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THE RULE OF THE TALMUD VS THE RULE OF  
RABBINIC CONSENSUS IN THE *ORACH CHAIM*  
SECTION OF RABBI YEHEIL MIKHEL EPSTEIN'S  
*ARUKH HASHULHAN*

by

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**I. An Introduction to Rabbi Yechiel Mikhel Epstein and the *Arukh Hashulchan*: The Last Great Posek of Czarist Russia**

Rabbi Epstein was the last great Jewish Law authority in Czarist Russia. As the martyred scholar Rabbi Eitam Henkin explores in his posthumously published biography,<sup>1</sup> and as we have noted elsewhere in great detail,<sup>2</sup> Rabbi Yechiel Mikhel Epstein was born into a relatively wealthy family on January 24, 1829 in Bobriusk, Russia (present-day Belarus) and died on February 24, 1908 in Navahrudak, Russia. 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.<sup>3</sup> 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

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<sup>1</sup> Rabbi Eitam Henkin חי"ד was writing, at the time of his murder, a biography of Rabbi Yechiel Mikhel Epstein, the author of the *Arukh Hashulchan*. This work has recently appeared under the title תערוך לפני שלחן ("Set a Table Before Me") and the subtitle זמנו ומפעלו של הר"י מ' עפשטיין בעל ערוך השלחן ("The Life, Time, and Work of Rabbi Yechiel Mikhel Epstein, Author of the *Arukh HaShulchan*") (Jerusalem: Maggid Press, 2019). Eitam Henkin indicated in this above manuscript (at page 309) an intent to address the many topics we discuss in this article (and our book) but he sadly did not live to write those sections. Instead, the biography he published was of the person (and less about the approach of the work). We are certain he would have done a better job at the methodological tasks we are undertaking, 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 the first section 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 dwarfs on the shoulders of a young giant taken from our community before he could grow to his full height.

<sup>2</sup> See Michael J. Broyde and Shlomo C. Pill "Building the Set Table, Cluttering the Set Table and Two Competing Methods for Decluttering the Set Table," *Dine Israel* 34:1-70 (2019) and *Setting the Table: An Introduction to the Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh HaShulchan* (Boston: Academic Studies Press, 2021).

<sup>3</sup> See Eitam Henkin, *Set a Table Before Me*, *supra* note 1, at 37-43; Simcha Fishbane, *The Boldness of an Halakhist: An Analysis of the Writings of Rabbi Yechiel Mikhel Halevi Epstein's "The Arukh Hashulchan,"* at 2-4 (Boston: Academic Studies Press, 2008).

through 1843.<sup>4</sup> While Rabbi Epstein briefly pursued a business career,<sup>5</sup> he was appointed a rabbinical judge and assisted his teacher, Rabbi Goldberg, in his hometown of Bobruisk, and ultimately decided to become a communal rabbi.<sup>6</sup> 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 and secular, Chasidim and *Mitnagdim*—lived.

Rabbi Epstein's crowning literary achievement is his monumental compendium of Jewish Law titled *Arukh HaShulchan* 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 *Shulchan 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.<sup>7</sup>

In his *Introduction* to the first published volume of the *Arukh HaShulchan*, 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. 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. Rabbi Isserles contributed his own conclusions, which drew on the texts, traditions, and customs viewed as fundamentally important among Ashkenazic Jewry. "Together," Rabbi Epstein writes, "the two built the entire house of Israel with [their clarifications] of the laws that apply in contemporary times." However, Rabbi Epstein argues, the *Shulchan 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. Consequently and unsurprisingly then, the publication of the *Shulchan 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. As a result, Rabbi Epstein writes, "in the current generation . . . the uncertainty and confusion [about the law] have returned." 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."<sup>8</sup> Thus, the purpose of the *Arukh HaShulchan* 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 HaShulchan* was not written to replace the *Shulchan Arukh*; indeed, Rabbi Epstein recognizes the central and esteemed place occupied by the organizing structure of Rabbi Karo's *Shulchan Arukh* in modern *halakhah*.<sup>9</sup> Instead, the *Arukh HaShulchan* seeks to reset Rabbis Karo and Isserles's table presenting both prior and subsequent developments in rabbinic literature

<sup>4</sup> See Fishbane, *supra* note 3, 5. On Rabbi Epstein's time in the Volozhin Yeshivah, see Henkin, *supra* note 1, at 57-58, 321-322, & 349-351.

<sup>5</sup> See Henkin, *supra* note 1, at 43-44.

<sup>6</sup> See Henkin, *supra* note 1, at 349-361 (for more on Rabbi Goldberg).

<sup>7</sup> See *Arukh HaShulchan*, *Introduction* to Choshen Mishpat.

<sup>8</sup> All citations are (translated) from *Arukh HaShulchan*, *Introduction* to Choshen Mishpat.

<sup>9</sup> *Arukh HaShulchan*, *Introduction* to Choshen Mishpat.

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 *Shulchan Arukh*.<sup>10</sup> The *Arukh HaShulchan* follows the same four-part division of *halakhah*, created by the *Arbah Turim* and confirmed by the *Shulchan Arukh*, into daily observances (*Orach Chayyim*), ritual practices (*Yoreh Deah*), family law (*Even HaEzer*), and civil law (*Choshen Mishpat*). Likewise, within each section, the *Arukh HaShulchan* utilizes the subject headings of the *Shulchan Arukh* and generally follows the same chapter numbering system utilized by Rabbi Karo, such that the content of each chapter of the *Arukh HaShulchan* broadly corresponds to the substantive issues addressed in each corresponding chapter of the *Shulchan Arukh*. However, while the *Shulchan 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.<sup>11</sup>

In addressing each legal issue, Rabbi Epstein begins by presenting the foundational sources for the rule or doctrine under discussion in the Torah 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 *Arbah Turim*, *Shulchan 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.<sup>12</sup> Thus, rather than a code like Rabbi Karo's *Shulchan Arukh*, the *Arukh HaShulchan* reads as a compressive review and analysis of rabbinic legal literature on every topic covered but importantly, as a work ultimately interested in reaching practical legal conclusions, rather than just offering a digest of rabbinic opinions or learned study of Talmudic dialectics.

This article explains and illustrates two of the primary and contradictory rules that Rabbi Epstein uses to determine the correct *halakhic* standard in the *Orach Chayyim* section of his *Arukh HaShulchan*. Part II explains Rabbi Epstein's rule of "Talmudic Correctness," arguing that ideally Jewish Law should follow the correct Talmudic rule as understood by the decisions. Part III explains Rabbi Epstein's rule of "consensus," where he accepts that one ought to err on the side of caution by setting aside one's own *halakhic* viewpoint, and, instead, he adopts the more stringent understanding of the issue endorsed by other important authorities.

## I. The Rule of the Talmudic Correctness

The basic jurisprudential premise of Rabbi Epstein's methodological approach is the view that, in principle, the correct *halakhic* rule for any given issue is the norm or standard prescribed by the Talmud.<sup>13</sup> We say that, according to Rabbi Epstein, the Talmudic rule is the right one "in principle" to highlight, and we caution that often Rabbi Epstein does not rule in accordance with what he believes is the legal standard embraced by the Talmud. In Rabbi Epstein's jurisprudence, the Talmudic standard is the right *halakhic* norm in theory; it is a kind of platonic ideal form of

<sup>10</sup> *Arukh HaShulchan*, Introduction to Choshen Mishpat.

<sup>11</sup> See Rabbi Moshe Walter, *The Making of a Halachic Decision: A Comprehensive Analysis & Guide to Halachic Rulings* 39-64 (Menucha Publishers, 2013).

<sup>12</sup> *Arukh HaShulchan*, Introduction to Choshen Mishpat.

<sup>13</sup> See *Arukh HaShulchan*, Introduction to Choshen Mishpat.

the right legal rule. The theoretically correct Talmudic rule is often genuinely unclear, however, and elsewhere we consider the practical ways in which Rabbi Epstein reaches practical *halakhic* determinations when such Talmudic indeterminacy precludes his arriving at an analytically correct ruling. Moreover, even when the Talmudic rule is clear and known, this standard often gives way to alternative standards in practice as theoretically correct and abstractly formulated Talmudic standards come into conflict with various religious, social, and pragmatic concerns in real-world *halakhic* practice. As we discuss elsewhere, such tensions often call for a reconsideration of what the *halakhah*, broadly defined, requires in practice, and often such analyses result in some substantial modification of the Talmudic rule itself or at least some alternative expression of what that standard entails when applied to complex real-world conditions.<sup>14</sup>

Before considering how he addresses the very complex issue of how to interpret and apply *halakhic* standards in practice, this article addresses the methodological principles that Rabbi Epstein uses to determine the ideally correct *halakhic* norms that form the theoretical foundation for practical, applied *halakhic* rulings. At this initial stage of the *halakhic* decision-making process, every rabbinic decisor must contend with the pivotal issue of how much he trusts his own *halakhic* judgment in the face of contrary rulings by other authorities.

