

A PRINCIPLED DEFENSE OF THE CURRENT STRUCTURE AND STATUS OF THE CJLS

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The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

Introduction

Every so often in the history of the Rabbinical Assembly, concerns are raised about the structure of the Committee on Jewish Law and Standards (henceforth: CJLS), and whether it adequately serves both the ideology of the movement and the needs of the RA's members. Such discussions surrounded its creation in 1927, its restructuring in 1948, and various changes in its by-laws. Indeed, my own earliest, and still most vivid memory of a spirited exchange on the floor of the RA Convention, was the heated debate at the 1976 Convention, during which members presented a resolution which stated, among other things, that the CJLS, as then structured, "weakens the authority of all rabbis, whether the individual rabbi agrees or disagrees with the majority decision of the Committee. . . . In this way, the Mara D'atra becomes less and less his own congregation's interpreter of the classical sources of the Jewish tradition."¹ The resolution called for the CJLS to be dissolved, and to be replaced by a "Panel on Jewish Law", which would have had the authority to respond only to individual rabbis who had sent in queries, and which would not have produced published, authoritative responsa. Although the resolution was defeated, it did enjoy some significant, and vocal support. It is perhaps worth remembering that the opposition to the central authority of the CJLS in that instance, and in other similar ones, came from members dissatisfied with what they considered liberalizing decisions of the Committee. To them, the authority of the **מרא דאתרא** meant not legal atomism and chaos, but their right to issue **פסקי הלכה** in accordance with their own consciences and religious convictions, taking the histories and needs of their communities into account.² There was then, and I believe still is, a strong majority in the RA that believes in the

¹ PRA 38 (1976): 318.

² The 1976 episode, and a host of other important details of CJLS history through 1980, is described thoroughly in

importance of a central Law Committee with significant scholarly and moral authority in the Movement, and which simultaneously is committed to a certain inalienable authority that each local rabbi has in the area of halakhah. There is surely a tension here, and the rules of the CJLS have, in their fluctuation over the years, reflected that tension. But the argument of this paper will be not only that the CJLS structure accurately mirrors the political and professional dynamics of the Conservative rabbinate, but that it also conforms best to our religious convictions, and indeed to corresponding tensions evident in many, diverse classical sources on halakhic authority.

To be more specific, it is this conception of the role and the authority of the CJLS that I will be defending here:

The CJLS is the central body in the Conservative movement for halakhic discussion and decision making. Its authority derives from the assent of the members of the Rabbinical Assembly that there should be a central body composed of members who have significant expertise in Jewish law, and who are willing and able to devote a significant amount of time to researching, discussing, and debating halakhic matters that affect Conservative Rabbis and the movement generally. The CJLS thus brings a much-needed consolidation and focusing of legal opinion to what otherwise would be an overly decentralized and chaotic field. For this reason, the CJLS can be said to be the halakhic voice of the movement as a whole, and it is thus undesirable and inconsistent with Rabbinical Assembly aims for there to be other law committees or panels that publicly issue responsa in the name of Conservative Judaism. (An exception to this observation is the authority explicitly granted to the Masorti movement's panel to issue responsa on דברים התלויים בארץ.) Because it is a body that seeks to coalesce judgment around particular halakhic opinions, and not simply to give voice to individually held positions, it is right and proper that six members of the CJLS be required to define an authoritative opinion. Because it is a body that is ultimately here to provide service and guidance to Rabbinical Assembly members, it is also right and proper that authoritative opinions not be categorized by the number of votes that they received, and that they not be binding on Rabbinical Assembly members in a coercive sense, but rather only in the sense that we are bound by our covenant to one another to give extraordinary weight to CJLS responsa in reaching our own legal decisions. Should a Rabbinical Assembly member choose, upon study and consideration, not to follow any CJLS position on a given matter, he or she would thus be unable to claim any authority or backing for that position from the CJLS, a "sanction" which in some circumstances could be substantial, in others not. Some constituencies of the movement, such as the United Synagogue, can choose and have chosen to bind themselves to follow only authoritative CJLS opinions. And finally, the CJLS may, as a legislative initiator, propose to the Convention a Standard of Rabbinic Practice, which would coercively

the unpublished paper, "The Clearing House: A History of the Committee on Jewish Law and Standards," by George Nudell.

apply to all Rabbinical Assembly members. The plenum of the Convention actually enacts the Standard. Thus, it could be said fairly that halakhic authority in our movement is shared. It ultimately resides with the Mara D'atra, though by covenant the CJLS in practice serves as the authoritative guide for legal decision, and by Rabbinical Assembly rules, the CJLS and the plenum share the legislative power to enact the Standards that define, in part, our legal boundaries.

And now to the defense.

Majoritarianism and Authoritarianism

The CJLS operates on what I shall call a “modified majoritarian principle” for which there is, apparently, no real precedent in pre-modern Jewish life. It is a “modified” majoritarianism because, as is well known, we do not have “majority” and “minority” opinions as such, and even positions that do not enjoy a majority, or even a plurality, on the CJLS can be authoritative Committee pronouncements. Yet it is majoritarian in the sense that votes are taken, and CJLS rules define a threshold (six votes) below which opinions are **יחידים** **דעות** and are denied Committee sanction. We will turn our attention to the CJLS’s characteristic modifications of majoritarianism a bit later. For now, we must focus on majoritarianism in any form as a Jewish religious construct.

