Contemporary Halakhic Problems

Volume VIII

Rabbi J. David Bleich

CONTEMPORARY HALAKHIC PROBLEMS

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To our great-grandchildren **שיחיו**
with the fervent prayer

שלא תמוש התורה מפי זרענו וזרע זרענו עד עולם

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Contents

Preface

This is the eighth in a series of volumes devoted to analyses of contemporary issues confronting members of the Jewish community. Many of those issues have arisen, or have become more intense, because of advances in science and technology. "Even that which a diligent student will one day teach in the presence of his master was already told to Moses at Sinai" (Palestinian Talmud, *Pe'ah* 2:4). The ongoing halakhic enterprise is essentially a matter of elucidating age-old principles in formulating modern-day applications or, better, distilling old wine to yield previously unidentified nuances of flavor.

We have been assigned the challenging mandate of plumbing the depths of Torah by engaging in halakhic analysis in arriving at cogent responses to halakhic queries. But, as the Gemara *Berakhot* 58a informs us, human intellects are dissimilar in nature. Consequently, it is not surprising, and indeed it is to be expected, that different minds will arrive at diverse conclusions.

The purpose of this endeavor is to explain sources, elucidate applicable principles and identify the bases of divergent opinions. In no way is this work intended to serve as a definitive compendium. It is designed as an expression of the most sublime form of *talmud Torah*. If,

in addition, it will prompt the reader to further study and reflection, the goal of *le-hagdil Torah u-le-ha'adirah* will be enhanced.

Each of the chapters in this volume originally appeared in my "Survey of Recent Halakhic Literature" which is regularly featured in the columns of *Tradition* and is herein presented in somewhat revised and expanded form. My appreciation to Rabbi Jeffrey Saks, the editor of *Tradition*, for his encouragement and support; to Rabbi Dr. Shlomo Zuckier, a member of *Tradition*'s Editorial Committee, for his extremely able editorial comments and his attention to both style and substance; to my son, Rabbi Dr. Moshe Bleich, for the many sources that he provided and for his keen insights; and to Rabbi Yitzchak Adlerstein, for his careful reading of the manuscript and his corrections. I particularly wish to acknowledge the invaluable contributions of my son-in-law, Rabbi Benzion Sommerfeld, who meticulously revised each of the chapters, provided insightful comments, suggested numerous revisions and drew my attention to additional sources. Many of those sources and insights have been incorporated both in the text and in the footnotes. I am indebted to Dr. David Marks and Mr. Jonah Ottensoser for their review of descriptions of technical aspects of electrical devices and to Rabbi Meir Shalom Halberg for his comments on chapter eleven. I also wish to acknowledge the assistance of Rabbi Moshe Schapiro in making his bibliographic expertise available to me and both to him and Mr. Zvi Erenyi of the Mendel Gottesman Library for their ongoing helpfulness particularly as maneuvering the stacks of the library becomes more taxing.

My appreciation also to Rabbi Joseph Cohen, M.D., spiritual leader of the Fleetwood Synagogue of Mount Vernon, for his dedicated and ongoing assistance over a period of years. My gratitude also to my student, Rabbi Yitzchak Radner, instructor of Talmud at Yeshivat Rabbeinu Yitzchak Elchanan, for his invaluable efforts in preparing the manuscript for publication and to Ellie Radner for her diligence in preparing the index. Most especially, my thanks to my granddaughter Hadassah Gurwitz, whose proficient proofreading has spared this work from many inadvertent errors; and last, but certainly not least, to my students for their thoughtful and provocative questioning.

My appreciation also to the staff of Maggid Books (an imprint of Koren Publishers, Jerusalem), particularly to Dr. Yoel Finkleman, Caryn

Meltz, Rabbi Reuven Ziegler, Ita Olesker, and Mr. Matthew Miller, with all of whom it is always a pleasure to work.

I express my thankfulness to the Almighty for His continued beneficence and mercy in sustaining me in life and granting me the privilege of dwelling in the tents of Torah. Above all, I am grateful to the Almighty for my cherished collaborators – the members of my family. Our prayer to the Almighty is that we continue to be numbered among the *mashkimim le-divrei Torah* and, to paraphrase the words of the *hadran, ke-shem she-ʿazartanu le-sayyem sefer zeh, ken taʾazrenu le-hatḥil sefarim aḥerim u-le-sayyemam, lilmod u-le-lamed, lishmor ve-laʿasot u-le-kayyem.*

Chanukah 5784

"Now these are the ordinances which you shall set before them." It should not enter your mind to say, "I shall teach them a section of Torah or a halakhah twice or thrice… but I shall not trouble myself to cause them to understand the reasons for the matter and its explanation…"

Rashi, Exodus 21:1

Introduction: The Principles and Methodology of Jewish Law

Since the day the Temple was destroyed
the Holy One, blessed be He, has only the four ells
of Halakhah in His world.

Berakhot 8a

THE NATURE OF JEWISH LAW

I. Divine or Human?

A professor at a prominent school of law relates that he was asked a rather incongruous question. On the last day of classes in a course on Roman law, a student soliciting information regarding the approaching final examination asked, "Are we responsible only for material in the textbook or are we responsible for recent cases as well?" It is, of course, ludicrous to speak of "recent cases" in conjunction with a system of law that, despite its continued and profound influence over other systems of law, has for many centuries not been sovereign in any jurisdiction.

A similar question, if asked in a class devoted to the study of Jewish law, would not have elicited a derisive response. Despite the fact that Jewish law was not the law of any sovereign jurisdiction from the time of the exile of the people of Israel from their ancestral homeland until its

limited reinstatement in rabbinic courts in the State of Israel, Jewish law remains alive and healthy throughout the Diaspora. Hardly a day goes by that does not bring with it publication of new articles and responsa that serve to expand and deepen our understanding of the immutable principles embodied in Halakhah while simultaneously bearing witness to the vitality and dynamism of Jewish law in confronting novel situations.

There is a well-known hasidic tale that recounts how, one Passover eve, a hasidic sage, the *Rebbe* of Berditchev, announced that he would not begin the *seder* until a quantity of Turkish wool, Austrian tobacco and oriental silk was brought to him. Within a short time everything that he requested was procured. Thereupon, he announced that one additional item was required: a crust of bread. His disciples were taken aback by this strange request but they unquestioningly set out to fulfill their master's command. They scoured the town, but to no avail. They were forced to return empty-handed and crestfallen. The *Berditchever* listened in silence as they reported their lack of success. Then, with a smile enveloping his face, he raised his hands and exclaimed, "Master of the Universe! The Russian Czar deploys thousands of guards to patrol his borders, employs countless numbers of police officers to enforce his edicts and administers a vast penal system to punish those who violate his laws. But look at the contraband that can be found within his borders! You, Master of the Universe, have no guards, no police and no prisons. Your only weapon is a brief phrase in the Torah forbidding Jews to retain *ḥameẓ* in their possession during Passover, but not a morsel of *ḥameẓ* can be found in all of Berditchev!" Indeed, the fact that Jewish law remains vibrant is assuredly eloquent testimony to the loyalty and devotion of the Jewish people. No other such comprehensive system of law has survived without the police power of a state to enforce adherence to its dictates.

Any attempt to understand the nature and contents of the corpus of Jewish law must begin with the awareness that it is a self-contained system predicated upon the axiological assumption that both its contents and canons of interpretation are the product of divine revelation. Thus it follows that man has no legal or moral right to manipulate the system in order to support predetermined conclusions, no matter how appealing or desirable they may seem. To be sure, human intellect may,

and indeed must, be employed in order to apply Halakhah to novel or previously unexamined situations. But that process must be both methodologically rigorous and intellectually honest. In applying theory to practice the decisor must pursue the law to its logical conclusion. The underlying nature of the legal system is modified only by the narrowly defined and severely circumscribed legislative powers of properly constituted rabbinic bodies to create "fences" around the law, to promulgate social welfare legislation and to issue emergency ad hoc decrees.

In analyzing and applying any system of law, a scholar need not necessarily accept the basic principles of the system as wise or prudent. Thus, in an analogous manner, an American constitutional law scholar need not accept the doctrine of separation of powers as either socially beneficial or politically pragmatic. But intellectual honesty compels him to analyze the legal status of an executive order or of a congressional enactment against the backdrop of that principle.