If a contemporary scholar's judgment leads him to one legal conclusion, but the judgment and analysis of other, perhaps highly regarded—even legendary—decisors of past eras reached alternative *halakhic* conclusions, should the contemporary scholar follow his own judgment or should he defer to the rulings of those who preceded him? Rabbi Epstein addresses these concerns through two secondary rules of recognition and adjudication. First, as discussed in this section of the article, Rabbi Epstein maintains that the ideally correct *halakhic* rule is the one that emerges from his own independent understanding of the relevant Talmudic sources even where his own conclusions differ from those of important *halakhic* authorities of previous generations.<sup>15</sup> Importantly, in reaching his own understanding of the correct Talmudic rule, Rabbi Epstein considers the Jerusalem Talmud as an important source of legal material and often utilizes it alongside the more well-known and widely used Babylonian Talmud.<sup>16</sup> This direct engagement with the Talmudic corpus often leads Rabbi Epstein to prescribe entirely new *halakhic* rules and to offer novel rationales and explanations for well settled *halakhic* norms not previously articulated by other major rabbinic scholars. Second, as discussed in the next section, Rabbi Epstein tempers his willingness to independently derive *halakhic* norms directly from the Talmud with a healthy dose of epistemic humility. Thus, when his own understanding of the Talmudic sources conflicts with the *halakhic* conclusions expressed by a broad consensus of other authorities or when certain major authorities express more ritually stringent legal opinions, Rabbi Epstein sets aside his own potentially mistaken judgment and defers to his peers.

We could make the following claim:

*Rabbi Epstein maintains that the correct halakhic rule is the one that follows from the qualified scholar's independent understanding of the relevant Talmudic sources even against the precedential rulings of important authorities of previous generations.*

Before considering how Rabbi Epstein approaches the very complex question of how to interpret and apply the right rules of law in practice, we consider his thinking on what the right rule of law is, where it comes from, and how he knows it. As to these fundamental issues, Rabbi

<sup>14</sup> See "Building the Set Table", *supra* note 2, and the works cited in note 1.

<sup>15</sup> See *Arukh haShulchan*, Introduction to Choshen Mishpat.

<sup>16</sup> See, e.g., *Arukh haShulchan*, Orach Chayyim 345:21-24.

Epstein's approach is clear: At bottom, he approaches each *halakhic* issue with the conviction that the correct legal standard is the one articulated by the Talmud; his goal, then, is always to determine the rule or standard evinced by the relevant Talmudic sources.<sup>17</sup>

In explaining the roots, workings, and historical usage of this approach to rabbinic jurisprudence, it is helpful to contrast this methodological model with another, rival general jurisprudential outlook which helps highlight the significance of Rabbi Epstein's approach. As post-Talmudic rabbinic literature—including codifications and restatements of *halakhic* rules as well as voluminous *responsa* providing specific legal replies to actual questions—proliferated during the Middle Ages,<sup>18</sup> *halakhic* scholars began to debate the implications of these new materials for *halakhic* decision making. Two schools of thought developed. One group of scholars, which we call here the precedentialist school, maintained that while in principle the *halakhah* follows the prescriptions of the Talmud, in practice, *halakhic* decision makers should rely on and apply the legal rules and standards found in authoritative secondary works like Maimonides' major 12<sup>th</sup> century code, the *Mishneh Torah*, or Rabbi Joseph Karo's 16<sup>th</sup> century *halakhic* code, the *Shulchan Arukh*.<sup>19</sup> These scholars maintained that independent reasoning and direct engagement with the Talmud is not a virtue; on the contrary, it is likely to lead to mistaken understandings and erroneous legal conclusions. Therefore, rabbinic decision makers should rely on the well formulated *halakhic* rulings found in accepted secondary sources.<sup>20</sup> This view is grounded in a number of different textual, conceptual, and practical jurisprudential considerations put forth by rabbinic scholars.

Accepted secondary rules of rabbinic jurisprudence include doctrines governing the incidence of judicial error, which help determine whether a *halakhic* ruling is erroneous as well as the decision maker's liability for any losses caused by that mistaken judgment.<sup>21</sup> One such doctrine called *ta'ut b'davar mishnah*, or "mistake in Mishnaic matters," maintains that *halakhic* rulings that contravene clearly established rabbinic norms are null and void.<sup>22</sup> While most scholars have confined the reach of this rule to only those norms clearly prescribed by Talmudic sources, some have extended the doctrine to apply to widely accepted and authoritative post-Talmudic expressions of Jewish legal standards which establish binding precedents of Jewish Law and, thereby, limit later scholars' legal authority to draw *halakhic* rulings directly from the Talmud.<sup>23</sup>

For instance, Rabbi Abraham ben David of Posquieres (1125-1198) ruled that scholars of his own time were obligated to read the Talmud through the interpretive lens of the Geonim, a school of rabbinic authorities that flourished in what is today Iraq between the 8<sup>th</sup> and 11<sup>th</sup>

<sup>17</sup> In truth, this approach is, at least in theory, undisputed in rabbinic jurisprudence. But the central question is whether or not a Jewish law decisor writing *responsa* or code on the many layers which have already been written is free to ignore those layers. One need only compare the approach of Rabbi Ovadia Yosef with Rabbi Moshe Feinstein to see that novel claims of Talmudic truth redound in one work and are absent in another.

<sup>18</sup> On the development of post-Talmudic *halakhic* materials, see Chaim Saiman, *Halakhah: The Rabbinic Idea of Law* 140-194 (Princeton, N.J.: Princeton University Press, 2018).

<sup>19</sup> See, e.g., Responsa Chikrei Lev, Choshen Mishpat 3:49; Responsa Shevut Yaakov 2:64.

<sup>20</sup> See e.g., Responsa Ha'Ri Migash no. 114.

<sup>21</sup> See generally *Shulchan Arukh*, Yoreh De'ah 142; *Shulhan Arukh*, Choshen Mishpat 25.

<sup>22</sup> See *Shulchan Arukh*, Choshen Mishpat 25:1 ("A judge who rules in a monetary matter and errs: If the error is in matters that are revealed and well-known, such as explicit rulings of the Mishnah or *Gemarah*, or in the rulings of the [post-Talmudic] decisors, the judgement is reversed and the case retried.")

<sup>23</sup> See generally Beit Yosef to Arbah Turim, Choshen Mishpat 25:1.

centuries.<sup>24</sup> Similarly, Rabbi Joseph Karo writing in his major 16<sup>th</sup> century *halakhic* code, the *Shulchan Arukh*, ruled that contemporary rabbinic judgments that conflict with “matters that are well known, such as . . . the words of the [major post-Talmudic] *halakhic* decisors” are void.<sup>25</sup> And some more recent scholars have argued that the *Shulchan Arukh*’s codification of Jewish Law itself constitutes such binding precedent.<sup>26</sup> Even according to scholars who reject the applicability of the doctrine of *ta’ut b’davar mishnah* to post-Talmud legal opinions, another judicial mistake principle known as *ta’ut b’shikul hadaat* or “error in judgment,” may help create highly persuasive *halakhic* precedents that preclude later scholars from deploying the Talmud directly as a primary source of Jewish law.<sup>27</sup> “Errors in judgment” occur when contemporary *halakhic* decision makers reach legal conclusions that are not inconsistent with Talmudic norms, but which fail to account for the development of post-Talmudic consensuses in support of more specific and contrary standards.<sup>28</sup> This concept functions to create a kind of historical periodization of *halakhic* authority which, while somewhat ill-defined at the edges, has become fairly widely accepted.

There are three such generally accepted periods of post-Talmudic *halakhic* development: the Geonic period lasted roughly from 700-950 C.E. and was characterized by the *halakhic* hegemony of the Geonim, the heads of the rabbinic academies of Babylon, where the Talmud itself had been compiled; the Rishonic period lasted from the 11<sup>th</sup> through mid-16<sup>th</sup> century, and involved the development of major restatements, codifications and collections of responsa by the *Rishonim* (“Early Ones”), the rabbis who lived and worked in Europe and North Africa during this time; the Acharonic period began in the latter half of the 1500s and continued until roughly the turn of the 20<sup>th</sup> century, during which rabbis known as *Achronim* (“Latter Ones”) commented on and applied the texts produced during the Rishonic era.<sup>29</sup> According to some, the doctrine of *ta’ut b’shikul hadaat* instructs that at the close of each of these historical eras, the *halakhic* rulings from that period constitute a kind of strongly persuasive, if not truly formally binding, precedent which restricts the *halakhic* freedom of latter decision makers to render independent rulings based directly on the Talmud.<sup>30</sup>

The force of post-Talmudic precedent is reinforced, according to the precedentialist school, by an important Talmudic dictum and secondary rule of *halakhic* decision making that prescribes

<sup>24</sup> Raabad, as quoted by Rosh to Sanhedrin 4:6. See also *Mishneh Torah*, Hilkhot Sanhedrin 6:1.

<sup>25</sup> *Shulchan Arukh*, Choshen Mishpat 25:1.

<sup>26</sup> See Chavot Ya’ir, as quoted in Pitchei Teshuva to *Shulchan Arukh*, Choshen Mishpat 25:2.

<sup>27</sup> See generally *Shulchan Arukh*, Choshen Mishpat 25:2.

<sup>28</sup> See *Shulchan Arukh*, Choshen Mishpat 25:2 (“Errors in judgement: Such as an issue which is a matter of dispute among the *Tanna'im* or *Amora'im* where the law has not been clearly decided like either of them [by the Talmud], and he [the decisor] followed one of them without realizing that a rabbinic consensus has already developed in support of the other one . . .”).