The adherence in Rabbinic Judaism to the majoritarian principle is among its most basic postulates. It is classically formulated in any number of texts, and for our present purposes two of these will illustrate the point sufficiently:

1. ולמה מזכירין דברי היחיד בין המרובין הואיל ואין הלכה אלא כדברי המרובין.³
2. רבנן פליגי עילוין ויחיד ורבים הלכה כרבים או דילמא רבנן כוותן סבירי להו.⁴

Both of these texts incidentally make it quite clear that the issue of majoritarianism is inseparable in Rabbinic Judaism from the equally important matter of the authority of the rabbinic court. For the text in **ערויות** goes on to restrict severely the circumstances under which a court’s rulings may be overturned, and the text in **ברכות** implies that Rabban Gamaliel’s sons would have disregarded their father’s ruling (on the latest hour for reciting the evening **שמע**) had a majority of his contemporaries ruled differently. We shall return to this connection presently. For now, it is clear that the Rabbinic view of the law allowed for it to be determined by a majority vote, and that was quite a stunning departure from the biblical view that God’s law is mediated through prophets or oracular devices, which are assumed to be unambiguous and with respect to which majority views are irrelevant. The Rabbis knew they were doing something quite different from what prophets had done, and that in some sense their own enterprise was incompatible with prophecy and the direct divine authority it claimed. Consider this passage from the Sifra:

אלה המצות: אין נביאי רשאי לחדש עוד דבר מעתה.⁵

³ משנה ערויות א': ה'.

⁴ בבלי ברכות ט.

⁵ ספרא בחקתי י"ג:ד'.

which retroactively nullified the innovative power of any prophet after Moses, in apparent flat contradiction of the plain intent of Deuteronomy 18.⁶ Even more to the point, Maimonides, in the introduction to his commentary on the Mishnah, states what he believes to be the fundamental difference between rabbinic activity and the activity of all prophets other than Moses (who is referred to here as הנביא):

ומי שלא שמע בו פירוש מפי הנביא ע"ה... הוציא דינים בסברות במדות השלש עשרה... שהתורה נדרשת בהם... וכשהיתה נופלת המחלוקת היו הולכים אחרי הרוב כמו שנאמר אחרי רבים להטות. ודע שהנבואה אינה מועילה בפירושי התורה ובהוצאת ענפי המצות בשלש עשרה מדות אבל מה שיעשה יהושע ופנחס בענין העיון ובסכרא הוא שיעשה רבינא ורב אשי.⁷

In fact, not only is prophecy obsolete, one may not even legitimately think of reviving it:

וכן... שאמר בדין מדיני התורה שה' צוה לו שהדין כך הוא והלכה כדברי פלוני, הרי זה נביא השקר ויחנק – אע"פ שעשה אות – שהרי בא להכחיש התורה שאמרה לא בשמים היא.⁸

And yet, despite the ideology that saw prophecy as a dead institution of the past, some Rabbis, certainly, saw themselves as the *successors* of the prophets:

אמר רבי אבדימי דמן חיפה מיום שחרב בית המקדש ניטלה נבואה מן הנביאים וניתנה לחכמים. אטו חכם לאו נביא הוא? הכי כאמר אע"פ שניטלה מן הנביאים מן החכמים לא ניטלה. אמר אמימר וחכם עדיף מנביא.⁹

These are strong and bold statements attributed in this text to two different אמוראים of different places and different generations. And indeed, it has many echoes in talmudic and later rabbinic literature. This has important implications. Among other things, it means that the negation of prophecy did not necessarily mean that the rabbinic court would forego the authority that the prophets enjoyed. Rabban Gamaliel claimed precisely that kind of authority on a number of famous occasions, and although he attributed what some viewed as his high-handedness to utilitarian social/political motives,¹⁰ others after him went beyond utilitarianism to make stronger claims about the majoritarianism of the rabbinic court. Nahmanides, for example, in his comment on Deut. 17:11 – לא תסור מן הדבר אשר יגידו לך ימין ושמאל – began with Rabban Gamaliel's utilitarian justification for the domination of the majority, but then went on to a more metaphysical claim:

כי על דעת שלהם הוא נותן לנו התורה אפילו יהיה בעיניך כמחליף הימין בשמאל וכל שכן שיש לך לחשוב שהם אומרים על ימין שהוא ימין כי רוח

⁶ Verses 14-22 of that chapter set forth the obligation to heed the teachings of a prophet who has been granted a revelation by God, and who correctly predicts a wondrous event. The need for a "sign" obviously presumes some new, innovative, perhaps even startling statement by the prophet. Indeed, the context of this section is equally clear that Israel is being singled out from the nations in the following sense: the other nations rely on "readings," of the stars, or other phenomena or forces of nature. Israel is not to "read" that which is there, but is to be granted continually renewed revelations from God, through a prophet.

⁷ רמב"ם, הקדמה לפירוש המשניות.

⁸ רמב"ם, משנה תורה, "הלכות יסודי התורה" ט"ד'. Again, the contradiction of Deut. 18:14-22 is noteworthy.

⁹ בבלי בבא בתרא י"ב.