"You don't have to be Jewish to love Levy's Real Jewish Rye," announced a New York subway advertisement of the 1960's and 70's. Similarly, one does not have to be Jewish to study or appreciate Halakhah. One need not necessarily be a professing Jew or accept the phenomenon of revelation at Sinai as a historical fact in order to engage in an analysis of Halakhah. But, to engage in meaningful scholarship, one must recognize that the phenomenon of divine revelation at Sinai is the *Grundnorm* of Halakhah. Perhaps more importantly, the student must recognize that, most assuredly, the scholars who served as exponents of Halakhah over a period of millennia were men of intellectual honesty as well as moral probity and that their halakhic determinations were based upon the sincerely held assumption that the law was theirs to interpret only objectively, rather than subjectively, and certainly that they were powerless to modify the law other than in accordance with the very limited legislative power conferred upon them.

Judaism is fundamentally a religion of law, a law which governs every facet of the human condition. The Torah contains not merely a set of laws but also canons of interpretation as well as principles according to which possible internal conflicts may be resolved. Maimonides records the doctrine that the Torah will not be altered, either in its entirety or in part, as one of the Thirteen Principles of Faith. The divine

nature of Torah renders it immutable and hence not subject to amendment or modification.

Although the Torah itself is immutable, the Sages teach that the interpretation of its many laws and regulations is entirely within the province of human intellect. Torah is divine but "*lo ba-shamayim hi* – it is not in the heavens" (Deuteronomy 30:12); it is to be interpreted and applied by man. A remarkable corollary to the principle of the immutability of the Torah is the principle that, following the revelation at Sinai, no further heavenly clarification of doubt or resolution of ambiguity is possible. Clarification and elucidation are themselves forms of change. Since there can be no new revelation, a prophet who claims the ability to solve disputed legal points by virtue of his prophetic power stands convicted by his own mouth of being a false prophet.

Once revealed, the Torah does not remain in the heavenly domain. Man is charged with interpretation of the text, resolution of doubts and application of the provisions of its laws to novel situations. The Gemara, *Bava Meẓi'a* 59b, presents a vivid illustration of the principle *lo ba-shamayim hi* in a narrative concerning a dispute between R. Eliezer and the Sages regarding a point of ritual law. R. Eliezer refused to be overridden by the view of the majority and went to great lengths in invoking heavenly signs in support of his own position. R. Eliezer had sufficient power to work miracles, to change the course of nature and even to summon a heavenly voice in support of his position but the Sages, quite correctly, remained unimpressed. Interpretation of Halakhah has been entrusted to the human intellect and, accordingly, human intellect must proceed in its own dispassionate way, uninfluenced and unprejudiced by supernatural phenomena.[1]

Even more dramatic is the narrative recorded in *Bava Meẓi'a* 86a. Here we are told of a controversy between the Heavenly Academy and God Himself with regard to a case of possible ritual defilement. The Almighty is cited as ruling that there was no cause for ritual defilement, while the Heavenly Academy ruled that there was. The Gemara records that the matter was left for final adjudication by Rabba bar Naḥmani, "who is singular [in his proficiency] in such matters." Certainly, God did

1. Cf., *Tosafot, Yevamot* 14a, s.v. *R. Yehudah.*

not need to be instructed in His law by mortal man. This aggadic narrative is designed to underscore the principle that the law was designed to be understood, interpreted and transmitted by man. Accordingly, man's understanding of Torah must prevail. One may go so far as to say that the halakhic system regards elucidation of the law by legitimate exponents to be infallible. Since such interpretation was licensed by God, it could not possibly be erroneous. Man's interpretation is not only inherent in the content of revelation but is the one which God Himself wills to prevail.

Moreover, Jewish teaching recognizes that two conflicting conclusions may, at times, be derived from identical sources by different scholars. Which is correct? Both are correct! "*Elu va-elu divrei Elokim ḥayyim* – These and those are the words of the living God," declare the Sages (*Eiruvin* 13b and *Gittin* 6b). If two conflicting conclusions may be derived from the same corpus of law, then both must be inherent therein. In the realm of theory both are correct, both are Torah. Of course, in matters of practice, in terms of *psak halakhah*, i.e., of definitive halakhic rulings, there must be a means of deciding between the conflicting views, else legal anarchy would result. To this end Halakhah, as a legal system, includes canons of psak, i.e., canons of judicial determination. While these may produce decisions that are of absolute binding authority, normative adjudication does not imply that the view which is set aside is thereby rejected as a nullity. On the contrary, insofar as the study and pursuit of Torah is concerned, the superseded view is of undiminished importance. No one has ever suggested that it is not necessary to recite *birkat ha-Torah*, i.e., the blessing pronounced prior to engaging in Torah study, before studying the words of Bet Shammai on the grounds that the final decision is in accordance with Bet Hillel. In the eyes of God both are of equal validity. Definitive psak halakhah is a matter of practical necessity, but not a reflection upon transcendental validity.

The foregoing should not in any sense generate the impression that subjective considerations or volitional inclinations may ever be allowed consciously to influence scholarly halakhic opinion. Torah study requires, first and foremost, intellectual honesty. Bet Hillel did not purposively adopt a policy of permissiveness and Bet Shammai a policy of stringency; Bet Hillel did not set out to be easygoing and Bet Shammai to be hard and unbudging. Each expressed sincerely held

convictions, conclusions reached in as detached and dispassionate a manner as is humanly possible. It is a travesty of the halakhic process to begin with a preconceived conclusion and then attempt to justify it by means of halakhic dialectic. Neither Hillel nor Shammai nor any of their spiritual heirs engaged in sophistry in order to justify previously held viewpoints. The dialectic of halakhic reasoning has always been conducted in the spirit of "*Yikov ha-din et ha-har* – Let the law pierce the mountain" (*Yevamot* 92a and *Sanhedrin* 6b). The law must be determined on its own merits and let the chips fall where they may.

"These and those are the words of the living God" is a dictum applicable only when fundamental prerequisites have been met. The corpus of Halakhah must be mastered in its entirety and accepted in its entirety as the content of divine revelation. Canons of interpretation, which are an integral part of the Torah itself, must be applied in an objective manner. Then, and only then, are the resultant conclusions the "words of the living God." Then, and only then, may it be assumed that, from the time of Revelation at Sinai, it was destined that those conclusions be reached. It is quite conceivable that two different individuals of equal intelligence and erudition, both possessed of equal sincerity and objectivity, may reach antithetical conclusions. Since the Torah was given by God and disparate human intellects were created by God, the inference is virtually inescapable: it was part of the divine scheme that contradictory conclusions be reached. Since both conclusions are derived from accepted premises and both are defended by cogent halakhic argumentation, it follows that both are legitimate expressions of Halakhah and hence both are of equal validity. Of insights attained in this manner the Sages taught, "Even that which a conscientious student will one day teach in the presence of his master was already told to Moses at Sinai" (Palestinian Talmud, *Pe'ah* 2:4). In terms of transcendental truth, even contradictory conclusions may be infallible!

Of course the development of correctly formulated decisions governing matters of practice is of singular importance. There is an abstract Halakhah and an applied Halakhah. In a transcendental universe contradictory truths may be valid in the sense of "These and those are the words of the living God" but in the terrestrial realm there cannot be legal anarchy. There must be canons that are to be applied in picking

and choosing between conflicting principles to be applied in governing human conduct. A clear distinction must be drawn between theoretical Halakhah and applied Halakhah.

The methodology by which some opinions are accepted and others excluded from practical application constitutes a highly complex aspect of Halakhah. Halakhic decisions are not a matter of arbitrary choice. Decision-making is bound by rules of procedure.

The verse "Judges and officers shall you make for yourself in all your gates" (Deuteronomy 16:8) bestows autonomous authority upon rabbinic judges in each locale. They are empowered to promulgate their views in the geographic area subject to their jurisdiction. The local populace may, with complete confidence, rely upon the teaching of the local *bet din*, or rabbinic court. Thus, in the city in which R. Eliezer was the chief halakhic authority, the citizenry felled trees, built fires and boiled water on the Sabbath in preparation for a circumcision, while in a neighboring town such actions constituted a capital offense. R. Eliezer's opinion to the effect that Sabbath restrictions are suspended not only for performing the act of circumcision itself but even for preparation of the necessary accouterments of this rite was authoritative in his jurisdiction. The contradictory opinion of his colleagues remained binding in their jurisdictions. Only upon a decision of the supreme halakhic authority, the *Bet Din ha-Gadol*, or Great Sanhedrin, sitting in Jerusalem, did a given view become binding upon all of Israel.

