, the *Mishnah Berurah* advises when one should be strict and when one may be lenient.
3. When the codes record more than one normative view without excluding the validity of either, the *Mishnah Berurah* accepts the validity of different practices in different locations and suggests manners of fulfillment that incorporate the different views.
4. When the codes record two mutually exclusive opinions, the *Mishnah Berurah* suggests ways to avoid transgression according to either view.

161 Ibid.

5. When the early codes are lenient, and the later commentators are strict, the *Mishnah Berurah* inclines toward the strict position.
6. When the major codes adopt a lenient position, yet other codes are stricter, the *Mishnah Berurah* suggests qualifying one's intention to act so as to avoid transgression according to the strict position.
7. When people have adopted an unsupported custom, the *Mishnah Berurah* disapproves of it, yet attempts to justify it for those who will nevertheless continue to follow it.
8. When the codes are easily misunderstood, the *Mishnah Berurah* clarifies misunderstood rulings and defends widespread practices.
9. When the codes and the mystical traditions and teaching of the *Kabbalah* conflict, the *Mishnah Berurah* minimizes the tension between the two positions.
10. When the codes are in tension and the Vilna Gaon has expressed strong support for a particular view, the *Mishnah Berurah* allows one to rely on the position of the Vilna Gaon.¹⁶²

In many cases, the *Mishnah Berurah* used more than one of these guidelines or principles at a time and balanced them, along with the four central questions discussed above, in order to give the proper ruling, given his jurisprudential objectives.¹⁶³ Frequently, the *Mishnah Berurah's* rulings are actually a series of options presented to the reader as minimally acceptable, acceptable, better, and best, rather than simply "this is the correct answer."

As our book will show, but really as anyone who has studied both works knows, the methodology of the *Arukh ha-Shulhan* is distinctly different. The goal of Rabbi Epstein's code was to distill the practice of individuals into one "correct" approach to Jewish law whenever possible. This is not a mere stylistic difference of what is summarized or the sequence of ideas quoted but rather a much deeper and more robust difference in terms of what a code of Jewish law is supposed to do and what modern authorities of Jewish law are capable of doing. The *Arukh ha-Shulhan's* methodology—to start with the central talmudic texts and summarize the literature on each topic—is

162 See generally Broyde and Bedzow, *Codification of Jewish Law*, 28–59 for an explanation and in-depth analysis of each of these second-order rules.

163 Broyde and Bedzow, *Codification of Jewish Law*, 29.

not for the reader to merely use his work as a cheat sheet to avoid reading all the prior literature. Rather, the *Arukh ha-Shulḥan* is insistent that only by deeply digesting the prior literature—what is said by which scholars, and what is right or wrong with each argument—can anyone determine the correct way to conduct oneself.¹⁶⁴

Indeed, absent this regurgitative exercise of closely chewing through every single dispute that the *Arukh ha-Shulḥan* ponders through close and tight readings of the various talmudic texts, the exact parsing of the early and later rabbinic authorities, codifiers, and commentators, it is difficult to imagine how the *Arukh ha-Shulḥan* could have become the classical work that it is. The *Arukh ha-Shulḥan* on *Orah Ḥayyim* summarizes what Rabbi Epstein viewed as the most central Jewish legal literature literally from the time of God's revelation of the Torah at Mount Sinai through the late 1800s on hundreds and hundreds of complex matters, noting the various opinions that are taken and are plausible and presenting what in Rabbi Epstein's judgment is the single correct way to understand Jewish law. Indeed, in our forthcoming work we deconstruct the methodology of the *Arukh ha-Shulḥan*, based on carefully tracking and closely reading Rabbi Epstein's readings and treatments of the Talmud, codes, and commentaries, and the ways that his understandings of these materials contribute to the manner in which he resolves halakhic disputes.¹⁶⁵ Based upon a database, we share a collection of 200 diverse rulings from across the *Orah Ḥayyim* section of the *Arukh ha-Shulḥan* to illustrate for the reader the unstated rules of decision that drive *Arukh ha-Shulḥan's* substantive halakhic choices and conclusions.

Reasoning inductively from the data points provided by Rabbi Epstein's halakhic determinations, his rulings can be understood in light of ten distinctly different principles, more or less none of which overlap with the basic approach of the *Mishnah Berurah*. In our forthcoming book we provide

164 Concomitantly, the *Mishnah Berurah* does not summarize the talmudic literature precisely because neither what the Talmud truly states nor which *Rishonim* correctly understood it is important to his approach. If a group of *Rishonim* adopt a view, Rabbi Kagan avers, we can neither prove it correct nor incorrect, consistent or inconsistent with the talmudic texts. We simply note that this is what was said and who said it and formulate Jewish law in light of our inability to resolve disputes analytically.