¹⁰ רבש"ע, גלוי וידוע לפניך שלא לכבודי עשיתי ולא לכבוד בית אבא עשיתי אלא לכבודך שלא ירכו מחלוקות בישראל – בבא מציעא נ"ט:

השם על משרתי מקדשו ולא יעזוב את חסידיו לעולם נשמרו מן הטעות ומן המכשול.¹¹

Here we have the claim that there is a Divine Providence which warrants that the majority of the court will invariably be right, and thus a justification for the court taking on the authority of the prophet, to the point of the most severe sanctions against those who would defy its rulings.

The point of the texts brought in the previous paragraph is that it would be a mistake to celebrate the Rabbis' majoritarianism as a clear triumph of democracy or decentralization of religious authority; on the contrary, their majoritarianism operated within a clearly defined elite circle, and the court constituted by that circle was endowed with the authority of the priest or the prophet, in that failure to submit to the discipline of its rulings was punishable by death.¹² The Rabbis may have opened up the univocal and uncompromising biblical *לא תסור* into a process of debate and vote, but they still operated under a very authoritarian rubric. Once the debate and the vote were over, dissent was, at least theoretically, to be suppressed. Whatever "democratization" was inherent in the move from prophet to published text was all but nullified by the rigid authority claimed by the majority on the basis of the Deuteronomic *לא תסור*.¹³

Such, at least, was the theory. A closer consideration of the issue, and examination of some of the relevant texts, reveals, however, that majoritarianism was not necessarily and inexorably bound up with the authoritarianism symbolized by Rabban Gamaliel. For some in the Rabbinic world, the break with prophecy was more complete and more fundamental.

To understand this other mind set, I think it important to reflect on at least one aspect of the history of the verse in Exod. 23:2: *לא תהיה אחרי רבים לרעות ולא תענה על ריב*. Biblically, the meaning of the verse is, after all, fairly clear: "don't follow a majority when it is wrong." And certainly, the biblical view was that although a majority may have rejected, e.g., Jeremiah's instructions condemning the formation of alliances against Babylonia, Judeans loyal to God were expected to follow the prophet's "minority" view. A referendum, even if conducted solely among the prophetic elite, would have been irrelevant to the biblical mind.

Rabbinically, however, something unusual and striking happens to this very clear verse. In Mishnah Sanhedrin 1:6, for example, it is taken for granted that *אחרי רבים להטות* means "follow the majority," the exact opposite of its plain meaning. The understanding of the phrase *לא בשמים היא*, attributed to רב ירמיה (oh, the irony of the name here!) in *בבא מציעא נ"ט*: goes so far as to say that the majoritarian view is a constitutional principle by which God is, therefore, also bound. Now, why in biblical Judaism was it so clear that a majority should not necessarily be followed, and why, in Rabbinic Judaism was it so clear that a majority must be followed? The reason, I believe, is this: from the point of view of biblical Judaism, there is a truth, quite independent of the majority, that can be

¹¹ רמב"ן, פירוש התורה, דברים י"ז:א.

The Mishnah Sanhedrin 1:6 formulates this in its own way:

...רבו הדעות יסכימו לעולם אל האמת יותר מן המעוט. ובין שיסכימו לאמת או לא יסכימו לפי דעת השומע, הדין נותן שלא נסור מדרך הרוב.

¹² This, of course, is the law of the *ממרא* זקן, which the Rabbis transferred to their courts from Deut. 17:12, where it applies to the authority of the *בית דין*. The analogous authority of the biblical prophet is stated in Deut. 18:19, where the death penalty is not explicitly stated, but the ominously threatening sanction *מעמו* gives the imagination clear direction.

¹³ Deut. 17:11. We shall have occasion to return to this verse and its exegesis a bit later.

gotten through a prophet, or perhaps through the priestly **אורים ותמים**. From the point of view of Rabbinic Judaism, however, the statement **ה' כה אמר** is constitutionally forbidden, as much as would be a law that outlawed political dissent in Massachusetts. Rabbinic Judaism, in this understanding, is about the notion that we can't get religious truth directly. The majoritarianism of the Rabbis thus can be understood as flowing from an epistemological agnosticism, a conviction that what David Hartman has called the "immediacy" of the biblical period¹⁴ is forever gone. And thus, the new reading and use of **אחרי רבים** and such well-worn phrases as **אלו ואלו דברי אלקים חיים** must be seen for what they are: dramatic changes in the very definition of religious truth.

From this point of view, majoritarianism is not a matter of **גזרת הכתוב**, a new form of quasi-prophetic authority, but is rather born of a coming to terms with what truth means in the post-biblical and pre-messianic condition of epistemological indeterminism. It is our best tool for getting at religious truth, and thus the debates that precede the vote, and even the dissents that follow it, are integral parts of that quest for truth. This is no mere speculation; it is, in fact, reflected in a variety of rabbinic texts that decidedly do not see majoritarianism as being inevitably wedded to authoritarianism. One such text will suffice for the moment. It appears in the Palestinian Talmud, Tractate Sanhedrin, as a comment on the Mishnah which states the general principle that in both monetary and capital cases, the majority is to be followed:

אמר רבי ינאי אילו ניתנה התורה חתוכה לא היתה לרגל עמידה מה טעם וידבר ה' אל משה אמר לפניו רבונו של עולם הודיעני היאך היא ההלכה אמר לו אחרי רבים להטות רבו המזכין זכו רבו המחייבין חייבו כדי שתהיה התורה נדרשת מ"ט פנים טמא ומ"ט פנים טהור.¹⁵

Were it not for the last phrase, this text might also have been interpreted in such a way that the majoritarian principle was one dictated by **גזרת הכתוב**, and thus consistent with a Rabban Gamaliel-type exercise of coercive power. But **כדי שתהיה התורה נדרשת** seems to say more than that, and its significance was picked up by Moses Margoliot in his commentary on the Yerushalmi:

הודיעני היאך ההלכה: שלא יהיה בה ספק. א"ל זה אי אפשר, אלא אחרי רבים להטות וכו' מפני שהתורה צריכה שתהיה נדרשת במ"ט פנים לכאן ולכאן ואם אני מגלה לך ההלכה שוב לא תהיה נדרשת בהרבה פנים.¹⁶

The **פני משה** is making the following point: If there is any **גזרת הכתוב** operative here at all, it inheres only in God's decision not to allow religious truth to be unambiguous and univocal. But given that decision (which is, like all of God's decisions, ultimately inscrutable), the majority enjoys no providential guarantee, nor any special metaphysical status. It is simply that the way, the best way, to approximate religious truth ever more closely is to foster the debates out of which a majority emerges. The way in which the **פני משה** here draws out the language of the **ירושלמי** makes it further clear that diversity in debate, and even a certain indeterminacy, is "good" for Torah – it is the way in which Torah should be pursued. And the truly remarkable thing about the **ירושלמי** here is that it retrojects this all the way back to Mount Sinai. Unlike the **ספרא** and the **רמב"ם** at which we looked earlier,¹⁷ Moses himself

¹⁴ See David Hartman, *Conflicting Visions* (New York: Schocken, 1990), pp. 19-30 ("Joy and Responsibility").

¹⁵ ירושלמי סנהדרין ד'ב' (כ"ב).

¹⁶ פני משה, ירושלמי סנהדרין ד'ב'.

¹⁷ See n. 5 and n. 7 above.

(whom *הנביא* had called *רמב"ם*) is, according to this text, already in the post-prophetic age!

We have thus seen that there are two possible readings to the majoritarianism by which the decisions of the rabbinic courts have always been characterized. One of these is that the “procedures” changed, as it were, in post-biblical times. That is, the prophetic revelation was replaced with the sittings and votings of rabbinic courts, but the metaphysical and epistemological status of the pronouncements remained essentially the same. Religious truth was determinate, and it was determined by the court’s majority. From that view followed the sanctions invoked by Rabban Gamaliel and all of his intellectual successors.¹⁸ But there is another reading of the rabbinic majoritarianism, which we have begun to see emerge. That is the interpretation under which majority decisions are a best approximation to a truth which God has decided to leave indeterminate to humans, and are thus both the culminations of rounds of debate and dissension, and the preludes to further such rounds. We shall now spell this alternative view out just a bit more.

Majoritarianism without Authoritarianism

The theory under which all associated with the Rabbinic community owed unquestioning allegiance and obedience to the majority decisions of the court certainly did not operate unexceptionally. It was not just pivotal figures of the early period, such as Rabbis Eliezer and Yehoshua, who registered dissents and were said to have paid prices for those dissents. It seems from other texts, about later Sages, that the habits of asserting independence from majority decisions persisted. Consider an account given in the *ירושלמי*: The Mishnah states that:

אין נוטעין ואין מבריכין ואין מרכיבין¹⁹ ערב שביעית פחות מל' יום לפני
ראש השנה ואם נטע או הבריך אי הרכיב יעקור.

Now the *ירושלמי* tells the following story:

לא עקר פירותיו מה הן? רבי בא רבי לא הוון יתבין בצור אתא עוברא
קמיהון. הורי רבי לא ישפכו פירותיו. א"ר בא אני לא נמנתי עמה
בעליה.²⁰

The context makes it clear that a vote had been taken to add the additional and extraordinary sanction that if one (A) had violated what was a protective injunction pertaining to *ערב שביעית*, and (B) had also neglected to obey the sanction that required uprooting the sapling planted during the extended protective period, that one also (C) had to dispose of the fruit of such a tree when it was matured. But the text also makes it clear that *רבי בא*, not having been part of the voting body, would not agree to such a prolif-

¹⁸ I am referring here, at least, to the interpretation on such sanctions given by *רמב"ן* (see note 11 above), whose understanding is by no means idiosyncratic and isolated, nor even original to him. As we’ve seen, however, the text in *בבא מציעא נ"ט*: attributes to Rabban Gamaliel a prudential/utilitarian, rather than a metaphysical/epistemological motive (*שלא ירבו מחלוקות בישראל*). I shall take up the utilitarian point of view explicitly only briefly in this paper, long enough to illustrate that once the metaphysical point of view is countered with a plausible alternative, the conditions of Jewish modernity to which we have become accustomed present, in addition, a ready counter to the utilitarian argument for attaching nearly inviolate authority to majority decisions.