The primary function of the *Bet Din ha-Gadol* was not to sit as a court of appeals in particular cases but to resolve ambiguities and controversies with regard to questions of law. While the Great Sanhedrin might grant review to overturn or confirm a decision of law of a lower court – a form of *certiorari* – a question of law might be certified by a lower court in the midst of its proceedings, brought before the Great Sanhedrin and deliberation resumed only upon receipt of the determination of the Great Sanhedrin. The law as announced by the Great Sanhedrin then became binding upon inferior courts.

If Jewish law is to be studied as the living, vibrant system of law that it is, it is crucial to examine the application of that system of law from its own vantage point, through the intellectual prism of the scholars from whom its adherents seek legal guidance. As a viable system,

Halakhah can be understood only in light of the axiological principles enunciated by its exponents. Conclusions reached on the basis of any other thesis, including, but not limited to, original intent, evolutionary development or human authorship – as not infrequently occurs in the Academy – are a form of what may be termed legal anthropology, but are certainly not reflective of the living, contemporary system of Jewish law espoused by adherents of traditional Judaism.

II. Twin Fonts of Revelation

I have an acquaintance who describes himself as a Jewish law scholar specializing in biblical law and who is regarded in academic circles as such. By self-definition, his scholarship is limited to Jewish law of the biblical period. He once asked for my assistance in locating an "obscure" book he was unable to find in any card catalogue. He pronounced the title of the work as "*Seema*." It took me a moment or two to realize that he was referring to *Sema*, an acronym standing for *Sefer Me'irat Einayim*, a standard commentary on *Ḥoshen Mishpat* that appears in every edition of the *Shulḥan Arukh* published within the past several hundred years. No proficient student of Jewish law would fail to identify the *Sema* immediately; it might take him a bit longer to identify the *Sefer Me'irat Einayim*. It took me no time at all to realize that any amusement on my part would be misplaced. The *Sema* is irrelevant to scholarship limited to the literary record of the biblical period. But, then, scholarship limited to the literary record of the biblical period is equally irrelevant to fathoming the received corpus of Jewish law.

Crucial to an understanding of the halakhic system is the doctrine of *Torah min ha-Shamayim*. That doctrine affirms the divinity of Torah, not only of the Pentateuch, but also of the Oral Law. The Pentateuch simply cannot be read without interpretation and elucidation. The problem is not so much with regard to words such as "*totafot*" (Deuteronomy 6:8) for which there is no cognate in Scripture or, for that matter, in any known Semitic source. The term must either be interpreted as connoting the four compartments of the head phylactery, as understood by the Sages, or dismissed as gibberish. Nor is the problem limited to definitions and references to matters external to the revealed text: for example, "and you shall slaughter … as I have commanded you" (Deuteronomy 12:21).

Since there is no earlier recorded commandment concerning slaughter, the conclusion that the reference is to an already delivered oral instruction is inescapable. Even Naḥmanides' understanding of the phrase as an allusion to the slaughter of sacrificial animals entails the presumption that slaughter of those animals had to be performed in a particular manner – a matter not recorded in Scripture.

Much more problematic – but generally overlooked – are instances in which the text itself appears to be contradictory. Take, for example, Exodus 22:6–11, a seemingly straightforward biblical section dealing with the laws of bailment. Exodus 22:7–9 provides that a bailee who claims that the bailed object was stolen from him is exonerated upon swearing an oath to that effect. However, in an apparent contradiction, Exodus 22:11 declares that "he shall make restitution to the owner thereof." To further compound the problem, Exodus 22:8 states, "he whom God – *Elokim* – shall condemn shall pay double." How does God announce His verdict? Granted that the philologist will somehow discern that the word "*Elokim*" in biblical Hebrew is a homonym and connotes a "court" as well as "God," we are left with three contradictory rules: one demanding only a supporting oath for exoneration of the bailee; a second requiring restitution to make the bailor whole; and a third providing for restitution of the value of the bailment as well as a fine of equal value. Without the Oral Law explanation that Scripture herein describes these different categories of bailees, imposes different levels of culpability reflecting differing standards of diligence, and imposes a fine only in specific circumstances, the entire section would be incomprehensible.

The Oral Law is not really a commentary on the Written Law. It is far more felicitous to think of the Written Law as a vehicle or aide memoire for use in transmitting the Oral Law. The Karaites who dismissed the *masorah* (viz., the Oral Law tradition of the Rabbanites), soon realized that the Written Law could not stand by itself and consequently went about constructing an Oral Law of their own.

Judaism is a religion of Law. Judaism without the Oral Law is not Judaism. Ambiguity and controversy were bound to occur and, quite appropriately, the Oral Law contains canons for resolving such matters. The result is an exhaustive tradition of substantive, interpretive and

decision-making rules, a tradition endowed with sanctity because it is divinely ordained.

In the course of the development of any legal system, individual authorities will gain primacy, norms will be established and precedents will become dispositive. Such is the nature of the legal process. Retrieval of a rejected opinion from the cutting-room floor of halakhic history may constitute a valid and valuable exercise in *talmud Torah* (Torah study) but is of little consequence in determining halakhic rulings. The late Rabbi Joseph B. Soloveitchik once famously described the manuscripts of R. Menachem ha-Me'iri's talmudic commentary, *Beit ha-Beḥirah*, discovered in the Cairo genizah, as a "mere curiosity" insofar as the halakhic process is concerned. He was speaking without exaggeration and was entirely correct.[2]

There can be no Judaism without the Oral Law. Rejection of the Oral Law is rejection of the Judaism revealed at Sinai. Little wonder that Maimonides, *Hilkhot Teshuvah* 3:8, includes *makḥish maggideha* (one who contradicts its transmitters) in his list of individuals branded as heretics.

There is a definite line of demarcation separating legitimate disagreement within the boundaries of tradition from espousal of positions beyond the pale of the *masorah*. On rare occasions there may even be disagreement with regard to precisely where the line is to be drawn. But such a line does exist. The modern mind has little sympathy for witch-hunting, book burning or accusations of heresy, primarily because, historically, such activities often led to harsh repressive measures. The real point, however, is not application of sanctions against deviationists but preservation of the integrity of the *masorah*. There cannot be fidelity to either the teachings or the values of Judaism without fidelity to the *masorah*.

III. The Non-Teleological Nature of Halakhah

I once quipped that as a young man I had a *yeẓer ha-ra*, i.e., a "compelling desire," to become a Conservative clergyman and so I became a law professor. A jurist addressing a case of first impression or concerned

2. See *infra,* note 21.

with adapting the law to ever-changing circumstances often begins his undertaking with a clear vision of the conclusion he wishes to reach. That vision is born of ideological commitment, policy considerations and/or pragmatic ramifications. He then seeks precedents, draws analogies, offers analyses and develops legal arguments that provide cogency for his decision and thereby endow it with a legal imprimatur. His conclusion, if not a direct outgrowth of, is at least harmonious with, the extant legal corpus. In legal circles, such an enterprise is deemed not only appropriate but laudatory.

Thus, it is perfectly acceptable for an advocate on behalf of government aid to parochial schools to marshal sources and arguments in support of the position that the State may – and perhaps must – reimburse parochial schools for the cost of record-keeping required by the State and even of instruction in secular subjects mandated by the State. There is no transcendental truth enshrined in the law. A statute means what a civil court declares it to mean. A court's decision need only be plausible; it need not be compelled by rigid application of canons of logic.

Similarly, it is quite possible to argue that execution of a *get*, or religious divorce, is not a religious act within the meaning of the religion clauses of the First Amendment. Or, in the alternative, that even if it is a religious act, a voluntary undertaking to execute a *get* should be enforceable in a civil court on the basis of a neutral principles doctrine. Jurists regard the Constitution as a living document, the meaning of its words and phrases far from immutable and open to reinterpretation in light of changing mores. Even originalists concede that, when all is said and done, the Constitution means what the Supreme Court says it means. There is no single, transcendental constitutional truth that an honest, intelligent advocate must seek to capture.

The civil judiciary reads the election returns. It knows what people want and it may even know what people need. But *vox populi* is not *vox Dei*. Neither public desire, nor even public need, necessarily reflect the divine plan for regulation of the human condition.