<sup>29</sup> 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 et al. (eds.), *An Introduction to the History and Sources of Jewish Law* 203-14 (Oxford: Oxford University Press, 1996) (discussing the legal literature produced by the Geonim); *id.* at 228-34 (describing the lives and works of several major Geonic scholars). For background on the Rishonic era, see generally IDEM, 271-358; *id.* at 359-96. For an overview on major Acharonic works, see generally Daniel Mann (ed.), *Living the Halakhic Process: Questions and Answers for the Modern Jew* (Jerusalem/New York, N.Y.: Devora Publishing, 2007), 18-26.

<sup>30</sup> See, e.g., *Shulchan Arukh*, Choshen Mishpat 25:1 (arguing that contemporary rabbinic judgments which conflict with the rulings of major post-Talmudic *halakhic* decisors are void); Chavot Ya’ir, as quoted in Pitchei Teshuva to *Shulchan Arukh*, Choshen Mishpat 25:2 (arguing that the *Shulchan Arukh*’s codification of Jewish Law itself constitutes a similarly binding precedent).

“*halakhah k’batrai*,” or “the law follows the latter [view].”<sup>31</sup> According to many rabbinic commentators, this important principle teaches that present practitioners and adjudicators of Jewish Law should look to the more recent rather than the more ancient expressions of *halakhic* norms and standards for the most authoritative statements of Jewish Law.<sup>32</sup> Indeed, the Talmud itself seems to suggest that it should not be used directly as a source of practical *halakhic* norms: “We do not derive the law from specific incidents or from Talmudic teachings, but only from rulings issued as practical law.”<sup>33</sup>

Buttressing the foregoing normative claims regarding the possibility of post-Talmudic binding precedent is a strong sense, among some rabbinic scholars, that the history of Jewish legal and religious learning is one of gradual decline.<sup>34</sup> This concept is known as *yeridat hadorot*, or “the decline of the generations,” and generally teaches that the rabbinic scholars and *halakhic* decision makers of later generations are less competent than those of earlier generations due to a decline of scholarly ability, political upheavals and economic instability, and temporal distance from the original point of revelation at Sinai.<sup>35</sup> Belief in this proposition, at least in the realm of *halakhic* insight and knowledge, helps explain why, according to the precedentialists, post-Talmudic legal rulings rather than the Talmud itself should be the primary source of binding *halakhic* norms. On this view, rabbinic decision makers must always view themselves as less qualified and less capable than their predecessors and should, therefore, defer to precedential rulings of earlier *halakhic* authorities. In doing so, however, contemporary scholars should not refer all the way back to the Talmud itself; for while Talmudic sources are the earliest and most authoritative, the historical periodization of *halakhic* development established by the doctrines of judicial error as well as the principle of *halakhah k’batrai* urge against such direct engagement with the Talmud as a source of law and instead suggest that precedential rulings of more recent major rabbinic scholars should be the primary reference point for practical Jewish Law decision making.

As discussed earlier, many rabbinic scholars severely criticized and rejected the general approach that post-Talmudic precedent, whether in codes, restatements, or *responsa*, could establish binding norms of Jewish Law.<sup>36</sup> According to some opponents of ruling based on post-Talmudic codes and precedents, such materials are inadequate because they are merely expressions of their authors’ legal opinions rather than the law itself.<sup>37</sup> Thus, Rabbi Judah Loew (1526-1609) argued that relying on post-Talmudic precedents is mistaken because such texts “were merely authored for practical instruction, and not to learn the law from,”<sup>38</sup> meaning that post-Talmudic

<sup>31</sup> See, e.g., Rema to *Shulchan Arukh*, Choshen Mishpat 25:2; Tosafot to Babylonian Talmud, Berakhot 39b (s.v. *mevarech al haptitin vepoter et hashlemin*); Rosh to Bava Metzia 4:21.

<sup>32</sup> For an academic overview, see Israel Ta-Shma, “Hilchata K’batrai: Historical Observations on a Legal Rule,” 6–7 *Jewish Law Annual* (1979–1980), 405–23 [Hebrew].

<sup>33</sup> Babylonian Talmud, Bava Batra 130b.

<sup>34</sup> See, e.g., Menachem Marc Kellner, *Maimonides on the “Decline of the Generations” and the Nature of Rabbinic Authority* (Albany, N.Y.: SUNY Press, 1996).

<sup>35</sup> See, e.g., Babylonian Talmud, Shabbat 112b (“If the earlier [scholars] were sons of angels, we are sons of men; and if the earlier [scholars] were sons of men, we are sons of asses...”).

<sup>36</sup> For a comprehensive explanation of why *halakhic* rulings should not merely follow existing precedents—whether in the codes or other rabbinic materials—see Rabbi Tzvi Hirsch Chayes, *Darkhei Ha-horaah II*, pp. 249–250, in *Kol Sifrei Maharitz Chayes*, Vol. 1 (1958).

<sup>37</sup> See, e.g., Rabbi Chayyim ben Betzalel, *Viku’ach Mayim Chayyim*, sec. 1, 94.

<sup>38</sup> Rabbi Judah Loew, *Netivot Olam*, Netiv Ha-Torah, ch. 15.

accounts of the *halakhah* are useful handbooks of practical instruction for the times and places in which they were written but they cannot be regarded as the law itself. "It is more appropriate," Rabbi Loew continues, "to rule based directly on the Talmud, for while there is room to fear that in doing so one may . . . rule incorrectly . . . nevertheless, a wise man has only what his own mind understands from the Talmud," and he may thus rely on his own judgment.<sup>39</sup>

Others maintained that, in reality, the seemingly determinate rulings found in various post-Talmudic works were no more clear-cut than the meandering discourses of the Talmud itself and, therefore, offered little real advantage to rabbinic scholars seeking knowledge of correct *halakhic* norms.<sup>40</sup> According to this view, *halakhic* decision makers may as well engage directly with the Talmud—the true repository of the law—and rule in accordance with their respective understandings of the primary sources. Because relying on secondary works also requires substantial interpretation and analysis as abstract rules are applied to specific cases, it is better that such legal reasoning engage the law itself through independent Talmudic analysis rather than rely on secondary sources several steps removed from the ultimate source of *halakhic* authority.<sup>41</sup> Moreover, some scholars opposed ruling from post-Talmudic precedent because they thought that reliance on such secondary sources was bound to lead rabbinic decisors to reach incorrect results in practice. Rabbi Joel Serkes (1561-1640), for instance, argued that "those who [mechanistically] issue rulings based on the [precedential authority] of the *Shulchan Arukh* are ruling not in accordance with the *halakhah*, for they do not know the roots of the *halakhah* from which these specific rules emerge."<sup>42</sup>

More recently, two important 20<sup>th</sup> century *halakhic* authorities firmly rejected the possibility that rabbinic scholars can be bound by any precedent and instead affirmed that each must rule in accordance with his own independent judgment of the issue.<sup>43</sup> Rabbi Moses Feinstein (1895-1986), the preeminent *halakhic* authority in the United States during the latter half of the 20<sup>th</sup> century, wrote that the scholars of later generations are permitted and, indeed, required to resolve *halakhic* questions in accordance with their own considered understanding of the relevant sources even if their rulings conflict with the opinions of earlier authorities and even if they themselves might be objectively less qualified and learned than scholars of earlier generations.<sup>44</sup> Rabbi Hayyim David Halevi (1924-1998), the Chief Rabbi of Tel-Aviv, put this view even more stridently. Speaking about contemporary *halakhic* decisors, he wrote, "No precedent binds him, even a ruling of a court composed of scholars greater than he, and even of his own teachers."<sup>45</sup>

It is this school of thought to which Rabbi Epstein belongs. Rabbi Epstein rejects the view of some scholars that one must not issue *halakhic* judgments without investigating what is written in post-Talmudic texts. This approach, he says, "is irrational."<sup>46</sup> In his view, while various post-Talmudic works are impressive and important, the fundamental and primary source of *halakhah* is

<sup>39</sup> Rabbi Judah Loew, *Netivot Olam*, Netiv Ha-Torah, ch. 15. See also Rabbi Judah Loew, *Derekh Chayyim* 6:7.

<sup>40</sup> See Rabbi Solomon Luria, *Yam shel Shlomo*, Introduction to Bava Kamma (arguing that every time one attempts to author an account of the *halakhah*, "there is an even greater need for clarifications, and clarifications upon clarifications. For it is impossible that the initial clarification of the law would be free of all doubts and nuances such that there would be no need for further elaboration").

<sup>41</sup> See, e.g., Rabbi Solomon Luria, *Yam Shel Shlomo*, Introduction to Bava Kamma.

<sup>42</sup> *Sheilot U'teshuvot Bach* (Yeshanot), no. 80.

<sup>43</sup> See generally Jeffrey Woolf, "The Parameters of Precedent in Pesak Halakhah", *Tradition* 27:4 (1993), 41.

<sup>44</sup> See Introduction to Igrot Moshe, Orach Chayyim, vol. 1. See also Igrot Moshe, Yoreh De'ah 2:88.

<sup>45</sup> *Aseh Lecha Rav* 2:61 (1989).