165 Michael J. Broyde and Shlomo C. Pill, *Setting the Table: An Introduction to the Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh HaShulhan* (Brighton, MA: Academic Studies Press, forthcoming 2020).

detailed examples and robust explanations of each of them.¹⁶⁶ For now, we list them and briefly explain:

1. Rabbi Epstein follows his own independent understanding of the correct meaning of the relevant talmudic sources, even against the precedential rulings of important authorities of previous generations. Often, Rabbi Epstein's independent judgment involves innovating creative explanations of talmudic sources, novel reasons for particular laws, and entirely new rules of halakhic conduct. This independent judgment incorporates an impressive command of the Jerusalem Talmud, which Rabbi Epstein often deploys as an important source of halakhah.
2. Rabbi Epstein declines to follow his independent judgment of the correct understanding of the relevant talmudic sources when his own view is incompatible with the established rule of a broad consensus of past authorities, or when the views of all the major pillars of halakhic jurisprudence, such as Maimonides, the *Shulhan Arukh*, or *Arba'ah Turim*, adopt a rule more stringent than his own or than the contemporary practice.
3. When considering the views of past authorities in the absence of a clear, independent understanding of the talmudic sources or a strong halakhic consensus, Rabbi Epstein tends to give primary weight to the views of Maimonides and then to the rulings of the *Shulhan Arukh*.
4. Rabbi Epstein closely follows the standard halakhic rule that, in cases of doubt regarding biblical laws, one should act strictly, while in cases of doubt regarding rabbinic rules, one should act leniently, but only in cases where Rabbi Epstein is himself unsure of the correct talmudic rule and past rabbinic consensus and major authorities do not provide clear guidance on the issue.
5. Rabbi Epstein generally does not rule that one should act strictly in order to satisfy particular halakhic opinions that have been rejected in accordance with the ordinary rules

of halakhic decision making, but he does make use of such rejected opinions to resolve complex halakhic questions or disputes among past authorities to justify common practices that are at odds with standard halakhic norms, and to permit non-normative behavior in extenuating circumstances.

6. Rabbi Epstein generally encourages—but does not mandate—superogatory behavior that goes beyond the minimal requirements of the *halakhah*, but only when there is a genuine benefit to such conduct in terms of Torah values and observance. When he believes such extra-legal practices will have negative religious or material repercussions, Rabbi Epstein discourages superogatory conduct.
7. Rabbi Epstein tries whenever possible to reconcile the mystical prescriptions of the *Zohar* with standard halakhic norms, though he affirmatively rejects the halakhic relevance of mystical practices that are incompatible with talmudic sources. Moreover, Rabbi Epstein generally permits or even recommends the adoption of mystical practices innovated by the *Zohar* as long as they do not contradict halakhic requirements.
8. Rabbi Epstein upholds the halakhic normativity of what he sees as *minhag*—the customary practices of his own time and place—even when such customary practices are inconsistent with precedential halakhic rulings or Rabbi Epstein’s own preferred understanding of the talmudic sources, provided that the *minhag* is not unavoidably incompatible with basic halakhic norms or based on mistaken factual premises.
9. Rabbi Epstein insists that halakhic issues need to be decided in the present time and place. Thus, he holds that, when the underlying reasons for established halakhic stringencies or leniencies no longer apply, the practical rules once produced by those reasons change in response to present circumstances. So too, he notes changes in sociology, technology and the like and their relevance for religious observance.
10. Rabbi Epstein recognizes that *halakhah* must be practiced by real people in the real world and is therefore willing to adapt seemingly impracticable halakhic norms to better account for the real-world practical challenges attendant to trying to

actually uphold such standards. So too, he is unwilling to mandate halakhic practices that are too complex for normal people.

Four Illustrative Examples

Although a longer study is needed of every case in which the *Arukh ha-Shulhan* and the *Mishnah Berurah* provide different rules of decision in identical cases, it is worthwhile to share four examples of important decisions of Jewish law that both the *Mishnah Berurah* and the *Arukh ha-Shulhan* made and discuss, and to contrast them with each other in order to understand the most basic methodological distinctions between these two great decisors of Jewish law of the last century. In each of these examples, Rabbis Epstein and Kagan examine a complex and indeterminate halakhic problem and come to different conclusions in ways that highlight their deep methodological differences.

1. *Tefillin on Hol ha-Mo'ed*

Our first example focuses on whether one may or should don *tefillin* (phylacteries), the black leather boxes worn during prayers, on *Hol ha-Mo'ed*, the intermediate days of the major Jewish holidays that have both holiday and weekday qualities. This case is a prime example of the *Mishnah Berurah* and *Arukh ha-Shulhan's* competing understandings of how Jewish law ought to work.

The halakhic data available to both Rabbis Epstein and Kagan is simple and similar: The *Shulhan Arukh* rules that it is prohibited to wear *tefillin* on *Hol ha-Mo'ed* because, like the Sabbath and full holiday days, *Hol ha-Mo'ed* itself is considered a "sign" of the relationship between Man and God. Since the *tefillin* also serve as such a sign of the covenant with God, and because displaying two signs at once would derogatorily imply that one of the signs was somehow deficient, one should not wear *tefillin* on *Hol ha-Mo'ed*.¹⁶⁷ The *Rema*, on the other hand, rules that a person *is* required to don his phylacteries on *Hol ha-Mo'ed*, since he is of the opinion that *Hol ha-Mo'ed* is not considered a sign. Since there is nothing that would prohibit donning phylacteries during

167 *Shulhan Arukh, Oraḥ Hayyim* 31:2. The reason one must not have two signs together is that it shows contempt for each one. It is also considered a transgression of "*bal tosif*," the prohibition of adding to the commandments given in the Torah in such a way that it is perceived as though one is denying the perfection of the prescribed performance, i.e., like saying "This alone is not good enough."

those days, one is required to do so.¹⁶⁸ By the time that Rabbis Epstein and Kagan are writing, their communities include both traditional Ashkenazi Jews who, following the *Rema*, did wear *tefillin* on *Hol ha-Mo'ed*, as well as *Hasidim* who followed the Kabbalah-influenced practice of not donning phylacteries on *Hol ha-Mo'ed*. The issue was thus open both in theory and in practice with not clear or obvious normative or right halakhic rule.