At times, human texts are drafted with deliberate ambiguity. During the events leading to adoption by the United Nations General Assembly of Resolution 242 concerning the return of territories controlled by Israel in the wake of the Six-Day War there was debate about whether the

resolution should call for return of all the territories or whether it should require return only of some of the territories. The compromise was to refer simply to "territories" without a qualifying term. Does the resolution, as drafted, call for return of all territories or only some? If some territories, does the resolution mean the lion's share of the territories or only limited areas? At times, such texts are purposely left ambiguous in order to achieve timely agreement among the parties while allowing disputed matters to be cloaked in ambiguities to be resolved at a later date. Similarly, statutes are often drafted ambiguously because the legislature finds it prudent not to address certain issues. The legislator is perfectly willing to leave such issues for adjudication by the courts or to be resolved in some other way. At times, ambiguities that later arise in application of a statute may simply never have occurred to the draftsman.

Many issues in American constitutional law hinge upon the interpretation of a phrase or clause in the Constitution. In at least some cases it is clear that the Framers purposely created ambiguity because protracted debate over every contentious issue would have defeated all attempts to reach a consensus. As a result, many issues were left to be resolved at a later time through either legislation or judicial interpretation.

Examination of issues in constitutional law with a view to determining whether one or another constitutional interpretation is correct leads to a conclusion that is not markedly different from examination of similar problems in Halakhah. Does provision of separate but equal educational facilities satisfy the requirement of the Equal Protection clause of the Fourteenth Amendment or is "separate" inherently unequal? There was a time before *Brown v. Board of Education* when the accepted doctrine was that the Equal Protection clause does not preclude racial segregation. Separate but equal satisfied the equal protection requirement because, after all, everybody was treated equally. The Supreme Court's decision in *Brown v. Board of Education* declares that separate is by its very nature unequal and, accordingly, that separate can never be equal. Does this now mean that the earlier decision in *Plessy v. Ferguson* was simply wrong but previous courts were not sagacious enough to realize that racial segregation is *ipso facto* antithetical to equality? Perhaps. If it can be demonstrated that the psychological burden of segregation

necessarily creates inequality then, of course, the earlier doctrine was incorrect. If, on the other hand, the question of whether separation inherently constitutes inequality is a matter of judgment, we then have a situation in which different people have made different judgment calls and there is no way to say who is right and who is wrong. We then have a legitimate disagreement between those who espoused the original doctrine and the Court that issued the later decision. Today, such an assessment is politically incorrect, but the politically incorrect is not necessarily logically invalid.

Were one to be mistakenly convinced that there is some sort of transcendental truth embodied in the text of the Constitution, it would become necessary to formulate a doctrine to the effect that "*elu va-elu* – 'these and those' are the words of the Framers," i.e., "these and those" are both correct in the sense that each is consistent with the meaning imbedded in the Constitution by its authors. Indeed, if the Framers of the Fourteenth Amendment had contemplated a dispute of the nature later addressed in *Plessy v. Ferguson* but could not agree upon whether separate was, or was not, inherently unequal, it is quite conceivable that they might have intended the ambiguity and purposely left the issue unresolved. Whether they did or did not is irrelevant; the text acquires a life and meaning or meanings of its own.

Jewish tradition is based upon the premise that the divinely dictated text of the Pentateuch was designed to be ambiguous and subject to multiple interpretations. This too reflects a fundamental principle of Halakhah and was recognized as such by the Sages. Midrash *Shoḥar Tov* 12:4 reports: Rabbi Yan'ai declared, "The words of the Torah were not given in final form (*ḥatukhin*). Rather, with regard to every single matter that the Holy One, blessed be He, told Moses, He enunciated forty-nine considerations [to render it] pure and forty-nine considerations [to render it] impure. Moses exclaimed before Him, 'Sovereign of the Universe, when shall we arrive at a clarification of Halakhah?' God said to him, 'According to the majority shall you decide (Exodus 23:2). If those who declare it impure are more numerous, it is impure; if those who declare it pure are more numerous, it is pure.'"

Clearly, the "matters" to which the Midrash refers are not those presented to Moses in an unequivocal manner in the corpus of either the

Written or the Oral Law. They are matters with regard to which human intelligence must seek answers by grappling with principles and precedents firmly established within the system of Halakhah. Such endeavors constitute a dynamic and ongoing process.

Conflicting results were clearly the divine intention. The very fact that God allowed the text to be ambiguous means that He intended it to be so. But why should divine language be anything but unequivocal? That is not a legal question; it is a metaphysical or theological question.

The jurisdiction of local authorities flows directly from the biblical verse "Judges and court officers you shall appoint to yourselves in all of your gates" (Deuteronomy 16:18). Every city is required to appoint its own judicial authority and the citizenry may, and indeed must, act in reliance upon that authority unless the issue has been resolved by a decision of the Great Court, i.e., the Sanhedrin, sitting in the Temple precincts in Jerusalem. The decision of that body is, in effect, a Supreme Court decision that is binding upon all inferior courts. However, unless and until such a decision is forthcoming, there is no single uniform and monolithic ruling binding on everyone. Disagreements among members of a particular court, including among members of the Sanhedrin, are resolved on the basis of majority rule.

Unlike other systems of law, in Halakhah, policy considerations are irrelevant and not a factor to be taken into consideration in judicial decision-making. A civil court dealing with a human system of law may well seek guidance in legislative history, may consider how social policies fostered by the statute may best be implemented, may examine relevant values and institutions, etc., and then interpret the statute in a manner that will best reflect those considerations and advance those particular goals.

Decision-making in Halakhah does not operate in that manner. Indeed, it could not operate that way for the simple reason that it is often extremely difficult and even impossible to determine what the relevant "policy considerations" might be. Delineation of policy considerations would require that man fathom the reason or the rationale underlying any particular legal provision. Although it is perfectly legitimate for man to endeavor to understand why certain laws were promulgated, nevertheless, when the underlying rationale is not announced either in the Written

Law or in the oral tradition, it remains, at best, a matter of speculation and hence cannot be accepted as part of the legal corpus. The result is that, in its application, particular provisions of Halakhah are often quite divorced from what one might presume to be their underlying purpose.

A halakhic scholar who is attempting to understand and apply the law must not begin with a determination that he regards as wise or the goal that he assumes the legal system seeks to advance and then work back and try to substantiate that conclusion on the basis of legal argumentation. In other systems of law it may be perfectly legitimate to assume that certain results are compatible with the thrust of a statute or with the nature of the legal system and then to proceed to seek justification of a particular application by employing various forms of legal dialectic. In Halakhah, such is not a legitimate mode of procedure. In Halakhah, the principle is that a scholar must begin with the given, the raw material, i.e., the legal principles and statutes as they are formulated, then apply canons of interpretation and deductive reasoning in a *bona fide* manner in order to reach the necessary conclusion. The conclusion will not necessarily be the determination that the scholar might wish to reach but it will be the one he feels compelled to reach on the basis of the legal evidence. As noted, that methodological principle is captured in the rabbinic aphorism *"Yikov ha-din et ha-har" (Yevamot* 92a and *Sanhedrin* 5a), which translated literally means, "Let the law pierce the mountain!"

Obviously, lack of authority to modify the legal system by means of innovative interpretation can lead to situations in which corrective measures of some type are necessary, or are at least perceived as being necessary, because the purpose of the law seems to have been thwarted. However, that does not mean that the halakhic decisor has the right to engage in intellectual gymnastics in order to reach what he believes to be a more satisfactory pragmatic conclusion. The practical or social problems that may arise are addressed by means of applying rabbinic authority to promulgate *takkanot,* i.e., rabbinic legislation, or by fashioning devices designed to harness provisions of the law as a means that allow for escape from the harshness or the onus of the law that would otherwise result were the law allowed to run its own course.

There are situations in which it is quite evident that the ultimate purpose of the law is not being advanced by applying the technicalities

of the law, e.g., the law that provides that the firstborn male of domestic animals be offered as a sacrifice in the Temple. Today, with the destruction of the Temple, that is no longer a possibility. But, since there is no license to dispense with the law itself, the only available expedient is to modify circumstances so that different provisions of law will apply, i.e., to sell the pregnant animal to a non-Jew to whose animals such rules do not pertain.

Contemporary use of a "device" to avoid transgressing the letter of the law is probably best exemplified in the development of the *hetter iska*. That device is designed to transform what otherwise would have been a simple loan agreement into a joint venture in order to allow the financier to profit from the enterprise without running afoul of the prohibition against interest-taking. The effect of a *hetter iska* is to transform the technical nature of a transaction so that a different set of rules will apply.

The maxim "These and those are the words of the living God" has as its concomitant the notion that Revelation, or more precisely, legal Revelation, is a once in an eternity phenomenon. That is clearly a very profound theological doctrine. It is unique to Judaism and it explains why, insofar as Judaism is concerned, there cannot be a second, superseding revelation. Revelation at Sinai was unique and there never will be a comparable revelation that will result in a new covenant. The Sinaitic Code will not be repealed in whole or in part; it will not be amended, modified or supplemented. Nor is it subject to further divine interpretation or resolution of ambiguities.