<sup>46</sup> *Arukh HaShulchan*, Yoreh De'ah 242:35.

the Talmud. Legal rulings not grounded in direct knowledge of the Talmudic sources themselves are therefore necessarily deficient, and those who issue *halakhic* rulings directly from codes like the *Shulchan Arukh* do so without adequate knowledge of the underlying reasons and rationales of the rules they are applying. This, Rabbi Epstein maintains, leads to errors unless one's legal knowledge is solidly grounded in a direct understanding of the Talmudic sources themselves.<sup>47</sup> Indeed, Rabbi Epstein explains that a primary motivation in undertaking to write his *Arukh HaShulchan* was to counter the trend of his own time which saw competent *halakhic* scholars treating Rabbi Joseph Karo's code, the *Shulchan Arukh*, as the primary source of Jewish Law and as the starting point—if not always the final word—for *halakhic* decision making. His own work was intended to counter this trend by presenting not only his own *halakhic* conclusions, grounded in his understanding of the relevant Talmudic materials, but also to do so in such a way that would present to his readers the underlying Talmudic discussions, thereby better equipping others to understand and determine the *halakhah* based on the Talmud itself.<sup>48</sup>

One example of Rabbi Epstein's primary reliance on what he thinks is the right Talmudic norm, even against the contrary views of other authorities, concerns the question of whether or not one should recite the usually prescribed blessing upon ritually washing one's hand in the morning in a situation where one stayed awake the entire previous night. Ritual morning handwashing was originally prescribed as a means of cleansing the body of ritual impurity and uncleanness that one contracts while sleeping which must be removed before one can recite the morning prayers.<sup>49</sup>

Thus, the case of someone who did not sleep during the night poses a question: should the handwashing be performed and the ordinary blessing recited; or is washing in such a situation unnecessary, and would the recital of a blessing thus be a violation of the prohibition against taking God's name in vain? The *Shulchan Arukh* and *Rema* both rule that one should not recite a blessing in such a case because Jewish Law generally instructs that when one is in doubt about whether to recite a blessing, a blessing should not be recited.<sup>50</sup> Here, it is doubtful whether a blessing should be recited because, on one hand, the Talmudic Sages decreed that one washes one's hands in the morning with a blessing, and they did not distinguish between one who was awake the night before and one who slept the night before, while, on the other hand, both of the reasons given for washing one's hands in the morning potentially do not apply to one who was awake the night before.<sup>51</sup> Despite the assertion by these two preeminent *halakhic* authorities that a blessing should not be recited, Rabbi Epstein rules, to the contrary, that there is no doubt at all, and that a blessing should therefore be recited.<sup>52</sup> Rabbi Epstein bases this conclusion on his own understanding of the relevant Talmudic sources. He argues that the correct Talmudic rule is that everyone must wash their hands with a blessing each morning, even someone who did not sleep at all the previous night. This is because the Talmudic rabbis did not specifically exempt a person who remained awake all night from the general obligation to wash one's hands every morning with a blessing; if the rabbis had intended such an exception, they could have provided as much in the Talmudic discussion of hand washing.<sup>53</sup> Rabbi Epstein was indeed so confident in his own reading of the Talmudic norm, that

<sup>47</sup> See *Arukh HaShulchan*, Yoreh De'ah 242:36..

<sup>48</sup> See *Introduction* to *Arukh HaShulchan*.

<sup>49</sup> See *Rosh to Babylonian Talmud*, Berakhot 9:23; Responsa Rashbah 1:191.

<sup>50</sup> *Shulchan Arukh*, Orach Chayyim 4:13.

<sup>51</sup> See *Beit Yosef to Arbah Turim*, Orach Chayyim 4:13.

<sup>52</sup> See *Shulchan Arukh*, Orach Chayyim 4:12.

<sup>53</sup> See *Arukh HaShulchan*, Orach Chayyim 4:12.

he went so far as to prescribe the recital of what the *Shulchan Arukh* and *Rema* feared may be a blessing made in vain, which is subject to a severe prohibition.<sup>54</sup>

Another example of Rabbi Epstein's rejection of precedent in favor of his own Talmudic understanding concerns the question of whether one may leave the synagogue during the public Torah reading service. The Talmud rules that the congregation may not leave the prayer service taking place in a synagogue until after the Torah scroll used for public congregational Torah reading has been rolled up, covered, and returned to the ark.<sup>55</sup> While this rule is codified by the *Shulchan Arukh*, the *Rema* qualifies this prohibition as applying only to instances where the entire congregation leaves the synagogue at once; individuals, however, may leave one-by-one, even before the Torah scroll is returned to the ark.<sup>56</sup> The *Arukh HaShulchan* rejects the *Rema's* permissive view.<sup>57</sup> Rabbi Epstein asserts that a correct understanding of the relevant Talmudic passage shows that the prohibition on leaving the synagogue prior to the return of the Torah to the ark applies to each and every individual member of the congregation, not merely to the congregation as a whole. This, Rabbi Epstein says, is implicit from the context of the Talmudic ruling, which involves several discussions about the obligations of individuals as good members of a prayer congregation and is likewise consistent with Rashi's explanation of that Talmudic passage.<sup>58</sup>

Notably, Rabbi Epstein's methodology is unique and independent even within the Talmudic Law school, in that Rabbi Epstein does not only rely on the text of the Babylonian Talmud when forming his judgments about correct, Talmudically-prescribed *halakhic* rules. Rather, he makes substantial use of the Jerusalem Talmud as well, of which he has an impressive command. Traditionally understood to have been compiled and composed by Ravina and Rav Ashi, the heads of the main rabbinic academies in Persia around the first half of the 6<sup>th</sup> century C.E., the Babylonian Talmud includes the text of the *Mishnah* and a record of the discussions, interpretations, and applications of Mishnaic and other tannaitic materials by Babylonian rabbinic scholars over the course of the several preceding centuries as well as a wealth of homiletic and ethical content, and social, historical, economic, medical, and other insights.<sup>59</sup> The Jerusalem Talmud—so called because it was compiled in and by scholars living in the Land of Israel—is a much shorter work that was completed around one hundred and fifty years before the Babylonian Talmud. It too is based around the text of the *Mishnah*, but comprises the rabbinic discussions, textual analyses, and insights of the rabbis who lived in the Land of Israel during the third and fourth centuries.<sup>60</sup>

Traditionally, the Babylonian Talmud has been the primary touchstone of *halakhic* discourse and decision making.<sup>61</sup> For instance, Rav Hai Gaon maintained that “with respect to

<sup>54</sup> In fact, according to the Talmud, one who recites a blessing in vain thereby violates one of the Ten Commandments. See Babylonian Talmud, Berakhot 33a; Exodus 20:6.

<sup>55</sup> See Babylonian Talmud, Sotah 39b.

<sup>56</sup> See *Rema to Shulchan Arukh*, Orach Chayyim 149:1.

<sup>57</sup> See *Arukh HaShulchan*, Orach Chayyim 146:1.

<sup>58</sup> See *Arukh HaShulchan*, Orach Chayyim 146:1. For other examples in which Rabbi Epstein privileged his own Talmudic understandings over earlier precedential views, see *Arukh haShulchan*, Orach Chayyim 185:1, 301:10, 535:2, 555:2.

<sup>59</sup> See generally Menachem Elon (trs. Bernard Auerbach & Melvin J. Sykes), *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), Vol 3, 1087-1092.

<sup>60</sup> See generally idem, 1095-1097.

<sup>61</sup> See idem, 1098-1100.

*halakhic* matters decided by our [Babylonian] Talmud, we do not rely on any contradictory statements of the Jerusalem Talmud.<sup>62</sup> This view was widely accepted and repeated by many other prominent authorities. For instance, Rabbi Isaac Alfasi rules that “we rely on our [i.e. the Babylonian] Talmud,”<sup>63</sup> and Maimonides, when discussing the absolutely binding nature of Talmud norms, refers only to the Babylonian Talmud, implicitly downplaying the *halakhic* significance of the Jerusalem Talmud.<sup>64</sup> Likewise, *Tosafot* explicitly rule that the Babylonian Talmud takes precedence over the Jerusalem Talmud in cases of conflict.<sup>65</sup> Scholars have given a number of reasons for this *halakhic* preference for the Babylonian Talmud. Rabbi Isaac Alfasi argued that the Babylonian Talmud is superior to the Jerusalem Talmud because it was completed at a later date, and thus the editors of the Babylonian Talmud already had access to and accounted for materials and rulings contained in the Jerusalem Talmud.<sup>66</sup> Others point to the fact that the Babylonian Talmud is a much larger, comprehensive work; it covers more Mishnaic material, includes more rabbinic interpretation and discourse, and is several times the size of the text of the Jerusalem Talmud. This makes the Babylonian Talmud a better work for use as a primary source of *halakhic* norms.<sup>67</sup> In a similar vein, some have argued that the Jerusalem Talmud is a less complete and less well-edited work than the Babylonian Talmud, since it was composed hastily and under conditions of religious persecution and economic and political instability at the end of the 4<sup>th</sup> century in Judea and the Galilee.<sup>68</sup>

While the general *halakhic* consensus has thus long favored the Babylonian Talmud, many rabbis of the Rishonic period were clear masters of the Jerusalem Talmud and deployed it often—if not dispositively—in their *halakhic* writings.<sup>69</sup> Moreover, many of those authorities that have expressed their preference for the Babylonian Talmud have even noted that the teachings of the Jerusalem Talmud do carry normative import, even while they do not take precedence over the rulings of the Babylonian Talmud in cases of conflict between the two. Rav Hai Gaon, for instance, maintained that, while the rulings of the Babylonian Talmud are most authoritative, “whatever we find in the Jerusalem Talmud that does not contradict our own [Babylonian] Talmud, or which provides a nice explanation for its matters of discourse, we can hold on to it and rely upon it.”<sup>70</sup> Similarly, Rabbi Joseph Karo wrote that “any way that we can interpret the Babylonian Talmud in a manner that will prevent it from conflicting with the Jerusalem Talmud is better, even if that interpretation is somewhat forced.”<sup>71</sup> Maimonides, too, often relies on legal rulings contained in the Jerusalem Talmud on matters where the Babylonian Talmud is silent, or where the *halakhic* standard prescribed by the Babylonian Talmud is unclear.<sup>72</sup>

<sup>62</sup> Simha Assaf (ed.), *Gaonica: Gaonic Responsa and Fragments of Halachic Literature from the Geniza and Other Sources* 125 (Jerusalem: Darom, 1933) [Hebrew].