It is worth noting here that at first glance it is impossible to simply dispose of the matter by ruling strictly. Those who say one must wear *tefillin* maintain that not donning is a sin, and those who rule that one must not wear *tefillin* maintain that donning is a sin, just like donning *tefillin* on the Sabbath is a sin.

The *Mishnah Berurah* seeks to compromise since this dispute cannot be resolved. Rabbi Kagan adopts the following argument: With respect to the *Shulhan Arukh's* reasons for prohibiting the donning of phylacteries during *Hol ha-Mo'ed*, the *Mishnah Berurah* writes that the prohibitions of displaying two covenantal signs simultaneously and of "*bal tosif*" (adding unprescribed observances to Torah obligations) apply only to times when a person would don phylacteries for the sake of observing the Torah commandment to do so. If he dons them without such intention, however, wearing the *tefillin* would neither show contempt for any other covenantal sign, nor would it be a transgression of "*bal tosif*." Therefore, Rabbi Kagan recommends that during *Hol ha-Mo'ed*, a person should don his phylacteries without saying a blessing and have in mind the following intention: "if I am obligated to wear phylacteries, then I am donning it for the sake of fulfilling the commandment, and if I am not obligated to wear *tefillin* today, then I am donning them without any intent to observe a religious duty."¹⁶⁹ In this manner, one can,

168 *Rema* to *Shulhan Arukh*, *Orah Hayyim* 31:2.

169 *Mishnah Berurah* 31:8. The *Mishnah Berurah's* explanation of the *Shulhan Arukh's* reasoning gives him the tools to deal with a blatant contradiction and create a compromise in the following way. He first mentions that the *Aharonim* agree with the *Turei Zahav* that a blessing on donning phylacteries during *Hol HaMoed* should not be said. The reason not to say the blessing is that its requirement in the first place is in doubt, since there is a doubt as to whether or not one must don phylacteries at all on these days; and also, even if there is a requirement to don them, missing blessings do not actually impact upon fulfillment of a commandment. Thus, one need not make the blessing. Having removed this otherwise necessary verbal indication that donning phylacteries is certainly required, i.e., the saying of a blessing, which implies that this, the putting on of

the *Mishnah Berurah* claims, satisfy both schools of thought in Jewish law and need not resolve this issue or decide which view—that of the *Shulḥan Arukh* or the *Rema*—is actually correct. The matter is thus practically resolved without being legally resolved.

In his discussion of wearing phylacteries on *Ḥol ha-Mo'ed*, after reviewing the different opinions on the matter and summarizing the data no differently that did the *Mishnah Berurah*, the *Arukh ha-Shulḥan* writes:

The *Beit Yosef* rules that one should not don phylacteries, but the *Rema* writes that there are those who do don them but make the blessing in a whisper. No Sephardic Jew dons, and all Ashkenazic Jews don; but today they don without a blessing, and so it seems proper to act accordingly. And many great later authorities have already written at length regarding this, one saying one thing, and another saying another. Thus, each should continue according to his custom. And now, many—even among the Ashkenazic Jews—do not don, and we will not continue at length on this.¹⁷⁰

The *Arukh ha-Shulḥan* encourages all to do as their custom directs with no other instruction provided.

This case serves as an excellent example of how these two works resolve disputes differently, even as they understand both the social and halakhic data identically. The *Mishnah Berurah* recognizes that there are two competing claims made by two different schools of thought in Jewish law, and that these competing views are—at first glance—incompatible with each other: either the law is “yes, every man must put on *tefillin* on *Ḥol ha-Mo'ed*” or “no, it is a sin to don *tefillin* on *Ḥol ha-Mo'ed*.” In the face of this seeming unresolvable dispute, the *Mishnah Berurah* works very hard to craft a resolution that he

phylacteries, is a required act, *today*, the *Mishnah Berurah* advises that a person have a particular intention while donning his phylacteries, which would allow him to fulfill the potential obligation without running into a possible transgression if donning them *were* really prohibited. He writes that before a person dons his phylacteries, he should think to himself that if he is obligated to do so, then his donning is for the sake of fulfilling a commandment, and if not, it is not. This stipulation removes the possible transgression of “*bal to'sif*,” since one acts without definitiveness, yet it provides enough intention to be considered efficacious if necessary, even, as we said, without a blessing.

170 *Arukh ha-Shulḥan, Oraḥ Ḥayyim* 31:4.

thinks actually works according to both schools of thought, which entails a very complex thought process of “doing X while thinking Y,” and intending to conditionally fulfill the *mitsvah* of donning *tefillin*. It is jurisprudentially unwise, the *Mishnah Berurah* must posit, that no matter which option of Jewish law a pious Jew chooses, sin will result according to an important school of thought. So, he crafts a resolution that solves this problem.