¹⁹ The reference here is, of course, to grafting part of a tree onto another tree of the same species. Grafting across species is forbidden whether or not it is the sabbatical year.

²⁰ *ירושלמי שביעית כ"ו* (ל"ג:).

eration of גזרות, and felt free to rule on his own, as he saw fit.²¹

What makes the behavior attributed to רבי בא and others so striking to us is the fact that the juridical authority claimed by the Rabbis under לא תסור seems so strong.²² Let us be specific about what a majoritarianism without authoritarianism must overcome, in terms of the textual tradition. One of the most famous of all the authoritarian texts is the one from the ספרי, constituting a comment on Deut. 17:11:

לא תסור מן הדבר אשר יגידו לך ימין ושמאל – אפילו מראים בעיניך על שמאל שהיא ימין ועל ימין שהיא שמאל שמע להם.²³

The impact of this comment is potentially enormous, and it seems unequivocally to support the idea that the decisions of the rabbinic court have been endowed with a special status that transcends human reason, and therefore commands human assent.²⁴ What complicates the situation, and opens up alternative understandings, is an apparently diametrically opposed baraita which appears in the ירושלמי. It reads as follows:

יכול אם יאמרו לך על ימין שהוא שמאל ועל שמאל שהוא ימין תשמע להם? ת"ל ללכת ימין ושמאל – שיאמרו לך על ימין שהוא ימין ועל שמאל שהוא שמאל.²⁵

Many efforts have been made to harmonize and reconcile the baraitot in the ספרי and the ירושלמי. The one that will be of most interest to us here, not only because of its persuasiveness, but also because it comes from a rabbi of the modern era, is that of David Zvi Hoffmann. Hoffmann notes that there are two verses in Deuteronomy that give a command with the words לא תסור – in 17:11 (the one we have looked at already), and in 28:14 – ולא תסור מכל הדברים אשר אנכי מצוה אתכם היום ימין ושמאל. In 28:14, the word אנכי is spoken by God, and therefore Hoffmann claims that we have here two potentially conflicting commands. One commands unswerving obedience to the rabbinic court (at least as the Rabbis understood 17:11), and the other commands unswerving obedience to God. That Hoffmann recognizes these as a potential conflict already demonstrates that he rejects the metaphysical view of the authority of a rabbinic majority (for the metaphysical view identifies that majority with the unitary will of God). Moreover, Hoffmann says that according to 17:11 (and thus the ספרי), one who wishes to follow the court without doing any study or investigation of one's own is fulfilling religious obligations fully. Indeed, Deuteronomy and the ספרי state the imperative so strongly in order to give

²¹ Essentially the same story is told, with some different names (though רבי בא is still the main character) in ירושלמי מעשר שני א'א' (נ"ב:). A different story which also illustrates an ambivalence about the authority attached by some to court majorities is found in תוספתא אהלות י"ח:י"ח.

²² Since רבי בא explicitly said אני לא נמנית עמהן, this is not a claim that he was somehow flouting the law of the זקן ממרא, which was not taken to apply to non-members of the voting court. Rather, it is a claim that the general, but unmistakable spirit of so many texts that the rabbinic court was to be the legal authority seems to be violated by the kind of cavalier statement attributed to רבי בא and others. See what follows in the main text of the paper.

²³ ספרי דברים ק"ד.

²⁴ It won't do to argue, as some have tried, that the words מראים בעיניך in themselves allow us to conclude that this rule applies only when one only "suspects" that the court has made a mistake, but not when one "knows" it, since there are parallels to the ספרי passage in which the text reads simply מראין (which should probably be understood as מורין) and יאמרו לך. See David Zvi Hoffmann, *The Highest Court*, trans. Paul Forchheimer (New York: Maurosho Publications, 1977), pp. 111-112.

²⁵ ירושלמי הוריות א'א' (מ"ה:). An interesting question here is just what the proof text appealed to by the ירושלמי is, if any. The problem is that consultation with a concordance confirms that there is no such verse as ללכת ימין ושמאל!

lenient decisions of the court greater authority: “The **לא תסור** had to be pronounced absolutely for the High Court as, otherwise, it would not have any validity, as many an individual would have denied recognition to a decision that rendered things easier out of scruples of conscience.”²⁶ However, one who chooses to investigate and study further, and who comes to the conclusion that the majority of the court is mistaken, must reckon with the **לא תסור** of Deut. 28:14, which commands unswerving obedience to the commands of God. The court has no unbreakable monopoly on legal competence. Here are Hoffmann’s strong and far-reaching words: “But on the other hand, so says the Baraita of the Yerushalmi, the second **לא תסור** has been pronounced for the word of God with all the more emphasis and absolutely. *For the Torah has been given as an inheritance directly to the whole community of Jacob, and no edict of the authority is able to delete even one word from the Torah.* . . . In this case there is thus a conflict between the two **לא תסור** and the individual has to decide for one of them.”²⁷ For Hoffmann, the issue was clear. The majoritarianism of Rabbinic law is not a **גזרת הכתוב**, which every individual, no matter who he or she is, is obligated to submit to. It is rather a divinely sanctioned accommodation to the indeterminacy of religious truth (also divinely ordained, according to the **סנהדרין ירושלמי** and the **פני משה** cited above, n. 15 and n. 16). The court’s majority provides for the promulgation of the best consensus (of the community which looks to the court) as to what God’s commands are. Once promulgated, those decisions are all that members of the community need follow to remain in good standing and good conscience. They do not, however, forbid or prevent individuals who can investigate on their own, and who can study, understand, and critique those very decisions, from coming to their own conclusions, following their reasons and their consciences.²⁸