<sup>63</sup> Rif to Eruvin 35b.

<sup>64</sup> *Introduction to Mishneh Torah*. See also Rosh to Sanhedrin 4:5.

<sup>65</sup> See Tosafot, Berakhot 39a (s.v. *batzar lei shi'ura*); Tosafot, Sukkah 26b (s.v. *v'lo birech acharav*). See also Tosafot, Berakhot 11b (s.v. *she'kevar niftar*).

<sup>66</sup> Rif, Eruvin 35b. See also *Shailot U'teshuvot Maharik* nos. 84, 91.

<sup>67</sup> See Rabbi Naftali Zvi Yehudah Berlin, *Ha'emek Davar*, Shemot 34:1.

<sup>68</sup> See R. Yitzchak Isaac Halevi Rabinowitz, *Dorot Rishonim*, ch. 20.

<sup>69</sup> See Michael J. Broyde, “May the Jewish Daughter of a Gentile Man Marry a Kohen?,” *The Journal of Halacha and Contemporary Society* 47 (Spring 2009), 100, n. 6.

<sup>70</sup> R. Hai Gaon, as quoted in Rabbi Abraham Isaac of Narbonne, *Sefer Ha-Eshkol*, vol. 2, 49 (s.v. *Hilkhot Sefer Torah*) (Benjamin Hirsch Auerbach, ed., 1868).

<sup>71</sup> Kessef Mishnah to *Mishneh Torah*, Hilkhot Gerushin 13:18.

<sup>72</sup> See Shach to *Shulchan Arukh*, Yoreh De'ah 145:1.

Rabbi Epstein, too, views the Jerusalem Talmud as an important source of *halakhic* standards. Throughout his writings in the *Arukh HaShulchan*, Rabbi Epstein demonstrates an impressive command of the Jerusalem Talmud. He quotes it frequently, citing passages not previously referenced by other authorities, identifying misquotes and mistaken references to the Jerusalem Talmud made by other *halakhic* writers, and often using passages in the Jerusalem Talmud to elucidate ambiguous discussions in the Babylonian Talmud. For instance, the *Arbah Turim* rules that if one blows a full three-sound series of blasts from a *shofar* in a single breath, without taking a new breath in between each of the three sounds, the sounds are not ritually valid and do not count towards the fulfillment of the obligation to blow the proper number of sounds with a *shofar* on Rosh Hashanah.<sup>73</sup> This is also the view of the *Rosh* and is supported by a tannaitic *Tosefta* which explicitly invalidates a series of *shofar* sounds if the individual sounds were not separated from each other by separate breaths. Rabbi Epstein notes, however, that the Jerusalem Talmud offers a contrary ruling, holding that if all the sounds were produced with a single breath, one still fulfills the obligation to hear the *shofar* through those blasts. Rabbi Epstein rules in accordance with the Jerusalem Talmud and against the *Arbah Turim* and the *Tosefta*, since the Babylonian Talmud does not directly contradict the Jerusalem Talmud's ruling.<sup>74</sup>

Rabbi Epstein's impressive command of the Jerusalem Talmud—itself a function of the importance with which he regards this work as a source of *halakhic* norms—is demonstrated well by an additional example: namely, his disagreement with Rabbi Joseph Karo regarding the correct explanation for the fact that an unusual number of Torah verses are read as part of the public Torah reading service on the holiday of Purim.<sup>75</sup> It is well-settled that on Purim the congregation reads only nine verses from the Torah during the public Torah reading service.<sup>76</sup> This practice requires an explanation because, normally, a minimum of ten verses are read during communal Torah readings. Rabbi Karo seeks to explain this practice as derived from a passage in the Jerusalem Talmud, which teaches that we “cut off” the reading, as it were, to symbolize Haman's attempt to “cut off” the lives of Jewish people in the Purim story as told in the book of Esther.<sup>77</sup> However, the *Arukh HaShulchan* points out that this explanation is not found in the Jerusalem Talmud at all.<sup>78</sup> In fact, Rabbi Epstein notes, the Jerusalem Talmud provides a completely different explanation for the practice, namely, that the subject matter of the Torah reading ends after nine verses, and, thus, there is no need to read more than that.<sup>79</sup> Here, Rabbi Epstein shows a command of the Jerusalem Talmud by proposing that the explanation attributed to it by Rabbi Karo is incorrect, and then providing a better explanation. Rabbi Epstein feels he is a more competent user of the Jerusalem Talmud than Rabbi Karo.<sup>80</sup>

Importantly, Rabbi Epstein's reliance on his own independent understanding of both the Babylonian and Jerusalem Talmud leads him occasionally to prescribe entirely new *halakhic* rules as well as novel rationales and explanations for well-settled legal norms. Thus, to offer an additional example, Rabbi Epstein utilizes the Jerusalem Talmud to suggest a new explanation for

<sup>73</sup> *Arba'ah Turim*, Orach Chayyim 590.

<sup>74</sup> *Arukh HaShulchan* 590:14. For other examples of Rabbi Epstein's reliance on the Jerusalem Talmud as an important factor in his legal analysis, see *Arukh HaShulchan*, Orach Chayyim 1:24, 106:9, 154:11, 301:10.

<sup>75</sup> See *Arukh HaShulchan*, Orach Chayyim 137:1.

<sup>76</sup> See *Rif* to Babylonian Talmud, Megillah 12a.

<sup>77</sup> See *Shulchan Arukh*, Orach Chayyim 137:1.

<sup>78</sup> *Arukh HaShulchan*, Orach Chayyim 137:1.

<sup>79</sup> See *Arukh HaShulchan*, Orach Chayyim 137:1.

<sup>80</sup> *Shulchan Arukh*, Orach Chayyim 137:1.

the well-established obligation to pray three times each day and to prescribe a new prayer rule not previously prescribed by other authorities. In contrast to the more commonly known view expressed by the Babylonian Talmud, that the three daily prayers were established by the three patriarchs, Abraham, Isaac, and Jacob,<sup>81</sup> Rabbi Epstein cites the Jerusalem Talmud which maintains that the three daily prayers correspond to the three times each day that our environment changes around us. Rabbi Epstein goes further, however, and notes that this passage of the Jerusalem Talmud also prescribes a short prayer to be said as part of each of the three daily prayers to mark each of these three daily transitions. Rabbi Epstein appears to endorse this practice and the reason for the daily prayers offered by the Jerusalem Talmud, despite also noting that no other *halakhic* decisors reference this idea or endorse this practice.<sup>82</sup>

Thus, the *Arukh HaShulchan* is a thoroughly independent work of Jewish Law in which Rabbi Epstein reaches *halakhic* conclusions by directly engaging the breadth of Talmudic sources without feeling bound to follow the rulings of even very prominent rabbinic decisors of earlier eras.

## II. The Rule of Consensus As The Alternative Rule

The previous section explored the first and most fundamental of the methodological principles that guide Rabbi Epstein's *halakhic* determinations in his *Arukh HaShulchan*. First and foremost, Rabbi Epstein thinks the *halakhah* should follow the analytically correct norms and standards that arise from each competent decisor's understanding of the relevant Talmudic sources. This section explains how Rabbi Epstein tempers his willingness to independently derive *halakhic* norms directly from the Talmud with a healthy dose of epistemic humility. Thus, when his own understanding of the Talmudic sources conflicts with the *halakhic* conclusions expressed by a broad consensus of other authorities or when certain major authorities express more ritually stringent legal opinions, Rabbi Epstein sets aside his own, possibly mistaken, judgment and defers to his peers.

Allow us to phrase this rule as follows:

*Rabbi Epstein declines to follow his own understanding of the relevant Talmudic sources in cases where that understanding is incompatible with a halakhic rule agreed upon by a broad consensus of past authorities or when major halakhic scholars adopt a rule more stringent than his own.*

Rabbi Epstein's confident and independent approach to reaching *halakhic* conclusions on the basis of his own understanding of the relevant Talmudic sources does not mean that he is convinced that his assessments of the Talmudic materials are necessarily always correct. On the contrary, while he does not recognize the legal formulations of prior *halakhic* authorities as formally binding, following the nearly universal approach of rabbinic scholars, Rabbi Epstein does regard the precedential opinions of major rabbinic figures as sources of persuasive precedent and as carrying jurisprudential weight. In practice, Rabbi Epstein's regard for such *halakhic* precedents leads him to second-guess his own Talmudic understandings in cases where a broad consensus of past rabbinic scholars has reached a contrary conclusion or where major individual authorities, such as Maimonides or Rabbi Joseph Karo, prescribe more ritually stringent *halakhic* norms.

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<sup>81</sup> See Babylonian Talmud, Berakhot 26b.

<sup>82</sup> See *Arukh HaShulchan*, Orach Chayyim 1:29.