This is not the approach of the *Arukh ha-Shulḥan*. Since the Talmud itself is completely silent on this issue, Rabbi Epstein recognizes that no direct talmudic resolution of this dispute is possible, and there are thus two competing customs in practice. So, he simply notes that each person and community should continue their custom and practice. Rabbi Epstein upholds the halakhic normativity of what he sees as *minhag*—the customary practices of his own time and place—and he is completely comfortable with the idea that one person’s custom is another person’s sin. Furthermore, he runs away from overly complex resolutions like the one offered by the *Mishnah Berurah*, since Rabbi Epstein recognizes that *halakhah* must be practiced by real people in the real world, and is therefore unwilling to adopt the seemingly impracticable practice of “doing X while thinking Y” in order to bridge the gap between two competing halakhic norms.

2. *Prayer in Front of Fully Uncovered Hair of a Married Woman*

The second example concerns the problem of married women who come to synagogue with their hair uncovered, a practice that became common around the time that Rabbis Epstein and Kagen were writing their works. The *Shulḥan Arukh* rules that a man may not recite the *Shema* prayer while standing in view of a woman’s hair which she is accustomed to covering,¹⁷¹ and elsewhere he notes that the women ought to cover their hair.¹⁷² In this context, Rabbi Epstein laments that for many years married woman have been ignoring the halakhic requirement to cover their hair. Indeed, he decries the fact that in his own day this shameful state of affairs had become endemic.¹⁷³ As a result of this social change for the worse, however, Rabbi Epstein rules that men may now pray and recite the *Shema* in front of a married woman’s uncovered hair, since seeing such hair is no longer potentially erotic.¹⁷⁴ To

171 *Shulḥan Arukh, Oraḥ Ḥayyim* 75:2.

172 *Shulḥan Arukh, Even ha-Ezer* 21:5.

173 *Arukh ha-Shulḥan, Oraḥ Ḥayyim* 65:7.

174 *Arukh ha-Shulḥan, Oraḥ Ḥayyim* 65:7.

support this contention, Rabbi Epstein cites the thirteenth century authority Rabbi Mordekhai ben Hillel ha-Kohen (1250–98), known as the *Mordekhai*, who himself quotes the earlier authority, Rabbi Eliezer ben Joel ha-Levi (1140–1225), known as the *Ra'avyah*. The *Mordekhai* rules that an unmarried woman's hair is not considered a form of *ervah*, or “nakedness,” in the presence of which prayers cannot be said because the common custom is for unmarried women to uncover their hair, and men are therefore so accustomed to seeing women's hair that it does not lead to improper thoughts.¹⁷⁵ The *Arukh ha-Shulhan* extends this logic to a married woman's hair as well. Because men are long accustomed to seeing uncovered hair of even married women, he argues, there is no fear of improper thoughts upon seeing such during prayer. Thus, a married woman's hair is not considered “nakedness,” and prayers may be said while in sight of it.

The *Mishnah Berurah* takes the exact opposite approach to this issue. Indeed, quoting his words might help highlight his approach. He states:

And you should further know that, even if this woman and her friends in that place have a practice of going out with their hair [literally “head”] uncovered in public in the way of those who are immodest, it is still forbidden [to pray in their presence] no differently than the case of uncovered thigh, which is forbidden under all circumstances. As we have explained in note two above, since this woman is required to cover her hair by operation of Jewish law (and this involves a Torah prohibition, because the verse says, “And he shall uncover the woman's head,” that this implies that her hair was covered initially), and also, since all Jewish women who observe Torah law have been careful about this from the time of our ancestors a long time ago until the present day, uncovered hair is considered a nakedness, and it is forbidden to pray in its presence. . . . And, do not say that such is permitted since once one is used to it exposed [or that] it does not generate erotic thoughts, as I explain later on.¹⁷⁶

The contrast between the two approaches is obvious: The *Arukh ha-Shulhan* delves into the talmudic and classical Jewish law sources and comes to a novel conclusion of Jewish law which, while grounded in the sources, is not

175 *Mordekhai* to *Berakhot*, end of the third chapter.

176 *Ibid.*

found in this exact case in any prior source that he was aware of.¹⁷⁷ While unprecedented, Rabbi Epstein's conclusion does derive from those talmudic and classical sources, although only when studied and broken down to basic principles that the original authors of those sources never explicitly considered. Furthermore, the *Arukh ha-Shulḥan* neither bothers to share with the reader that this is a novel idea of his own, nor that others might not agree.¹⁷⁸ Nor does he encourage one to be strict on this matter, since the leniency he is providing appears to him to be analytically correct. Rabbi Epstein views his determination here as correct as a matter of law and not merely as practical instruction for how to navigate a complicated halakhic issue. Not so the *Mishnah Berurah*, who simply is unaware of any Jewish law authority who has adopted the view, unknown to him, which will be propounded by the *Arukh ha-Shulḥan*.¹⁷⁹ Rabbi Kagan does not see the mandate of this work as being to provide novel explanations of Jewish law, and he is not prepared to extend the leniency of the *Shulḥan Arukh* beyond its text, since others have not done so before him. Rather, his mission is to reinforce the universal status quo that such conduct is both prohibited and may not be allowed in the synagogue under any circumstances. The "custom" discussed here is neither legitimate nor sanctioned by Jewish law authorities, nor permitted in the synagogue. The absence of precedent makes the matter easy to the *Mishnah Berurah*.