Here we have a persuasive justification for the majoritarianism without authoritarianism that we seek – and that characterizes the relationship between the CJLS and the individuals and institutions of our Movement. It is significant that this defense can not only be extracted from the classical texts (both normative and narrative), but is also explicitly and forcefully given in the writings of a traditional halakhist of the modern era – one who understood well what the forces of emancipation had irrevocably done to make a rigid, centralized, halakhic authoritarianism unwise. Indeed, it was not just Hoffmann in Germany who articulated this. For roughly at the same time that

²⁶ David Zvi Hoffmann, *The Highest Court* (see n. 24 above), p. 116. One cannot help being reminded here of the dissatisfactions voiced in the past against what were viewed as overly liberal majority decisions of the CJLS, and the desire of those who identified themselves as liberals to defend the central authority of the CJLS. See, again, the Nudell paper (cited above in n. 2) and the 1976 *Proceedings of the Rabbinical Assembly*.

²⁷ David Zvi Hoffmann, *op. cit.*, pp. 116-117 (emphasis mine). Hoffmann is primarily speaking of occasions on which the individual scholar, acting as local jurist, would follow what his competent understanding told him was the will of God, rather than accept an overly lenient decision of the court. The substance of Hoffmann’s argument, however, is equally valid for, and can be easily extended to, other cases in which the individual who is competent in halakhic texts would feel compelled to diverge, in teaching and practice, from the majority of the central court. Such occasions might include judgments that an overriding ethical imperative underlying the halakhic system itself had been neglected by the court’s majority.

²⁸ These last two sentences correspond rather closely to two of the characteristics of the status of the CJLS set forth at the beginning of this paper. Specifically, it is perfectly in order and normative for individuals (lay or rabbinic) in the Movement, and indeed, for entire institutions such as the United Synagogue, to accept only authoritative decisions of the CJLS as their halakhic imperatives. At the same time, it is also normative and proper for rabbis, particularly those who are charged with making halakhic decisions for congregations, to study CJLS opinions and to come to their own decisions, even if they do not coincide with any CJLS opinions. That is the point of the **הוריות** in **ירושלמי** (see n. 25 above), and indeed, the **בבלי** as well (see **הוריות ב:ו**), the section ending with the words **דטעו במצוה לשמוע דברי חכמים**.

Hoffmann made his argument cited above, a similar interpretation of the baraita in the ספרי was given in Eastern Europe by Naphtali Zvi Yehudah Berlin, the נצי"ב of Volozhin. The נצי"ב understands a comment in the שאילתות דרב אחאי גאון to be a reaction to a peculiarity in the text of Deut. 17:10. In that verse we are told: ועשית על פי הדבר אשר יגידו לך מן המקום ההוא אשר יבחר ה' ועשית על פי התורה. In 17:11 we are told: אשר ירוך... תעשה לא תסור מן הדבר אשר יגידו לך ימין ושמאל. Here is the נצי"ב commentary:

ומקרא דעל פי התורה וגו' מיותר שהרי כבר אמר ועשית על פי הדבר וגו' ותו מאי הוא על פי הדבר ומאי הוא על פי התורה? משום הכי מפרש דאמר משה לפני המקום יתברך בזמן שלא יהיה המקום אשר יבחר ה' קיים מה יעשו? וא"ל על פי התורה וגו'. נמצא בזמן שבהמ"ק קיים מה שיאמרו הסנהדרין אפילו שלא בהוכחה מכללי התורה ישמעו, אבל בזמן שאין בהמ"ק קיים דוקא על פי התורה.²⁹

That is, a metaphysical aura may have surrounded the court at the time when the Temple stood, but that is all (safely?) in the past now. For the נצי"ב, normal rabbinic practice demanded that reasons be given for rulings of the court (for he understands the otherwise superfluous word תורה as "reasoned teaching" rather than as "pronouncement"). For those who had the competence to evaluate the court's proceedings, the court's authority extended no further than the persuasiveness of its arguments. The נצי"ב underscored this even more vividly in his commentary on the Torah:

אבל בזמן שאין בהמ"ק קיים אזי דוקא על פי התורה אשר ירוך... וכל הדרשות אמת והתורה כפטיש יפוצץ סלע.³⁰

We need no better summary of this position than that.