Rabbi Epstein's epistemic humility and self-doubt in this regard are deeply rooted in the rabbinic tradition of *halakhic* jurisprudence. A famous Mishnaic dictum instructs that good rabbinic practice requires one to "be deliberative in judgment."<sup>83</sup> Commentators explain this to mean that:

those who teach legal rules, issue legal decisions, and judge litigious disputes. . . should not rule based on their first impression, but only after great deliberation and incisive investigation . . . For error is found in all people . . . and about this matter, King Solomon said: "If you see a man who thinks himself wise, there is more hope for a dullard than for him" (Proverbs 26:12). Therefore, it is incumbent upon someone who makes legal decisions to go back and forth on the matter and that their thoughts sit and ripen . . . for through ripening and deliberation, we add reasoning to our reasoning and sharpness to our sharpness, until we thereby judge true and honest judgments.<sup>84</sup>

The same Mishnaic passage continues by urging rabbinic scholars to "raise many students."<sup>85</sup> Once again, commentators on this passage have understood this implication as a means of inducing scholarly caution and humility.<sup>86</sup> Students, the commentators note, serve as a check on scholarly hubris and misplaced self-confidence. Knowledge and self-assurance in one's own scholarly accomplishments and abilities can lead to error as one too quickly assumes that one's views are correct and fails to fully engage in scholarly debate and to question the underlying premises and logic of one's views owing to one's presumed academic excellence. By directing even accomplished scholars to teach and raise students less knowledgeable and competent than themselves, the Mishnah intends to force scholars into a position where they will be required to clarify and second-guess their own conclusions in the face of naïve and basic questions from their pupils. Moreover, having to teach, interact with, and persuade students helps situate the rabbinic scholar within a community of learners with different perspectives and ideas, and compels the accomplished scholar to genuinely listen and respond to questions and alternative points of view with understanding and humility.<sup>87</sup>

The importance of humility in *halakhic* decision making is underscored by the importance rabbinic sources have placed on *yirat hora'ah* or the "fear of deciding" legal matters. This concept is well sourced in the Talmud and in later rabbinic literature and refers to a degree of fear, apprehension, and awe that good *halakhic* decision makers are expected to have when making legal judgments or presuming to say what the law is or means.<sup>88</sup> This, in turn, is rooted in a profound awareness that rendering *halakhic* decisions is qualitatively different from reaching other kinds of normative or even legal judgments. Unlike human law where judges are responsible to litigants and legislators, *halakhah* at its core is fundamentally religious, and thus, rabbinic decisors see themselves as duty-bound to God and their rulings as having cosmic implications beyond the specific matter at hand.<sup>89</sup> Thus, "judges should know whom they judge, and before Whom they judge, and Who it is who judges with them [God], and Who [if they reach a false verdict] will

<sup>83</sup> Mishnah, Avot 1:1.

<sup>84</sup> Rabbi Jonah Gerondi, Commentary on Mishnah Avot 1:1.

<sup>85</sup> Mishnah, Avot 1:1.

<sup>86</sup> See, e.g. Rabbi Judah Loew, *Derekh Chayyim to Avot 6:6*.

<sup>87</sup> See Rabbi Judah Loew, *Derekh Chayyim to Avot 6:6*.

<sup>88</sup> See Babylonian Talmud, Sanhedrin 7b.

<sup>89</sup> See Yuval Sinai, "The Religious Perspective of the Judge's Role in Talmudic Law," *Journal Law & Religion* 25:2 (2009), 357.

exact punishment from them [that is, God]. And it says in Scripture, ‘God stands in the congregation of the Divine, and in the midst of judges He judges.’<sup>90</sup> Rabbinic discussions of judicial ethics likewise caution decision makers to imagine themselves, when judging *halakhic* matters, as though they are standing before a gaping pit leading to hell and as if a sharp sword were resting on their necks.<sup>91</sup> They are likewise urged against articulating their legal opinions until “the matter is clear like the shining sun.”<sup>92</sup> This “fear of deciding” thus stems from a religious concern—*yirat shamayim* or “fear of Heaven”—which constitutes another important touchstone of *halakhic* decision making.<sup>93</sup> In rabbinic thought, getting *halakhah* right matters, not only because a wrong decision fails to correctly uphold parties’ genuine rights and obligations, but because the law—while a product of rabbinic interpretation and application—is ultimately God’s law, and pious decision makers should proceed with extreme caution lest they presume to misrepresent the divine will through their erroneous *halakhic* rulings.

The importance of humility and caution when rendering *halakhic* rulings should not be debilitating and paralyzing, however. The Talmud itself clarifies that while rabbinic scholars faced with the gravity and significance of reaching legal decisions may balk at the responsibility, they must do so nevertheless: “A decisor might say to himself, ‘for what do I need all this [personal responsibility for correctly discerning the right *halakhic* standards]?’” Scripture thus responds, “I [God] am with you in judgment,” meaning that a judge should follow his own understanding [and rule accordingly].<sup>94</sup> In other words, while the responsibility for reaching correct *halakhic* conclusions is serious indeed, rabbinic decisors should take confidence in the fact that God has ultimately entrusted them to give expression to the law. As Rabbi Aryeh Leib Heller (1745-1812) puts it, “Human decisors fear lest they err with respect to the Torah . . . But the Torah was not given to the angels, but to human beings with [flawed] human reason . . . and God said, ‘truth shall spring from the earth.’ (Psalms 85:11)”<sup>95</sup> Since God has entrusted the law to mankind, human beings may—and truly must—proceed to determine the *halakhah* despite the possibility of error. They are responsible to do so carefully, responsibly, and with due humility, of course, since intellectual hubris may make them more prone to error. But even so, ultimately “the judge only has what his own eyes see,”<sup>96</sup> and one may rule on the basis of one’s own well-considered judgment. Rabbi Chaim Volozhin (1749-1821) put it as follows:

A person must be cautious [when offering his own *halakhic* conclusions] lest he speak arrogantly and stridently simply because he has found a reasonable basis for disagreement, or lest he come to think he is as great as his teachers or as the author of the book that he wishes to dispute. Rather, a person must know in his heart that sometimes he has not fully understood the author’s words and intent. Therefore, he should take an attitude of great humility; and [when offering his own view] he should say, ‘Although I am not worthy [to disagree], nonetheless it is Torah [and I cannot but offer my own considered understanding].’<sup>97</sup>

<sup>90</sup> Toseftah, Sanhedrin 1:9; Psalms 82:1.

<sup>91</sup> Babylonian Talmud, Yevamot 109a.

<sup>92</sup> *Mishneh Torah*, Hilkhot Sanhedrin 20:7; *Shulchan Arukh*, Choshen Mishpat 10:1-2.

<sup>93</sup> See A. Yehudah Warburg, *Rabbinic Authority: The Vision and the Reality* (Jerusalem/New York, N.Y.: Urim Publications, 2013) 57-63.

<sup>94</sup> Babylonian Talmud, Sanhedrin 6b.

<sup>95</sup> Rabbi Aryeh Leib Heller, *Introduction to Ketzer Hachoshen*.

<sup>96</sup> *Mishneh Torah*, Hilkhot Sanhedrin 23:9.

<sup>97</sup> Rabbi Chaim Volozhin, *Ruach Chaim* on Avot 1:4.

Following this traditional approach, Rabbi Epstein's jurisprudence exhibits appropriate confidence in his own knowledge and ability to reach his own independent *halakhic* conclusions, while also recognizing that his understandings of often ambiguous Talmudic sources may be mistaken, and that other scholars' conclusions may in fact be more correct than his own. Specifically, Rabbi Epstein begins to question his own conclusions when they conflict with the *halakhic* position endorsed by a consensus of other authorities.

Rabbinic consensus has long been considered a weighty authority in *halakhic* jurisprudence and an important indicator of which legal viewpoints are correct. Thus, it makes good sense that despite Rabbi Epstein's confidence in his own ability to interpret and derive *halakhic* norms directly from Talmudic sources, he becomes less confident and more deferential to other scholars in the face of a consensus of opinion that upholds a contrary understanding of the Talmud and reaches an alternative legal standard. The Hebrew Bible itself affirms the normative weight of a majority opinion over and against minority views. "Follow the majority"<sup>98</sup> is understood as an important secondary rule of adjudication in Jewish Law, and instructs that, in cases of dispute over the law, the majority view should be regarded as correct.<sup>99</sup> Technically, rabbinic jurisprudence generally understands this secondary rule as applying only to the judicial deliberations of sitting courts.<sup>100</sup> Rabbinic courts traditionally comprise three, twenty-three, or seventy-one judges, and this principle prescribes that a court's ruling follows the opinion of a majority of its judges.<sup>101</sup> The importance of majority opinions in rabbinic jurisprudence has gone far beyond its earlier technical meaning, however. Especially with the decline of formal judicial institutions like the Sanhedrin as the principal repositories of *halakhic* authority following the destruction of the Second Temple in 70 C.E.,<sup>102</sup> the principle of majority rule took on the character of an informal decisional principle for resolving rabbinic disputes about *halakhah*.<sup>103</sup> Thus, when the Mishnaic text records disputes between individual scholars and "the Rabbis", such disputes are generally resolved in favor of "the Rabbis", though the disputants did not typically sit together on the same courts, and thus the "follow the majority" principle did not technically apply. Rabbi Nissim Gerondi (1320-1380) explained that the scriptural command "'follow the majority' . . . constitutes a general command to follow the view of the majority of scholars in the legal rulings and judgements of the Torah."<sup>104</sup> Likewise, Rabbi Moses Isserles ruled that, "if there is an individual view and a majority view, we follow the majority view."<sup>105</sup>

The normative weightiness of consensus or majority opinion also contributes to the jurisprudential concept of *ta'ut b'shikul hadaat* or "error in judgment." As discussed earlier, post-Talmudic rabbinic legal thought has recognized the legal significance of consensus by positing that even *halakhic* issues not clearly decided in a particular way by the Talmud can be more or less authoritatively resolved by a post-Talmudic scholarly consensus supporting a given legal rule. Rabbi Joseph Karo defines such an "error in judgment" as occurring:

<sup>98</sup> Exodus 23:2.