3. *The Minimal Size for Tsitsit*

The *Shulḥan Arukh* explains simply and concisely that "the size of the garment that is obligated in *tsitsit* [the ritual fringes worn on four-cornered garments] is one large enough to cover in length and width the head and most of the body of a child who can go alone in the market and does not need an adult to watch him."¹⁸⁰ The problem with this formulation is at first glance clear: the standard needs elaboration since the measure is imprecise and hard for the reader to apply.

177 We now know that this approach was noted just prior to Rabbi Epstein by the *Ben Ish Ḥai*, Year 1, *Parashat Bo*, no. 12.

178 Indeed, *Arukh ha-Shulḥan* has *Mishnah Berurah*, volume one, so he knows that Rabbi Kagan disagrees.

179 Which was published a few years later than the *Mishnah Berurah*.

180 *Shulḥan Arukh, Oraḥ Ḥayyim* 16:1, the only section in this chapter.

This is exactly the problem the *Mishnah Berurah* confronts, and he discusses the spectrum of opinions. *Mishnah Berurah* summarizes the views of those who came before him simply, and he explains both the best way to conduct oneself, and the most lenient way to conduct oneself, as well as other standards in-between, and he concludes with a recommendation for what people should do in practice.¹⁸¹ First, he cites the view of the *Peri ha-Arets* that the minimal size of a *tsitsit* garment is three-quarters of a cubit in length and half of a cubit wide; *Mishnah Berurah* then notes that the *Maḥatsit ha-Shekel* and others note that this view is inconsistent with the Talmud and should not be relied on, particularly with respect to *tsitsit* garments needing to be only half of a cubit wide. Rabbi Kagan then notes the practice of what he called “*anshei ma‘aseh*,” or “people who engage in [exceptional religious] action,” who held that one’s garment should be at least one cubit in width and length and that this satisfies the views of the *Peri ha-Arets* and others. The *Mishnah Berurah* goes on to add that certainly one should not wear a garment smaller than three-quarters of a cubit in length and width, as such a garment may well not be obligated to have *tsitsit* and reciting the blessing for wearing *tsitsit* when donning such a garment might be a blessing in vain.

The *Arukh ha-Shulḥan* approaches this topic totally differently. He notes that a huge cultural change has taken place between the talmudic era and his own time. *Tsitsit*-wearing Jews, he observes, actually wear two such garments, one during prayer on top of one’s clothes and one under their shirt that they wear all the time. Furthermore, *Arukh ha-Shulḥan* posits that the talmudic discussion and the rules codified in the codes speak to the minimal size for the larger garment worn during prayer, which needs to cover one’s head and body. But, he argues, the smaller *tsitsit* garment worn by Jews of his own time under their clothes can be of any size. He thus writes:

In my humble opinion, this whole discussion of the size of *tallit*¹⁸² is unneeded, and all fulfill their obligation to wear *tsitsit* with small garments, for we have already explained in the opening section of chapter 8 that . . . as a matter of Torah law every garment one wears with four corners needs *tsitsit*, and this is the opinion of the *Beit Yosef*. The requirement to

181 *Mishnah Berurah* 16:4.

182 A four-cornered garment, usually a shawl worn over other garments during prayer, with fringes (*tsitsit*) on its corners.

fully wrap oneself with a *tallit* is only with a prayer *tallit* which was like a handkerchief [with no neck hole] in the center. . . . But our small *tallit* which is worn under the shirt needs no minimal size at all, rather it only has to have four corners to be obligated in *tsitsit*.¹⁸³

Here the *Arukh ha-Shulḥan* and the *Mishnah Berurah* again disagree, and their disagreement is about a few things. First, in light of the changed reality of how the commandment of wearing *tsitsit* is observed in practice, the *Arukh ha-Shulḥan* concludes that, when the *Shulḥan Arukh* speaks about the minimum size for a *tsitsit* garment, he has in mind a very different kind of garment than the one Rabbi Epstein is concerned with; one is speaking about the large prayer shawl worn during prayers, while the other is addressing the issue of the small *tsitsit* clothes worn under one's shirt. The *Mishnah Berurah* follows the simple text of the codes before him and refuses to modify these codified standards in light of the changed reality of how Jews observe the *tsitsit* commandment. Second, the *Mishnah Berurah* organizes and cites—and places in order from best to worst—the many precedential views on the issue with little commentary on which view he thinks is “correct”; even with respect to the view that he says one should not rely on, Rabbi Kagan declines to recommend adopting that opinion only because others have rejected it and not because of any talmudic proof that it is actually incorrect. The *Arukh ha-Shulḥan*, however, cites the views that he thinks are correct, leaving out the various different “wrong” views of those who came before him, and then updates the *halakhah* to reflect the sociology he is living in. Third, the *Mishnah Berurah* cites no authorities from the period of the *Rishonim* in his discussion of this topic, whereas the *Arukh ha-Shulḥan* is essentially only discussing the views of Jewish law authorities in the era of the *Rishonim* and that of the *Shulḥan Arukh*.