IV. Halakhic Decision-Making

As is well known, the Talmud is comprised of two parts: 1) the Mishnah, compiled by Rabbi Judah the Prince in the first century C.E.; and 2) the Gemara, redacted by Ravina and Rav Ashi in approximately the year 500 C.E. The Mishnah is the first authoritative written exposition of the Oral Law. Once committed to writing it became the text studied, expounded and debated in the academies of subsequent generations. Among the canons of halakhic decision-making having the most far-reaching effect is the principle that unequivocal and uncontradicted rulings recorded in the Mishnah are incontrovertible. Thus, the Amora'im, literally the "expounders," who flourished roughly between the years 100 and 500

C.E., explained and amplified rulings recorded in the Mishnah but did not venture to express disagreement.

The rulings of the Mishnah and later of the Gemara might well be described as precedents but, if so, in the sense of strict or binding precedents as that rule developed in England during the 19th century. Under the doctrine of strict precedent, earlier rulings are to be cited and must be followed because such rulings are "not merely evidence of the law but a source of it."[3] But, unlike British law, the doctrine in Halakhah is not a convention of judicial practice subject to revision. The principle is regarded as inviolate; the question is – Why? An early 20th century scholar, Rabbi Elchanan Wasserman, "*Kuntres Divrei Soferim*," appended to his *Kovez Shi'urim*, II (Givatayim, 5720), 95, advanced an intriguing halakhic hypothesis explaining the rigid nature of that rule.

Certainly, a decision of the Great Sanhedrin, or the *Bet Din ha-Gadol*, is final. That is because God decreed that we establish a judiciary in which a *Bet Din ha-Gadol* constitutes the highest authority. The primary role of the *Bet Din ha-Gadol* was not to sit as a court of original jurisdiction with regard to certain specified matters or even as an appellate court to which conflicting opinions of inferior courts might be brought for final resolution. The primary function of the *Bet Din ha-Gadol* was to determine the Halakhah with finality in any instance of conflict or doubt. In cases of doubt, an inferior court could, in the midst of its proceedings, certify a question for adjudication by the *Bet Din ha-Gadol*. In instances in which different inferior courts espoused diverse positions, the decision of the *Bet Din ha-Gadol* became controlling. A *dayyan* became a *zaken mamreh*, "a rebellious scholar," only if he persisted in ruling contrary to an authoritative declaration issued by the *Bet Din ha-Gadol*. The power of final determination in establishing normative Halakhah was vested in the *Bet Din ha-Gadol*. It was the *Bet Din ha-Gadol* that established Halakhah definitively for posterity. That is certainly not to say that if two lower courts issued conflicting opinions, one was "right," and one was "wrong." In the world of transcendental truth, i.e., in terms of theoretical Halakhah, both opinions remain in

3. John William Salmond, *Jurisprudence; Or, The Theory of the Law,* 2nd ed. (London, 1907), p. 160.

the nature of *elu va-elu divrei Elokim ḥayyim*. But in terms of practical decision-making, the Halakhah was determined with finality in accordance with the ruling of the *Bet Din ha-Gadol*.

R. Judah the Prince did not function as a solitary reporter engaged in compiling a restatement of Halakhah. His work was a product of consultation and collaboration with the many preeminent rabbinical authorities of his day. The authority of the Great Sanhedrin, asserts Rabbi Wasserman, was derived from the role of its members as representatives of, and spokesmen for, their contemporaries. They constituted what might be termed a "house of delegates" whose authority was derived from their representative role. If so, those whom they presumed to represent might well, at any point, have reclaimed their authority. With the lapse of the Great Sanhedrin, adjudicative power returned to those scholars but could be exercised only collectively. As a matter of historical fact, those scholars did not meet in periodic synods but consensus did arise during the course of their deliberations with Rabbi Judah. Consequently, the decisions reflecting the consensus of the scholars of that period as recorded by the redactor of the Mishnah are endowed with binding authority equal to rulings of the Great Sanhedrin. Those determinations can be modified only by a body of equal authority, *viz*., a Great Sanhedrin.

Halakhic decisions recorded unambiguously and unequivocally in the ensuing discussions of the Gemara are accorded the same deference. It is well established that the Amora'im did not challenge the definitive rulings of the Tanna'im. They did not take issue with a Mishnah other than upon reliance on a *beraita*, a tannaitic text contemporaneous with the Mishnah. Subsequently, after the close of the period of the Amora'im, no scholar challenged the rulings of the Amora'im. Why?

Again, explains Rabbi Wasserman, Ravina and Rav Ashi served as editors, or reporters, rather than as authors. The redaction of the Gemara by Ravina and Rav Ashi was undertaken in a manner quite similar to the redaction of the Mishnah by R. Judah the Prince. Their monumental work was a collaborative effort undertaken in conjunction with their peers. In the absence of a Great Sanhedrin, the scholars of the period were collectively endowed with the powers vested in that judicial body. Hence, a decision recorded as a result of the collaborative efforts

of the Amora'im was, in effect, a decision of the Great Sanhedrin. Since those decisions are tantamount to rulings of a Great Sanhedrin they are binding for posterity unless and until reversed by a body vested with the authority of a Great Sanhedrin.

A similar phenomenon with regard to the doctrine of precedent occurred in the form of a distinction drawn between *Rishonim* and *Aḥaronim*, or "early-day scholars" versus "latter-day scholars." An informal rule arose – admitting of some exceptions – to the effect that scholars of later generations do not deviate from rulings recorded by scholars of earlier generations unless they can adduce support for their position from the writings of early-day authorities. The point of demarcation – although not hard and fast – is roughly the year 1500 C.E. That distinction, however, proved to be more in the nature of a convention rather than an inviolate rule. Thus, for example, R. Elijah of Vilna took issue on occasion with rulings of *Rishonim* and his authority to do so went unchallenged.

The distinction between early-day and latter-day authorities may be a convention but it is not arbitrary. Since the distinction between *Rishonim* and *Aḥaronim* became widely accepted, it, too, has become part of the *masorah*, i.e., transmission, of the Halakhah and, consequently, the reasons underlying that principle are largely irrelevant. To the best of my knowledge, since Halakhah is not their forte, historians have not dealt with that issue. Nor are the reasons for this development clearly enunciated in rabbinic literature. Nevertheless, what I regard as the crucial factors are not difficult to discern and have been established beyond cavil. In earlier periods of Jewish history the corpus of Halakhah was transmitted directly from teacher to disciple. During those years there was an unbroken chain of tradition in which a teacher transmitted to his students all that he knew. The period spanning the late 15th and early 16th centuries was a time of political, economic and social turmoil with the result that aspiring scholars no longer had the opportunity to spend years and years studying at the feet of a renowned master. The Spanish expulsion of 1492 is the most widely known, but Jewish communities in France and Germany were also uprooted and became victims of banishment and exile. Persecution and discriminatory edicts brought economic upheaval in their wake. Plagues and epidemics decimated the population

of Europe and contributed to further relocation of vast numbers of Jews in the hope of survival. Studies were interrupted; fewer and fewer students could afford the luxury of years of single-minded uninterrupted study under the tutelage of a recognized scholar.

The consequence was a *hefsek* or lacuna – or, better, lacunae – in the *masorah*. No longer was there a full and complete transmission of one generation's scholarship to the next. No longer could students claim that the erudition of their mentors had been passed on to them in its entirety. Instead, there arose a well-founded recognition that the scholarship of earlier generations was more comprehensive and far superior to that of their successors. Well-placed intellectual humility spawned judicial reticence. Rulings of early-day authorities were not to be disturbed.

As a result, anything stated by an *Aḥaron* is subject to a caveat, namely, the scholar might well have reached a different conclusion had he exhaustively studied that area of Halakhah with his mentor. Moreover, since one cannot be proficient in one area of Halakhah without being proficient in all areas, a latter-day scholar would be extremely reticent in contradicting an early-day authority because of a well-grounded fear that he may be missing a point or an insight that would have made a difference in the applicable determination. But regardless of the underlying reason, the convention has become integral to the *masorat ha-Yahadut*, i.e., the recognized tradition of Judaism.