<sup>99</sup> See *Mishneh Torah*, Hilkhot Sanhedrin 8:1

<sup>100</sup> See Exodus 23:2; Babylonian Talmud, Chullin 11a; Torah Temimah, Shemot 23:2, n. 23.

<sup>101</sup> See Babylonian Talmud, Sanhedrin 3b.

<sup>102</sup> See Menachem Elon (trs. Bernard Auerbach & Melvin J. Sykes), *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), Vol 3 at page 19.

<sup>103</sup> See Babylonian Talmud, Chullin 11a; Maimonides, *Introduction* to Commentary on the Mishnah.

<sup>104</sup> *Derashot Ha-ran*, no. 12. See also Babylonian Talmud, Avodah Zarah 7a.

<sup>105</sup> *Rema to Shulchan Arukh*, Choshen Mishpat 25:2.

where there is a matter that is subject to dispute among Mishnaic or Talmudic authorities, and those sources did not explicitly determine the correct rule in accordance with any of them, and he [the erring rabbinic decision maker] ruled in accordance with one of them, not knowing that the general practice throughout the world is in accordance with the other view.<sup>106</sup>

Legal consensus, in other words, determines correct legal norms. Scholars have offered a variety of rationales for the *halakhic* normativity of consensus beyond the formalistic rule of “follow the majority.” One important and presently pertinent explanation suggests that rabbinic decisors should generally follow the weight of consensus because the formation of scholarly consensus, along with the absence of significant scholarly debate, gives some strong indication that the consensus view is in fact the right one.<sup>107</sup> The presence of a scholarly consensus on an issue thus gives Rabbi Epstein pause. This broader application of “follow the majority” has typically been treated more as a broad decisional principle than a hard-and-fast secondary rule of decision; it lends weightiness and authority to *halakhic* positions endorsed by a majority of scholars but does not completely foreclose the possibility that competent rabbinic decisors may still disagree.<sup>108</sup> Nevertheless, even Rabbi Epstein’s usual intellectual confidence and independence typically gives way in the face of a rabbinic consensus opposing his own *halakhic* view.

One example of this tendency concerns the recital of multiple blessings upon sequentially donning several pairs of *tzitzit* or ritual fringes worn on the corners of four-cornered garments in fulfillment of the biblical commandment to “make fringes on the corners of your garments.”<sup>109</sup> The *Rema* rules that if a person has many four-cornered garments with *tzitzit*, and removes one such garment that he had previously donned after saying the appropriate blessing, and afterwards seeks to put on another four-cornered garment, he must recite a second blessing on fulfilling the commandment of *tzitzit* before putting on the second garment.<sup>110</sup> The *Arukh HaShulchan* expresses his support for the *Rema*’s ruling here, reasoning that when it comes to repeating the same blessing on numerous successive performances of the same *mitzvah*, the operative concern is whether or not the person in question has broken his intent to continue to fulfill that same *mitzvah*.<sup>111</sup> If one has continuous intent to fulfill the *mitzvah*, the original blessing suffices for all subsequent performances of that *mitzvah*; but once one concludes the performance of a *mitzvah*, then subsequent performance of that *mitzvah*—even if temporally linked to the earlier performance—requires a new blessing. Thus, Rabbi Epstein writes that when one removes a four-cornered garment, one has demonstrated that he has concluded the performance of that *mitzvah*, and must therefore make a new blessing when putting *tzitzit* back on thereafter.<sup>112</sup> Despite his agreement with the *Rema*’s ruling in principle, in practice Rabbi Epstein prescribes that one should not recite a new blessing when putting on a pair of *tzitzit* after having previously removed another pair of *tzitzit*. This is because Rabbi Epstein notes that the consensus of *halakhic* authorities disagrees

<sup>106</sup> *Shulchan Arukh*, Choshen Mishpat 25:2.

<sup>107</sup> See Rabbi Baruch Efrati, *Tokvam shel HaMinhagim Be'israel* (2005), DAAT.AC.IL, <http://www.daat.ac.il/daat/toshba/maamarim/okpam-2.htm> (last visited Dec. 31, 2021).

<sup>108</sup> See *Rema to Shulchan Arukh*, Choshen Mishpat 25:2; Bi'ur Ha-Gra to *Shulchan Arukh*, Choshen Mishpat 25:15 (s.v. *elah im hu*); *Igrot Moshe*, Yoreh De'ah 1:136.

<sup>109</sup> Deut. 22:12. See also Num. 15:38–40.

<sup>110</sup> See *Rema to Shulchan Arukh*, Orach Chayyim 8:12.

<sup>111</sup> See *Arukh HaShulchan*, Orach Chayyim 8:18.

<sup>112</sup> *Arukh HaShulchan*, Orach Chayyim 8:19.

with the *Rema's* view and "the law follows the majority."<sup>113</sup> Rabbi Epstein's respect for the consensus view stands even as he presents his own arguments for the weaknesses in the reasoning of those authorities that disagree with the *Rema*. Thus, while the *Arukh HaShulchan* is generally willing to rule in accordance with its own understanding, and against individual but important authorities like the *Shulchan Arukh*, it is far more deferential to the *halakhic* consensus even when it runs counter to its own preferred understanding of the substantive issue.<sup>114</sup>

Another instance of Rabbi Epstein's deference to consensus concerns the ritual validity of a cracked *shofar* for use on Rosh Hashanah.<sup>115</sup> Rabbi Joseph Karo rules that if a *shofar* is cracked around most of its width, it may not be used for ritual purposes on Rosh Hashanah; if the crack runs across less than half the width of the *shofar*, then the *shofar* may be used. However, even a *shofar* that is cracked around most of its width may be used if the crack is situated far enough away from the horn's mouthpiece that the *shofar*, measured from the mouthpiece to the crack, is large enough to be ritually valid even if the cracked section were removed.<sup>116</sup> This view is supported by the *Rosh*, *Ran*, *Baal Ha'ittur*, *Semak*, *Semag*, and possibly Maimonides.<sup>117</sup> Rabbi Karo also records another position, however, which maintains that a *shofar* that is cracked along most of its width is usable even if there is not enough length from the mouthpiece to the crack to constitute a valid *shofar*, so long as the crack does not produce a distortion in the sound the *shofar* makes when blown.<sup>118</sup> Rabbi Epstein endorses the first view because, he says, it is supported by a consensus of authorities (and the Talmudic text).<sup>119</sup>

Rabbi Epstein also mistrusts his own understandings of Talmudic materials: instead, he defers to the alternative readings and rulings of other rabbinic scholars in cases where particularly prominent *halakhic* authorities have reached more ritually stringent conclusions. In such instances, Rabbi Epstein errs on the side of caution and rules that one should follow the more demanding *halakhic* standard prescribed by others, just in case their understanding of the Talmudic sources is correct and his own is mistaken.<sup>120</sup> For instance, Rabbi Epstein declines to follow his own independent judgment and instead endorses a more stringent view proposed by other authorities regarding the correct blessing to recite upon cleaning one's hands with a medium other than water. Ordinarily, one is obligated to wash one's hands in the morning with water and to recite the blessing of "*al netilat yadayim*" ("on the washing of the hands").<sup>121</sup> If water is not available, however, the Talmud instructs that one should wipe one's hands on a stone, earth, a beam, or any other abrasive surface that would clean one's hands.<sup>122</sup> Rabbi Epstein's own independent judgment leads him to the conclusion that upon wiping one's hands in this manner, one may recite the blessing of "*al nekiyut yadayim*" ("on the cleanliness of the hands") instead of the usual "*al netilat yadayim*." However, Rabbi Epstein notes that the *Arba'ah Turim* and *Rosh* both reject such an alternative blessing and instead require one to recite the blessing of "*al netilat yadayim*," whether

<sup>113</sup> *Arukh HaShulchan*, Orach Chayyim 8:19.

<sup>114</sup> For other examples of Rabbi Epstein's reliance on consensus as a counterweight to his own analytic understanding of the Talmud, see *Arukh HaShulchan*, Orach Chayyim 20:3, 206:5, 302:3, 689:5.

<sup>115</sup> See generally Babylonian Talmud, Rosh Hashanah 27a.

<sup>116</sup> See *Shulchan Arukh*, Orach Chayyim 586:9.

<sup>117</sup> See *Be'er Hagolah* to *Shulchan Arukh*, Orach Chayyim 586:21:2 (quoting those *Rishonim*).

<sup>118</sup> See *Shulchan Arukh*, Orach Chayyim 586:9.

<sup>119</sup> See *Arukh HaShulchan*, Orach Chayyim 586:21.

<sup>120</sup> See, e.g., *Arukh HaShulchan*, Orach Chayyim 61:13, 626:9, 648:10.