4. *Validating the Custom of Building Citywide Communal Eruvin*

An *eruv* (pl. *eruvim*) is a ritual enclosure around a community which allows Jews to carry objects on the Sabbath when they would otherwise be forbidden to do so. The *eruv* is meant to symbolize a wall around the community in order to turn it into one unified domain for the purpose of carrying on the Sabbath, when carrying objects in public spaces is prohibited. The *Shulḥan Arukh* rules that an *eruv* built to enclose a genuine public domain is ineffective;

183 *Arukh ha-Shulḥan, Oraḥ Ḥayyim* 16:5.

an *eruv* can only be built to permit carrying in areas that are neither genuinely private property nor truly public spaces.¹⁸⁴ To define what constitutes a public domain, Rabbi Karo writes in the *Shulḥan Arukh* that a public domain is defined as streets and markets that are sixteen-cubits wide and which are not roofed or walled. The *Shulḥan Arukh* adds that there are those who say that any place that does not contain six hundred thousand people in it every day is not considered a public domain, no matter the size of the area. It is clear from Rabbi Karo's writing style and methodology that he does not accept this view, and it is likewise rejected by both Maimonides and the *Rif*.¹⁸⁵ Importantly, the Talmud makes no mention of the six-hundred-thousand person requirement for public domains in its own discussion of the issue.

However, despite the lack of textual justification, by the 1800s, the prevalent custom among European Jews had in fact become to build *eruvim* that enclosed very wide streets that stretched from one end of the city to the other, based on the opinion that only areas traversed by at least six hundred thousand people daily are considered genuine public domains that cannot be enclosed by an *eruv*. Based on that disputed requirement, even the very wide streets of nineteenth-century European cities would not be public domains, and the construction of symbolic *eruvim* would be effective at permitting Jews to carry items in these areas on the Sabbath. Indeed, by the time of the *Arukh ha-Shulḥan* and *Mishnah Berurah*, the common custom among Europe's Ashkenazic Jews was to actually build such public *eruvim* in many different larger communities, where the streets were certainly larger than sixteen cubits but where the population was less than six hundred thousand. The question presented was whether this was a valid approach or not. Without this leniency, both the *Mishnah Berurah* and the *Arukh ha-Shulḥan* understood that no larger communal *eruvim* could be built, as city streets are all wider than sixteen cubits.

As an initial matter, with respect to how to define a public domain, the *Mishnah Berurah* writes that he has searched through all the opinions of those scholars who defined a public domain in terms of six hundred thousand people, but he could not find the stipulation that the people must be present every day. Rather, Rabbi Kagan argues, these authorities meant that a public

184 *Shulḥan Arukh, Oraḥ Ḥayyim* 364:2. (He admits, however, that some say, if an area is not closed at night, an *eruv* around it may still be valid on the condition that it is at least *able* to be closed at night.)

185 *Shulḥan Arukh, Oraḥ Ḥayyim* 345:7.

domain is an area in which there is a possibility that six hundred thousand people may be found in general.¹⁸⁶ In the *Be'ur Halakhah*—Rabbi Kagan's own gloss on the *Mishnah Berurah*—he notes that if the actual presence of six hundred thousand people were a necessary condition, the Talmud would not have omitted mentioning it.¹⁸⁷ The *Mishnah Berurah* writes that, even though many early authorities disagree with this opinion, one cannot protest against those who act leniently and use *eruv* that enclose areas larger than sixteen cubits but without six hundred thousand people. Nevertheless, Rabbi Kagan writes, a *ba'al nefesh*—a religiously conscientious person—should be stringent upon himself and not use an *eruv* that encloses spaces wider than sixteen cubits.¹⁸⁸

By stating that one cannot protest against those who follow the lenient custom, the *Mishnah Berurah* demonstrates that he does not believe that the lenient position is the essential normative opinion that should be followed. However, because some rabbinic authorities have found the more lenient view to have legal worth, and in order to spread the net of halakhic legitimacy as widely as possible and not label those many Jews who follow the common custom of carrying in such an *eruv* as sinners, the *Mishnah Berurah* somewhat condones it and maintains a steady ambiguity as to what the right rule of law really is. A *ba'al nefesh*, on the other hand, should follow what he thinks is the true halakhic position, which is not to carry in such an *eruv*.¹⁸⁹ Thus, the *Mishnah Berurah* writes that a *ba'al nefesh* should, and will, act stringently. *Mishnah Berurah* encourages people not to carry in all modern communal *eruv* but will not label as sinful the decision to carry.

Like the *Mishnah Berurah*, the *Arukh ha-Shulhan* understands the difficulty of the established custom to use an *eruv* enclosing a street wider than sixteen cubits. On the contrary, he believes that most Jewish law authorities prior to him understand the *halakhah* to be according to the opinion that does not consider population when defining a public domain, which would mean that he thinks using an *eruv* to enclose areas wider than sixteen cubits would be ineffective. Rabbi Epstein makes this point simply, by recounting the various

186 *Mishnah Berurah* 345:24.

187 *Be'ur Halakhah* 252 (s.v. *she-ein shishim ribbo*).

188 *Mishnah Berurah* 345:23; 364:8.