In order to conclude this section, a few words should be said about the utilitarian argument (attributed, as we've seen, to Rabban Gamaliel himself) that, irrespective of what one believes about the metaphysical significance of the rabbinic court, obedience to central authority serves to prevent undesirable fragmentation and sectarianism in the community. It has already been noted above that Hoffmann's and Berlin's endorsements of the right of the individual to diverge from the court's rulings on the basis of conscientious study and consideration are significant in the light of the fact that they are both nineteenth century, post-emancipation halakhists. Indeed, the contemporary Jewish world is marked not only by an irrevocable religious decentralization, but also by theological views which would seem to make the disutility of strongly sanctioned religious authority outweigh whatever gain might be expected from the point of view of promoting halakhic uniformity. Now a structure marked by a central interpretive body which is paralleled, and in some sense rivaled, by the halakhic authority of each individual מרא דאתרא is not unlike other familiar structures with parallel or overlapping jurisdictions. The late Robert Cover gave a principled defense of the jurisdictional complexities, redundancies, and rivalries in the American federal system against those who have argued for the desirability of a more uniform, linear flow of legal authority. It is an instructive defense for our purposes. For like those who have criticized the Conservative movement's legal structure (with local deciders somewhat beholden to, but still independent of, the CJLS) as incoherent and haphazard, there have always been those who have looked at concurrent and overlapping jurisdictions in the United

²⁹ העמק שאלה, על שאילתא נ"ח (משפטים), אות ל"ז.

³⁰ (emphasis mine) העמק דבר, על דברים י"ז:יא.

States as “an accident of history and a . . . malformed jurisdictional anomaly that we have endured, but not loved, for so long.”³¹

But there is another way to view such complexities, argued Cover; not as a “dysfunctional relic,” but rather as a product of a coherent evolution, which persists because of its strong functionality. He gave a number of interesting and compelling defenses of the maintenance of rival jurisdictions, but perhaps the most intriguing one – and one we would do well to heed – concerns the benefits of legal innovation that jurisdictional complexity and decentralization opens up:

There may be with respect to many matters a potential for a unitary national norm. . . . However, more typically we rely upon a regime of polycentric norm articulation in which state organs and lower federal courts enjoy a great deal of legislative autonomy. This multiplicity of norm articulation sources provides opportunities for norm application over a limited domain without risking losses throughout the nation. This proliferation of norm-generating centers also makes it more likely that at least one such center will attempt any given, plausible innovation. . . . The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia.³²

Stated in our terms, this argument means that, in addition to all the principled reasons we have given for maintaining the distinctive and delicate balance between the CJLS and the **מרא דאתרא**, our Movement’s structure allows for religious and halakhic creativity locally, where the need for it first arises, and where its authenticity can best be evaluated. This is a precious resource indeed, and it should not be lightly dismissed for the sake of an elusive “uniformity” which will disappoint tomorrow those whom it satisfies today.

The analogy to a federal system should not be thought strange here. Indeed, we have not only theoretical statements on local autonomy from such sources, ancient and modern, as have been cited above, but historical precedents as well. H.H. Ben-Sasson, for example, characterized the status of the well-known **ועד ארבע ארצות** as follows:

The Council of the Lands of the Polish Crown originated from the rabbinical court at the fairs held in Lublin. It acquired the status of a central bet din because of its activity during the meetings of merchants and heads of the communities and because famous rabbis participated in its deliberations. . . . Even at the zenith of the activities of the councils, the autonomy of the individual community, which had its own independent boroughs, was undiminished. . . . the bet din was competent to adjudge disputes among the constituents of the council, or between the council and its constituents.³³

The **ועד** functioned for over 200 years, and served a crucially important centralizing

³¹ Robert Cover, “The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation,” in *William and Mary Law Review* 22 (1981): 640.

³² *Ibid.*, pp. 673-674.

³³ H.H. Ben-Sasson, “Councils of the Lands,” *Encyclopaedia Judaica* (Jerusalem: Keter Publishing House, 1972), vol. 5, pp. 995-996.

function. But it did not supplant local juridical competence, unless issues affecting the polity as a whole came before it.³⁴

Hundreds of years earlier, Rabbenu Gershom (early eleventh century) had already put together a similar kind of “federal system,” at least as it is described by Finkelstein:

[T]he traditional unity of the Jewish people had at last been disrupted. . . . Whereas previously the Jews throughout the world had looked to some central authority to guide them in matters of religious observance, each community now had its own traditions. . . . Rabbenu Gershom undertook no less a task than that of bringing all these scattered communities into a federation. . . . [T]he idea of a democratic federation had never been fully developed in Israel. There had been obedience to constituted authority but this authority was always based on that of past ages. Rabbenu Gershom proposed to establish a voluntary constitution among the communities that would claim its authority solely from those whom it governed.³⁵

Menahem Elon, in fact, understands the era of Rabbenu Gershom and its aftermath to have been a sort of watershed in Jewish jurisprudential history. It was, he tells us, at that time that central courts, like those of the Babylonian Geonim, ceased to function as master “receivers” to which all questions of consequence were transmitted. Local halakhah began to make its existence felt:

כאשר אנו מציינים, שעיקרה של חליפת השאלות ותשובות מתקופה זו ואילך היתה בתוך כל מרכז ומרכז, אין כוונת הדברים לומר, שמכאן ואילך נותקו קשרי השאלות ותשובות בין המרכזים השונים. מתחילתה של תקופה זו, ובמשך כל הזמן שלאחר מכן, מצויות בידנו ידיעות רבות על שאלות ותשובות, שנשלחו ממרכז אחד למשנהו... ההבדל העקרוני, שחל מבחינה זו בין השו"ת בתקופת הגאונים לשו"ת שבתקופות שלאחר מכן, היה אפוא בכך, שבתקופת הגאונים עיקרן ורובן של השאלות באו למרכז שכבבל, ולאחר מכאן היתה חליפת השאלות ותשובות העיקרית בתוך אותו מרכז ורק חלק ממנה התנהל גם בין המרכזים השונים.³⁶