<sup>121</sup> See *Shulchan Arukh*, Orach Chayyim 4:1.

<sup>122</sup> See *Shulchan Arukh*, Orach Chayyim 4:19.

one washes one's hands with water or cleans them with another medium. Since these authorities adopt a more restrictive view as to which blessings are acceptable upon cleaning one's hands without water, the *Arukh HaShulchan* advises that one accordingly recite only "*al netilat yadayim*" and not "*al nekiyat yadayim*."<sup>123</sup>

Another example of Rabbi Epstein's deference to more stringent opinions in cases where he considers his Talmudic understanding less than fully dispositive involves the validity of a *sukkah* built under a retractable roof. Rabbi Epstein observes that, in his own time, many people build their *sukkah* beneath a removable roof by installing a ritually valid *skhakh*—a temporary covering for the *sukkah* made of cut foliage—beneath a regular permanent roof and then later removing the permanent roof in order to sit and eat in the *sukkah* under the *skhakh* as prescribed by Jewish Law.<sup>124</sup> Rabbi Epstein notes that this practice could be viewed as problematic because the *halakhah* requires that a *sukkah* be ritually valid at the time of its construction; if the *sukkah* was built in a ritually invalid manner, it remains invalid even after the impediment to its ritual validity is later removed.<sup>125</sup> Here, the *sukkah* is built beneath a roof, which renders it invalid, and so, the later removal of the roof should not succeed in validating the originally invalid *sukkah*. Based on his analysis of the Talmudic principle that a *sukkah* must be valid at the time of construction, Rabbi Epstein argues that this requirement applies only to invalidating features of the *sukkah* itself, rather than to external factors present at the time of construction that are later removed.<sup>126</sup> Thus, for instance, a *sukkah* that is covered with foliage that is still attached to the ground is invalid at the time of construction and cutting the foliage from the ground later will not make the *sukkah* ritually valid. By contrast, while the presence of a permanent roof hanging over an otherwise valid *sukkah* does indeed render the *sukkah* presently invalid, this invalidating factor is distinct from the *sukkah* itself, and so the later removal of the roof, which leaves the otherwise valid *sukkah* sitting properly beneath the open sky, will render the *sukkah* ritually fit for use.<sup>127</sup> Ultimately, however, Rabbi Epstein declines to apply this speculative understanding of the Talmudic principle that a *sukkah* must be valid at the time of construction which ultimately enjoys no explicit support in the Talmudic text itself. Instead, he defers to the more stringent interpretation of this principle offered by Rabbi Moses Isserles, who rules that the post-construction validation of a *sukkah* is ineffective even with respect to the removal of invalidating features external to the *sukkah* itself.<sup>128</sup>

The practice of deferring to the more stringent rulings of prominent authorities—even in the face of one's own self-confident and fully qualified understanding of the primary sources of Jewish Law—is deeply rooted in rabbinic tradition. While the Talmud often adopts a "better safe than sorry" approach to addressing *halakhic* doubts, in several other instances the Talmudic rabbis also commend the adoption of legal strictures even in cases where one believes that a different, more lenient *halakhic* standard is in fact correct.<sup>129</sup> For instance, in the course of a Talmudic discussion regarding various religious strictures designed to prevent illicit sexual relationships, the Talmud records a dispute between two rabbis, Rav Assi and Shmuel. According to Rav Assi, while

<sup>123</sup> *Arukh HaShulchan*, Orach Chayyim 4:19.

<sup>124</sup> See *Arukh Hashulchan*, Orach Chayyim 626:25.

<sup>125</sup> See Babylonian Talmud, Sukkah 11b.

<sup>126</sup> See *Arukh Hashulchan*, Orach Chayyim 626:25.

<sup>127</sup> See *Arukh Hashulchan*, Orach Chayyim 626:25.

<sup>128</sup> See *Arukh Hashulchan*, Orach Chayyim 626:25.

<sup>129</sup> See generally Daniel Goldstein, 'The Role of Humrot,' *Hakirah* 1 (2004) 11-24.

a man may not be alone with a woman in order to forestall any improper sexual contact between the two, a man may be alone with his sister, mother, or daughter, since there is relatively little risk of such improper behavior between close relations. Shmuel disagrees, however, and says that one may not be alone with any person with whom sexual relations are religiously prohibited and even goes so far as to proscribe seclusion between a human being and animal since bestiality is likewise biblically prohibited.<sup>130</sup>

After presenting these two opinions, the Talmud records that several scholars acted in accordance with Shmuel's stricter rule and avoided being alone with close relatives or animals. These rabbis acted strictly in this regard even though, as post-Talmudic commentators make clear, there was little doubt that Rav Assi's *halakhic* rule permitting such conduct is in fact the correct legal norm.<sup>131</sup> Some commentators explain that these Talmudic rabbis did not disagree with Rav Assi's opinion; they too understood the law as permitting seclusion with close relatives or animals. Nevertheless, in practice they set aside their own judgment of the correct rule and instead adopted Shmuel's more stringent position because they viewed doing so as religiously pious and proper.<sup>132</sup> One reading of this issue is that, while the referenced Talmudic rabbis concluded that Rav Assi's view is indeed normative, Shmuel's disagreement provided some basis for uncertainty about the correct *halakhic* standard. In such a situation, these scholars deemed it prudent to follow Shmuel's stricter standard just in case their own understanding of the issue turned out to be mistaken.

The Talmud attributes this deferential approach to none other than the prophet Ezekiel who declared, "My soul has not been polluted, for from my youth until today I have not eaten [the meat of an animal] that died on its own or was torn."<sup>133</sup> Anticipating the question of why Ezekiel would consider himself particularly praiseworthy for merely adhering to basic biblical dietary rules that prohibit the meat of animals that have not been properly slaughtered, the Talmud explains that Ezekiel is referring to his decision to avoid any meat whose *halakhic* permissibility was subject to some question, even if ultimately it was ruled permitted as a matter of law.<sup>134</sup> As one commentator explained, "There are, of course, many things that are subject to dispute among *halakhic* authorities; one scholar permits while another prohibits. Ezekiel [is saying that he] would not have eaten food whose legal status was subject to such disputes . . . even though some scholars ruled it permitted."<sup>135</sup> Legal disputes, in other words, raise questions and doubts about correct *halakhic* standards even in cases where a competent decisor has a good personal sense of what he thinks is the right rule of law. In such cases, there is ample reason—grounded in prudence, piety, and a more localized instance of Pascal's wager—to err on the side of caution by setting aside one's own *halakhic* viewpoint and instead adopting the more stringent understanding of the issue endorsed by other important authorities.<sup>136</sup>

Thus, Rabbi Epstein practically counselled intellectual humility and moderation. He was not inclined to endorse his own sense of the "right" rule of Jewish Law when the consensus of

<sup>130</sup> Babylonian Talmud, Kiddushin 81b.

<sup>131</sup> See *Shulchan Arukh*, Even Ha-ezer 21:1.

<sup>132</sup> See Rosh to Babylonian Talmud, Kiddushin 4:24.

<sup>133</sup> Ezekiel 4:14.

<sup>134</sup> Babylonian Talmud, Chullin 44b.

<sup>135</sup> Rabbi Elijah de Vidas, *Reishit Chochmah*, Shaar Hekedushah, ch. 15.

<sup>136</sup> See, e.g., Rabbi Moses Chayyim Luzzatto, *Mesilat Yesharim*, Ch. 11.

scholars before him was stricter than the rule that he thought was correct, absent a great and weighty need.<sup>137</sup>

### III. Conclusions

This article has argued that Rabbi Epstein saw two competing principles at play which are central to the process he employs in the *Arukh HaShulchan*. The first principle maintains that the correct halakhic rule is the one that follows from the qualified scholar's independent understanding of the relevant Talmudic sources, even against the precedential rulings of important authorities of previous generations. The second principle is that a qualified scholar ought to decline to follow his own understanding of the relevant Talmudic sources in cases where that understanding is incompatible with a *halakhic* rule agreed upon by a broad consensus of past authorities or when major halakhic scholars adopt a rule more stringent than his own.

Rabbi Epstein's approach to reaching *halakhic* conclusions in the *Arukh HaShulchan* entails direct and independent engagement with Talmudic sources. A less than systematic reading of the *Arukh HaShulchan* might lead the reader into thinking that Rabbi Epstein engages in this Talmudic analysis without limitation and applies it normatively. Actually, Rabbi Epstein also recognizes the importance of situating himself and his *halakhic* opinions within the broader context of rabbinic discourse and decision making. The kind of independent legal judgement exhibited in the *Arukh HaShulchan* is therefore tempered by Rabbi Epstein's prudential regard for the collective weight of rabbinic consensus.

Even where Rabbi Epstein thinks that he has arrived at the most correct understanding of the relevant Talmudic sources, he typically defers to alternative *halakhic* opinions endorsed by a broad consensus of other competent authorities. Rabbi Epstein achieves his fame—as the final great Jewish Law authority of Czarist Russia—not by being bold, novel and original, going where other decisors had never gone before, but by being a conservative innovator, balancing the grand Talmudic insights he has with the precedent that came before him.

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<sup>137</sup> In our book, *supra* note 1, we explain at great length the factors that Rabbi Epstein looks at in order to determine when he is inclined to adopt a novel explanation. It is worth noting how similar this approach is to that found in *Iggrot Moshe*, YD 1:101; *sv uma shekatav*.