Later, the posture of judicial humility extended even to precedents established during the early period of the *Aḥaronim*. A doctrine of "loose precedent" was established, i.e., earlier decisions might be quoted and, more likely than not, would be followed, but did not control in an absolute sense. The underlying rationale was that each successive generation regarded the scholars of previous generations as having achieved greater halakhic competence and prowess. By and large that assessment was accurate.

Paradoxically, the greatest blow to the transmission of the art of halakhic decision-making was the rise of the yeshivah movement beginning with the establishment of the yeshivah of Volozhin in 1802. Previously it was usual for the *Rav* of every local community to gather a small group of students, most often only a handful, sometimes somewhat more, but rarely any large number. The *Rav* delivered *shi'urim*, or

lectures, devoted primarily to Talmud and Codes. But as a result of that association the students became privy to questions brought to the *Rav* and his responses to them. Even without consciously seeking to acquire proficiency in matters of practical halakhah they absorbed the art of *psak* or rendering decisions. The curriculum of a yeshiva that enrolled large numbers of students did not provide for formal instruction in any area of practical rabbinics, including *psak halakhah.* Some students aspiring to rabbinic posts journeyed to the venue of an acclaimed rabbinic figure for what has come to be termed *shimmush,* or observation of a *posek* practicing his calling. The amount of time devoted to that endeavor was generally limited and comparatively few students sought such opportunities. The net result was that many candidates for the rabbinate, products of acclaimed *yeshivot* and themselves consummate scholars, entered the rabbinate as neophytes in matters of *psak halakhah*, i.e., halakhic decision-making. That situation, to a greater or lesser degree, has persisted until the present.

METHODOLOGY OF *PSAK*

Zot ha-Torah lo tehe muḥlefet;[4] Halakhah is immutable. Therefore, Halakhah is not subject to change. Facts change; situations change. When applied to different facts and variegated situations, halakhic determinations need not be uniform but they are not inconsistent.

Halakhah exists in two diverse realms: in the abstract and in the concrete. There is certainly room for disagreement and controversy in the realm of theoretical Halakhah – *Elu va-elu divrei Elokim ḥayyim*. But it is impossible to apply conflicting theoretical principles to matters of normative practice. Perforce, Halakhah must incorporate canons of decision-making. Those canons are themselves not without some degree of controversy. Thus, different decisors, applying different canons, may on occasion issue diverse rulings.

It is almost a truism that *psak halakhah* is both a science and an art. To the extent that it is a science, I suppose its methodology can be taught. To the extent that it is an art, it probably cannot be taught. Either a person is blessed with artistic talent or he or she is not. A person either

4. Maimonides' Ninth Principle as formulated in the Prayerbook.

has a feeling for music or he or she does not. People who do have a talent can be trained to develop and apply that talent.

Ein adam omed al divrei Torah elah im kein nikhshal ba-hem (*Gittin* 43a). A person does not "arrive" at, or "succeed" with regard to, a matter of Halakhah unless he first "stumbles." Must one really stumble or err in a matter of Halakhah in order to understand it? Noteworthy is the phrase "*divrei Torah* – words of Torah" – rather than the singular "word of Torah." It is not a particular provision of Halakhah that must be violated in order to arrive at a proper understanding. It is the analysis or proper understanding that remains elusive until one "stumbles" in its understanding by recognizing and eliminating incorrect understandings. An infant does not learn how to walk without first stumbling multiple times. In order to grasp the correct analysis it is often necessary to formulate several alternative analyses in order to understand why they must be rejected.

One minor – almost trivial – example. Some years ago, I participated in a family celebration. I pronounced the *berakhah* recited over bread and began to eat a piece of home-made *ḥallah*. To my palate, it had an unusual taste. I turned to the hostess and asked, "How much fruit juice did you put into the *ḥallah*?" The young lady, who was quite knowledgeable, immediately realized that I was not questioning her skill as a baker. Without missing a beat she replied, "I am always careful to knead the dough with more water than fruit juice." My follow-up question was, "But in addition to the juice, how much sugar do you mix into the dough?" Sure enough, the sugar together with the juice was greater in quantity than the amount of water employed. The young lady knew quite well that for baked goods to be considered bread, the major portion of the liquid with which they are kneaded must be water. She did not realize that granulated sugar is a dehydrated form of the sap of sugarcane and has the halakhic status of fruit juice.

In conventional terms, sugar is not juice. To understand that it is "juice," one must formulate and reject the notion that "juice" exists only in liquid form. Only by "stumbling," i.e., rejecting alternative analyses, can one arrive at the correct understanding of a halakhic concept. Such modes of analysis are the essence of the "art" of halakhic decision-making.

But the process is not as simple as it might appear. Were it nothing more than application of a set of principles to concrete situations involved, the task might be assigned to a properly programmed computer; "Rabbi Google" might be the recognized authority. To be sure, computer software could be – and to a significant extent has already become – an invaluable tool, no less so than the encyclopedic compendia of various areas of Halakhah that are emblematic of current rabbinic scholarship. But halakhic decision-making, particularly in contemporary times, requires far more.

It seems to me that, as currently rendered, *psak halakhah* may be separated into three distinct categories to each of which I have assigned names. My nomenclature is certainly not hard and fast; it may well be the case that more apt terms might be found but the ones I have chosen seem to be accurate depictions:

1. First and foremost: "Substantive" *psak*. Substantive *psak* involves a determination of "bedrock" Halakhah, i.e., definitive establishment of rules and principles. To my mind, there are three subcategories of substantive *psak,* as shall be discussed.
2. "Adjudicative" *psak*. The word "adjudicate" is rarely used in common parlance, but, basically, to adjudicate is to decide between conflicting claims. As herein described, adjudication involves choosing between conflicting assertions regarding the correct formulation of a halakhic rule or regulation. The lion's share of *piskei halakhah*, or halakhic rulings, involve adjudicating in one form or another between conflicting opinions or precedents.
3. "Prophylactic" *psak*. A decision or directive designed to avoid arriving at a definitive *psak*. An alternate term might be "halakhic punting." Avoiding the need for *a psak* is an art in and of itself.

Let us examine each of these categories individually.

I. Substantive *Psak*

1. Distillation of Sources

Substantive or elemental *psak halakhah* in its pristine form is deductive in nature. The halakhic ruling is deduced from given sources. Substantive *psak* involves the process of *le-assukei shema'teta aliba de-hilkhata* – use of dialectic processes based upon authoritative sources in order to

reach a normative conclusion. When a question is posed, it is relayed to a "computer," which we call the human brain, that has already been loaded with all the requisite legal and methodological information. The brain searches its data files and applies innate powers of deduction in order to find the answer to the specific question. Obviously this genre of *psak halakhah* is appropriate only for a "*talmid she-higi'a le-hora'ah*, i.e., a student who has acquired the degree of proficiency necessary to issue rulings." I do not have the faintest idea how a person who is not a "*talmid she-higi'a le-hora'ah*" could pretend to engage in substantive *psak halakhah.* At its very minimum, that term means quite simply that a person must be proficient in Talmud and Codes in order to engage in substantive *psak*. Substantive decision-making entails plumbing those sources for rules and precedents to be applied to the question at hand.

Questions addressed in this manner result in answers that are compelled, just as the conclusion of an Aristotelian syllogism is compelled: All men are mortal. Socrates is a man. Therefore, Socrates is mortal. The human intellect has no discretion with regard to arriving at that conclusion. Once the premises are accepted, *viz.*, that all men are mortal and that Socrates is indeed a man, there is no logical choice but to affirm that Socrates is mortal.

When the human intellect is brought to bear upon a given set of premises, which in our case is the entire corpus of halakhic material, the conclusion should be readily apparent. However, the human intellect is idiosyncratic. Unlike the case with regard to Aristotelian syllogisms, in halakhic decision-making, different people may arrive at different conclusions. "*Ke-shem she-ein parẓufeihen domin zeh la-zeh, kakh ein da'atan domah zeh lah-zeh* – Just as their countenances are not uniform so are their intellects not uniform" (Palestinian Talmud, *Berakhot* 9:1). It is not a case of one size fits all. Beyond elemental argument forms grasped by the intellect in a uniform manner, human thought processes diverge and are capable at arriving at differing conclusions based upon the same set of premises. Different minds employ different thought processes and draw different conclusions from identical premises. To each of those minds the decision reached is perceived as compelled. The conclusions arrived at by each individual are dictated by the manner in which his or her intellect has been "programmed."