189 Thus, we see that Rabbi Kagan believes that 600,000 is not the normative view, yet he foresees that the practice cannot be changed, as it has been deeply ingrained and is a predicate for how the community actually functions in this area.

authorities who fall into either camp on this issue: he states this simply by his count of who says what in his discussion of this matter:¹⁹⁰

All of the permissible *eruvim* in our communities rely on this view [that public domains must have six hundred thousand residents], and since our cities do not have six hundred thousand people passing through them, they are not public places, and a *tsurat ha-petaḥ* [symbolic wall] is effective. According to the first view [that public domains do not require six hundred thousand inhabitants], since our streets are more than sixteen cubits wide, no such leniency is allowed, and they need doors that close at night with doors [that is, actual walls, instead of a just a symbolic *tsurat ha-petaḥ* post and lintel].¹⁹¹ Those who are lenient on this matter include the *Sefer ha-Terumah*, the *Semag*, *Semak*, *Maharam MeRotenberg*, *Rosh* and *Arba'ah Turim*—all of whom accept the view of Rashi [that public domains require six hundred thousand inhabitants]. Those who prohibit include the *Rif*, Maimonides, Rabbeinu Tam, *Rashbam*, *Ra'avan*, Nahmanides, *Rashba*, *Ritva*, *Ran*, *Maggid Mishneh*, *Rivash*, many of the Tosafists, including the first *Rashbam*, the *Rivah*, the *Ri ha-Levy*, the *Ram*, and the *Riaz*. So too, the *Maharshal* in the *Yam Shel Shelomoh* on tractate *Beitsah* also resolves this matter not consistent with this [the lenient] view.¹⁹²

Despite the long list of important authorities who rejected the minimum population requirement for public domains, however, Rabbi Epstein is acutely aware that all of the communities in his time and place actually adopt the more lenient position, and like the *Mishnah Berurah*, he wants to accept the more lenient opinion out of a desire to incorporate those who follow it into the realm of observance. After explaining how the requirement that public domains have six hundred thousand people actually present at one time is not accepted by any of the early authorities, the *Arukh ha-Shulḥan* writes:

But in any case what good will result from continuing at length now that the *eruvim* that have spread throughout the majority of cities of the Jewish people for many hundreds of years are

190 *Arukh ha-Shulḥan*, *Orah Ḥayyim* 345:17.

191 Which, we suspect, was factually impossible to implement.

192 *Arukh ha-Shulḥan*, *Orah Ḥayyim* 345:17.

based only on this leniency, and it is as if a *bat kol* (heavenly voice) came forth and said that the *halakhah* is according to this opinion; and if we come and restrain it, not only will they not listen, but it seems as if they have gone crazy.¹⁹³

Of course, the *Arukh ha-Shulhan* does not rely solely on the assumption that a heavenly voice went forth and said that the *halakhah* is according to this opinion; rather, after making this statement, he also goes back and attempts to support the leniency via his detailed textual analysis of the Talmud and the early rabbinic decisors of the period of the *Rishonim*. His textual analysis, however, seems to serve a primarily justificatory purpose; it is predicated on the legitimacy of the established custom, reflecting his basic methodology of reading the talmudic texts consistent with the common practice. But a look at what he does and how he does this serves a very important insight into his methodology.

Arukh ha-Shulhan opens his discussion by stating that “it is a *mitsvah* and a duty to find virtue in the conduct of the Jewish people. Thus, I focused my heart to find some justification.”¹⁹⁴ He then proceeds to list three excellent justifications for accepting the six-hundred-thousand-person requirement grounded in the Talmud itself.

First, Rabbi Epstein argues that a close read of the talmudic sources indicates that a city can have only one public thoroughfare—a single central street that runs straight across the entire city, or at most two such streets, one going east-west and one going north-south. However, “our cities,” the *Arukh ha-Shulhan* notes, are not designed that way, but instead have many, many smaller streets, none of which—even when wider than sixteen cubits—is the single main street. Thus, a city without a main street can never be a public domain, no matter how wide the streets.¹⁹⁵

Second, Rabbi Epstein argues that the talmudic paradigm of public domains assumes that a city has one central market place, which constitutes its public domain. But, Rabbi Epstein points out, cities in his own time have many, many market places and stores with no centralized single market; instead, stores are scattered here and there, each of which is then not defined as a public place at all. This is true, the *Arukh ha-Shulhan* claims, even

193 Ibid. 345:18.

194 Ibid. 345:18.

195 Ibid. 345:19–21.

according to those scholars that reject the six-hundred-thousand-person requirement. Indeed, the *Arukh ha-Shulḥan* notes that the Jerusalem Talmud and the *Behag*—an important Geonic era collection of halakhic rules—provide some support for this insight.¹⁹⁶

Third, the *Arukh ha-Shulḥan* reflects on the implications of the modern use of railroad systems, which certainly carry more than six hundred thousand travelers daily, and he concludes that railroads are indeed genuine public domains. Moreover, Rabbi Epstein indicates that perhaps railroads are the only modern example of a genuine public domain, since in modern times this is the method of public transportation, akin to the major city thoroughfare of talmudic times. Interestingly, it is a reasonable read of the *Arukh ha-Shulḥan* that in his view, in the cities of his time, only the railroad tracks are places through which Jews may not carry objects on the Sabbath. The *Arukh ha-Shulḥan* thus has given a modern application of the talmudic concept of a public space.¹⁹⁷

Having concluded with three plausible justifications, the *Arukh ha-Shulḥan* spends nearly another fifteen hundred words and ten paragraphs dealing with this same topic from other angles, adding talmudic proof after proof to the idea that even those authorities who rejected the six-hundred-thousand-person test would nonetheless refuse to consider modern cities “public spaces” where *eruv* cannot be built. The sheer tenacity he brings to bear on this problem—from the variety of talmudic and medieval sources, as well as the radical and novel readings of some of them—causes one to see that the *Arukh ha-Shulḥan* is not content to recite to the reader that a heavenly voice ruled this way or to cite other authorities who rule that six hundred thousand is needed, but rather he is seeking a plausibly honest reading of the binding texts which validates the custom of the community. Furthermore, *Arukh ha-Shulḥan* does not conclude that it is better to be strict. He is content to simply validate the custom.