The local halakhah that was developing became prominent enough to have moved Rabbenu Tam, in the twelfth century, to make a sweeping statement (which was, admittedly, close to a *דעת יחיד*, but noteworthy nonetheless). He claimed that a majority can enforce its will on the minority only if the latter explicitly agreed to that majority's

³⁴ No exact analogy between the *ועד* and the CJLS is being claimed here. The sole point is that the co-existence of a central body with agreed-upon judicial powers and local centers of authority has good precedents in Jewish life. Nevertheless, the CJLS's role in initiating Standards of Rabbinic Practice can perhaps be seen as analogous to the handling of such polity-wide issues by central organs of authority in the past. Indeed, Standards are small in number, and are generally confined to such issues as conversion, Jewish status, etc. in which the crossing of jurisdictional lines makes reliance on each *מרא דאתרא* either impractical or nonsensical.

³⁵ Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Philipp Feldheim, 1964), pp. 21-23. Finkelstein's work included as well, on pp. 257-264, the enactments of the Frankfurt Synod of 1603. That Synod had to “beg of every Rabbi who is not a member of this council to agree to these decisions. . . .” (Section 9). Again, we see the balance between the central body with legislative power ceded and recognized by the communities, and the local rabbis who, like *רבי בא* centuries earlier, seemed to be able to say *אני לא נמניתי עמהן בעלייה*.

³⁶ מנחם אלון, *המשפט העברי* (ירושלים: הוצאת מגנס, תשל"ח), כרך ב', עמ' 1232-1233.

authority in advance.³⁷ If such points of view existed concerning the legislative power of central courts (i.e., concerning *תקנות*), about which there was always greater utilitarian concern about community harmony, how much more so would local autonomy be accepted with respect to interpretive, or judicial functions.

These several precedents are illustrative of how our judicial and community history often knew delicate balances between central authority and local autonomy. They should quell fears with respect to our own particular version of non-authoritarian majoritarianism as embodied in the CJLS. There is, indeed, not only nothing to fear, but perhaps blessing as well. As Cover put it:

It seems unfashionable to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict. . . . I, ultimately, do not want to deny that there is value in repose and order. But the inner logic of “our federalism” seems to me to point more insistently to the social value of institutions in conflict with one another. It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts.³⁸

The creation and maintenance of the central authority of the CJLS witnesses to the value all Rabbinical Assembly members place on “repose and order.” But we, too, are a kind of federalism, with local rabbis playing the role, if we may say so, of lower, local tribunals. The tensions between the CJLS and the *מרא דאתרא*, which we have lived with since 1927, witnesses to our readiness to be “daring,” and to uphold a structure which reminds the Jewish world, and ourselves, of theological principles that we recognize in our classical sources, and in which we deeply believe.

Conclusion

This paper has been a principled defense of, not a realistic resignation to, the current structure and status of the CJLS. That is, the previous sections have reviewed the textual and theological bases for the authority traditionally vested in the majoritarian procedures of rabbinic courts. We have seen that two alternative views (at least) are possible with respect to this matter: the first has been seen to flow from metaphysical beliefs about the divinely bestowed authority of the court’s majority decisions, and the second has been seen to result from a theological conviction about epistemological indeterminacy in the post-prophetic age. Each one of these views carries with it implications concerning the rights of minorities and of individuals not on the court, implications which sharply diverge one from the other. While each view can consistently be maintained, it has been argued here that the second view is most in keeping with the history and theology of the Conservative movement, appropriate for the decentralized condition of the modern Jewish community, and amply supported by halakhic sources, ancient and modern. Indeed, the CJLS already operates under procedures quite different from traditional rabbinic majoritarianism. It has, since 1985, not even designated its opinions as “majority” or “minority” opinions, and it has done so out of a conviction that the majority of the court should not be granted a

³⁷ Elon (see previous note), vol. 1, p. 581. Also see Elon’s discussion in vol. 1, pp. 549-550, concerning the tendency, after the time of Rabbenu Gershom, for there to be ordinances and rulings of a local nature that were not expected to be adopted by all Jews.

³⁸ Cover, *op. cit.*, p. 682.

monopoly on legal competence and authority. What we have argued for, to wit a “majoritarianism without authoritarianism,” thus applies with even greater force to the CJLS, with its already modified majoritarianism. Reaffirming the responsibility of each **מרא דאתרא** to study and consider CJLS opinions, and reaffirming the right of that **מרא דאתרא** to choose even a halakhic path not chosen by the Committee (except, of course, in cases where a Standard has been promulgated by the CJLS and the Convention), should be seen not as a challenge to the legal and moral suasion which the CJLS will always wield. Nor should it be spoken of apologetically as a haphazard quirk of the Movement, made necessary by political contingencies. Rather, it should be understood as an extension of the very logic that has created the CJLS and its internal rules, and as our faithfulness to obligations to God and to community that, as David Zvi Hoffmann observed, will sometimes live in tension. It is hoped that this paper may facilitate not only a new understanding of the current structure and status of the CJLS, but a new pride in it as well.