Two orthopedists may look at the same X-ray of the lower spine. One diagnoses arthritis, the other sciatica. One is correct in his diagnosis and one is wrong. Both are equally skilled and equally proficient practitioners. Their disparate diagnoses are the result of individualized thought processes that, to the best of my knowledge, no one can explain in precise neurological terms. Different people view the same set of Rorschach blots and perceive them as different representations. Indeed, the same person may at different times perceive different figures in the same ink blots. The viewers' optical faculties are quite uniform and the raw visual phenomenon is identical. But we do not "see" with our eyes; we see with our brains. It is the brain that processes the visual phenomenon in a way that is far from uniform. Different people "see" different figures because the visual phenomenon is not processed in a uniform manner by the neurological systems of different individuals.

It is precisely that process that gives rise to the principle of *elu va-elu divrei Elokim ḥayyim.* Scholars examine a single question and arrive at contradictory conclusions. Each conclusion is correct; each conclusion represents the words of the living God. Qualified scholars sincerely engaged in a quest for halakhic elucidation are infallible. Judaism recognizes a doctrine of limited scholarly infallibility.[5] Judaism regards not only a single person to be vested with infallibility but recognizes an entire class of people to be infallible, *viz.*, all qualified rabbinic scholars. Those scholars are infallible in the sense that, by definition, their determinations, when based upon valid scholarship, cannot be wrong.

This concept is difficult to grasp because, ostensibly, Halakhah establishes something as permissible or Halakhah establishes it as prohibited – both propositions cannot be true at one and the same time. The matter seems to be analogous to the apocryphal story of a rabbi who was presiding over a hearing conducted by his rabbinical court. The plaintiff presented his case and the rabbi informed him, "You are right." Then the defendant presented his case and the rabbi responded, "You are right." At that point the rabbi's wife, who had been eavesdropping outside the door, barged in and exclaimed, "But how can they possibly both be right at the same time?" To which the rabbi replied, "You are also right!"

5. Cf., R. Moshe Feinstein, *Iggerot Mosheh, Oraḥ Ḥayyim,* I, Introduction.

"Elu va-elu divrei Elokim ḥayyim – These and those are the words of the living God" is an expression of the doctrine that contradictory conclusions are, at times, exactly what the doctor ordered, i.e., such conflicting conclusions are precisely what the Deity ordained. Contradictory conclusions, when sincerely arrived at, are part of the divine plan. God revealed a corpus of Halakhah that is intentionally ambiguous and allowed man to become actively involved in shaping its clarification and application.

R. Joseph Ber Soloveitchik of Brisk, in his commentary on the Bible, *Bet ha-Levi, Parashat Lekh Lekha,* eloquently explains the meaning of the divine appellation *"Shaddai,"* rendered by the Sages as a usage similar to an acronym connoting "I who said to My universe, 'Enough!'" The created universe, according to *Bet ha-Levi,* is a work in progress. God created the raw materials necessary to support human existence. He allowed for refinement and development of those materials but left it to man to complete the process by means of agriculture and craftsmanship. Seeds germinate and wheat grows in the field. The Creator could readily have provided a climate in which heavy winds would dislodge seeds from their stalks, beat them against one another until they become a powder, then cause the pulverized flour to be become inundated by rain that would churn the flour into dough and thereupon cause the sun to shine brightly so that its heat would bake the dough into bread. However, God proclaimed, "Enough! – I have done as much as I am going to do; the rest I leave to man to complete." Man is charged with becoming a partner with God in completing the process of Creation.

The same, it seems to me, is the case with regard to Torah as well. Revelation is the beginning of the halakhic process, not the end. God gave the Torah to Israel at Sinai and, as earlier noted, Revelation thereupon became complete; Revelation is a once in an eternity event. Torah, and its emergent Halakhah, are not subject to change. But Halakhah must be applied in an infinite variety of circumstances, including phenomena and eventualities that could not possibly have been fathomed by Jews standing at the foot of Mount Sinai. The Torah contains broad principles and even detailed minutiae but is silent with regard to many specific matters and humanly unfathomed eventualities. It was the divine intention that man accept the Torah in its entirety, including the Oral

Law transmitted through Moses, accompanied by canons of interpretation and then to apply human intellect to fill lacunae and to resolve questions as they arise.

Provided that the scholar conducts his inquiry within the parameters of that process the conclusions to which he is led are *ipso facto* valid. But those conclusions are "the words of the living God" only if they are reached by a scholar who is proficient in Talmud and Codes and who has arrived at those conclusions with intellectual honesty. If the qualified scholar applies the canons of *psak halakhah* to the received corpus of Torah, *ipso facto* he cannot be in error even when there is ample room for disagreement and others may be led by their intellects to a contradictory conclusion. In announcing contradictory conclusions and issuing conflicting rulings each halakhic decisor is giving expression to the words of the living God. Thus, man is the partner of God, not only in bringing the physical world to completion, but also in uncovering the mysteries of the Torah in all their complexities. The type of deductive *psak halakhah* described herein as substantive *psak halakhah* is scientific in that it is derived from acknowledged premises, but it is also an art in that it involves applying the human intellect in a manner that is not univocal.

The primacy of this form of *psak* is expressed in a quizzical, yet penetrating, statement of R. Judah Loew (Maharal) of Prague. Maharal was vehemently opposed to reliance upon the *Shulḥan Arukh* of R. Joseph Caro for the purpose of deriving halakhic rulings. As will be discussed, Maharal regarded an undertaking of such an endeavor as potentially antithetical to the halakhic process.[6]

Centuries earlier, there were those who objected to the dissemination of Maimonides' *Mishneh Torah*. In the case of the *Mishneh Torah* there were two types of objection. There were objectors, of whom R. Abraham ben David of Posquieres (Ra'avad) is the premier example, who in frequent instances did not agree with particular rulings of Maimonides. But other expressed a more fundamental objection. There were many prominent figures who were afraid that Maimonides would be successful. It is a well-kept secret, but Maimonides' project was an

6. *See* R. Judah Loew, *Derekh Ḥayyim, Avot* 6:6 and *idem, Netivot Olam, Netiv ha-Torah*, chap. 15.

abject failure. Maimonides failed miserably at what he set out to accomplish; but he was also wildly successful in what he did not at all set out to do. He did achieve a measure of success in that the *Mishneh Torah*, together with *Rif* and *Rosh*, became one of the three primary sources followed by later decisors. But his real success was in providing grist for *shi'urim* and lectures to be delivered by *roshei yeshivah* and in making puzzling statements destined to become the subject matter of scholarly disquisitions. He was highly successful in formulating conclusory statements that became comprehensible only upon brilliant and penetrating analyses. He enabled R. Chaim of Brisk and other expositors to postulate and demonstrate theoretical aspects of Halakhah that would not have occurred to them but for the writings of Maimonides.

Maimonides, though, set out to do something far different and, to the minds of many, far less creative. Maimonides' purpose was to compose a Restatement of Jewish Law. He sincerely believed that, with the availability of the *Mishneh Torah*, there would be no compelling need for a person's library to contain more than a copy of the Bible and the *Mishneh Torah*; a person would not really need other rabbinic works. A decisor would be equipped to issue halakhic rulings simply by perusing the *Mishneh Torah*. Nevertheless, with the exception of a tiny group of Maimonidean adherents in Yemen, no one has ever accepted the *Mishneh Torah* as a kind of *Kiẓur Shulḥan Arukh* or simple and concise restatement of Jewish law; Maimonides did not succeed in achieving that goal. I would be so bold as to add that it is highly fortunate that he did not succeed in achieving that goal. Maimonides' critics opposed dissemination of the *Mishneh Torah* precisely because they recognized the danger inherent in the success of Maimonides' quest. Divine providence supported those opponents.

Later, when the *Shulḥan Arukh* appeared, it met with the same opposition. R. Moses Isserles (Rema), disagreed with R. Joseph Caro with regards to innumerable matters and many others did so as well. But those disagreements, numerous as they may have been, were, in a manner of speaking, no more than a form of nit-picking. Scholars beginning with Rema accepted the work while seeking to correct perceived errors and to fill lacunae. However, scholars such as Maharal[7] and R. Solomon

7. *Loc. cit.* See also the elder brother of Maharal, R. Chaim ben Betzalel, introduction

Luria (Maharshal)[8] opposed the very nature of the enterprise. They did not welcome a dissemination of a brief digest of halakhic determinations. Had it been within their power, they would have suppressed the work in its entirety. Their objections seem remarkably similar to those of professors who object to students' use of CliffsNotes even though their answers to examination questions based on those notes may be entirely correct. The answers may be correct but the students' education is seriously truncated. The purpose of education is not simply to learn facts or find answers to particular questions, but to master the corpus of knowledge that yields those answers and that may be harnessed in exploring other issues as well.