The contrast between the *Mishnah Berurah* and the *Arukh ha-Shulḥan* is distinct and noticeable here and manifest in six distinct values. First, the *Mishnah Berurah* is more comfortable than the *Arukh ha-Shulḥan* in actually discouraging people from carrying in modern *eruv*. The fact that everyone builds them and the custom is to rely on this is less important to the *Mishnah*

196 Ibid. 345:21–24.

197 Ibid. 345:26.

Berurah than it is to the *Arukh ha-Shulḥan*. Second, the *Arukh ha-Shulḥan* is prepared to reexamine well-worn talmudic texts to find intellectually reasonable but novel ways to validate the common custom. The breadth and depth of the material he digests in order to validate a custom, from the Jerusalem Talmud onward, in new and novel ways is not something the *Mishnah Berurah* is prepared to do. Third, the *Mishnah Berurah* is much more deeply connected to the traditions and decisions of the scholarly community that resides around him, and he defers to their judgments in many ways, large and small. Fourth, the *Arukh ha-Shulḥan* is more prepared to apply the halakhic rules to the modern world in ways that allow greater function: the discussion of modern city structure and his discussion of railroads reflect that. Fifth, *Mishnah Berurah* is more nuanced and complex—prepared to both share that one should not rebuke people who carry, but that pious people should be strict—leaving some uncertainty as to whether this conduct is permissible as a matter of Jewish law. *Arukh ha-Shulḥan* here (and in other places as well) has more of a tendency to be binary with regard to whether something is permissible or prohibited than the *Mishnah Berurah*. Finally, and relatedly, is the tendency of the *Arukh ha-Shulḥan* to record one view, and rarely more than one view, which he thinks is correct, whereas the *Mishnah Berurah*'s methodology tends to record all of the different reasonable views and then rank them from best to acceptable.

Conclusion

We noted at the beginning of this section that the *Mishnah Berurah* and the *Arukh ha-Shulḥan* confronted the same problem: the “set table” had become very crowded and messy, and Rabbi Karo’s *Shulḥan Arukh* was no longer the practical guide to Jewish practice it was meant to be because it had evolved into the hub of a very diverse collection of other scholars’ opinions, thoughts, and insights. The “set table” stopped being an effective code of Jewish law, as it had become confusing to use, and it was thus hard to determine what was normative amidst the clutter of rabbinic opinions and learned discourses. Both the *Mishnah Berurah* and the *Arukh ha-Shulḥan* sought to reset the table; both were deeply committed to the organizational structure of the *Shulḥan Arukh* and that work’s important place in the rabbinic corpus, but both recognized the need for halakhic jurisprudence to go through yet another

round of systemization and synthesis, so as to make it more practical to know and follow the law.¹⁹⁸

While both Rabbis Epstein and Kagan sought to address the same basic challenge, each set out to solve the crowded table problem in a different way. The *Mishnah Berurah* set about to tidy the very crowded table by ordering the prior works that developed around the *Shulḥan Arukh*, imposing important ordering values on each opinion and sharing with the reader a structure for determining the proper place of each view in practice, so that all could be used and all could be useful. Everything is processed and placed in a proper place and little is discarded—almost nothing is labeled wrong. This was not the methodology of the *Arukh ha-Shulḥan*. Rabbi Epstein set out to clear the crowded table and reset it in his own vision. He removed from the table those commentaries and opinions that he thought did not belong, reinforced the correctness of that which remained, and provided concrete direction on how to use the remaining utensils on the table so that the table would have fewer settings but everything on it would be correct.¹⁹⁹

198 The *Mishnah Berurah*, more so than the *Arukh ha-Shulḥan*, because Rabbi Kagan's is a commentary which follows not only chapters but sub-chapters of the *Shulḥan Arukh*.

199 Although beyond the scope of this article, it is worth noting that the basic intellectual insight of the *Mishnah Berurah* (that current authorities cannot resolve intellectually disputes among giants of previous generations) and the basic intellectual insight of the *Arukh ha-Shulḥan* (that the job of a Jewish law authority is to provide a single correct opinion for conduct), while contrasted here, can be combined into a work that resolves questions of Jewish law, like either of these works. The current Sephardi code by Rabbi Yitshak Yosef titled *Yalkut Yosef* is such a hybrid work. It tends to function like an *Arukh ha-Shulḥan*-type code with one correct opinion but does so by following the *Mishnah Berurah*'s approach that disputes cannot be intellectually resolved. They are resolved by the rule of majority instead, with approaches crafted that satisfy a majority of decisors being the dominant test—no need to present to the reader “better” approaches, and no halakhic value in minority approaches.