But, the manner in which Maharal expressed himself sounds extremely strange to our ears. He made the bold statement that he would prefer a rabbinic authority to rule on the basis of his independent perusal of the Gemara, the writings of early-day authorities and other rabbinic sources, even though "one must fear" that the result might be an erroneous decision rather than to have him consult the *Shulḥan Arukh* and rule correctly.[9] When I came upon that statement for the first time, I was astounded. How could Maharal possibly endorse an incorrect halakhic ruling? The statement sounds not merely wrong-headed but unconscionable as well.

Let me try to explain Maharal's reasoning. Maharal firmly maintained that the fundamental principle of *elu va-elu divrei Elokim ḥayyim* applies precisely to the type of substantive *psak halakhah* that has been described. When a person who has mastered the entire Oral Law puts aside any possible biases that he might have – which is not at all an easy task – applies his intellect and finally reaches a conclusion, that conclusion is mandated by divine providence. The scholar's conclusion is precisely the determination that God desired him to reach and exactly

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to *Vikkuaḥ Mayim Ḥayyim* (Amsterdam 5472). Cf., R. Joseph ibn Migash, *Teshuvot Ri Migash,* no. 114, who states that "in our times" there is no person who has acquired the requisite level of talmudic erudition necessary to render decisions on the basis of the Gemara alone.

8. See Maharshal, introduction to *Yam Shel Shlomoh, Ḥullin*; see also introduction to *Yam Shel Shlomoh, Gittin*.

9. *Netivot Olam, Netiv ha-Torah*, end of chap. 15.

how the Almighty wanted him to rule despite the contradictory – and equally valid – ruling of R. Joseph Caro.

If some other qualified scholar declares the opposite to be correct, so be it. That is how the halakhic process was designed to operate, i.e., by application of human intellect and formulation of diverse views. Maharal did not want a scholar to feel intimidated by the *Shulḥan Arukh*. Even more momentous is the fact that he did not want the halakhic process to be stunted by removing the impetus for a scholar to embark upon his own independent investigation. Never mind that it is no less a personage than the author of *Shulḥan Arukh* who disagreed and that Maharal brands the view contravening the ruling of *Shulḥan Arukh* as incorrect: *elu va-elu divrei Elokim ḥayyim*.

To be sure, the person who makes no attempt *le-assukei shema'teta aliba de-hilkhata* – i.e., to base his ruling upon investigation of primary sources – whether because of an inability to do so or because of laziness or convenience – and instead consults a compendium or an array of compendia and, relying upon such secondary sources, reaches an incorrect conclusion on the basis of imprecise reading, inapt application or incorrect analogy cannot claim that his ruling is an embodiment of *divrei Elokim ḥayyim*. However, if a proficient scholar assiduously reviews the relevant material contained in the Talmud and Codes and arrives at what Maharal would regard as an incorrect conclusion, his "erroneous" opinion is nevertheless within the parameters of *elu va-elu*. Yet, if he arrives at the wrong answer simply by perusal of the *Shulḥan Arukh* he is responsible for his error. Maharal would prefer that the scholar reach a non-normative conclusion provided that he does so legitimately in accordance with the principles of halakhic dialectic rather than to have him find the normative rule by expeditiously consulting a compendium. There is no great spiritual or intellectual achievement in opening a book and finding the correct answer. That is not the task assigned to a halakhic decisor; the *posek* is supposed to proceed *de novo* in arriving at a decision.

Unfortunately, what Maharal feared might occur is essentially what has become the prevalent and accepted norm. Maharal was perspicacious enough to recognize that it *would* occur and he was saddened by the prospect. History, which is a synonym for divine providence, dictated that *Shulḥan Arukh* be accepted by the Jewish community with the result

that it has become part of the chain of tradition. *Nitkatnu ha-dorot* – the intellectual capacity of recent generations has become diminished. It is not impetuous to assume that divine providence guided acceptance of the *Shulḥan Arukh* because we suffer from a dearth of rabbinic decisors sufficiently qualified and capable of independently recreating the decisions of the *Shulḥan Arukh* – or parallel, albeit not identical, decisions in the process of *le-assukei shema'teta aliba de-hilkhata*. Necessity, stamped with the divine imprimatur, requires acceptance of less than the ideal.

2. *Issue-Spotting* Psak

There is a second substantive form of *psak* that, for lack of a better term, may be categorized as issue-spotting *psak*, i.e., *psak* in terms of identification or categorization.

In medicine, there is a process of differential diagnosis. A patient presents with a wide array of symptoms. The physician must take cognizance of each one of the many symptoms and relate each of them to a particular malady and, in the process, determine which and how many of those symptoms are related to one disease and which and how many to another. Of course, the physician must also recognize that some symptoms, under the circumstances, may be totally meaningless. On the basis of recognition of the import of the various symptoms the physician determines the most likely nature of the illness and treats the patient accordingly.

In the study of law that endeavor is called "issue-spotting." When presented with a complex legal problem, a jurist or student of the law must identify the issues. Only after the issues have been properly identified can one apply the law. In national law schools, professors pride themselves in asserting that they do not teach the law; rather, they teach the students to think like a lawyer. A typical law school examination consists of hypothetical fact patterns. The student is required to analyze the hypothetical and to identify the component issues. He or she must then bring to bear any statutory or case law that may apply. The latter exercise is generally the least of a competent student's challenges; the primary task is to identify the issues that are germane and require elucidation.

It is no secret that, in Lithuania, some roshei yeshivah and prominent rabbinic figures were known to have conferred ordination upon a

student who had not exactly mastered *Yoreh De'ah*. Their apologia was that they granted *semikhah* because the student was a *lamdan*, a *talmid ḥakham* who knew how to approach a complex talmudic topic and analyze it properly. The student was also a *yarei Shamayim* – a God-fearing person; the student would not undertake to answer a query unless he had mastered the sources. The student may not as yet have exhaustively studied the laws pertaining to the admixture of milk and meat but he was confident that as soon as a congregant came to him with a question regarding the *kashrut* of a pot or a pan the student could immediately apply himself and become proficient. The student had already mastered the art of halakhic analysis; he was also familiar with the issues, if not with their resolution. He knew how to think like a *posek*! Facility in issue-spotting is not easily acquired but is crucial to the process of *psak*.

R. Samuel Edels (Maharsha) records a remarkable comment in his *Ḥiddushei Aggadot, Sotah* 22a. Maharsha bemoans the fact that, already in his day, scholars were relying upon the *Shulḥan Arukh* rather than on their own halakhic prowess. He bemoans that practice because, as a result, rabbinic decisors had become intellectually lazy; in seeking answers they no longer bothered to analyze the relevant talmudic discussions. They simply relied on the *Shulḥan Arukh*. In effect, they did not find it necessary to think. They did not engage in meaningful analysis because they did not deem it to be necessary. They assumed that they knew all that was necessary for them to know because they had consulted the *Shulḥan Arukh* and engaged in superficial comparisons. Their conclusions were frequently incorrect, not simply because they were following the *Shulḥan Arukh* blindly, but because they drew false analogies and missed crucial distinctions.

No one can conceive of the contextual circumstances of every possible question or problem that might arise. It is not possible to author a *Shulḥan Arukh* or a Restatement that covers every possible contingency. Later scholars cited by *Pitḥei Teshuvah* comment that the Maharsha's criticism was on target when it was written but now that the commentaries of *Bet Shemu'el* and *Ḥelkat Meḥokek* as well as of *Shakh* and *Taz* have been incorporated in all published editions of the *Shulḥan Arukh*, all possible contingencies have been addressed. Nevertheless, I beg to differ and have reason to believe that contemporary decisors would do

so as well. I believe that *Pitḥei Teshuvah*'s claim was exaggerated when it was written and is even less correct today. As is immediately evident upon even a cursory survey of latter-day responsa, there are many contingencies left unaddressed by the commentaries on the *Shulḥan Arukh*. Moreover, novel problems that could not possibly have been anticipated in earlier times arise on an ongoing basis.[10]

An excellent example of the type of issue-spotting involved in the process of arriving at a *psak halakhah* may be found in R. Abraham Kornfein, *Shimmushah shel Hora'ah* (Jerusalem, 5754), no. 13. The situation involved a person who was cooking a quantity of chicken legs in a large pot. Let us assume that there were fifty-five chicken legs in the pot. Along came someone carrying a non-kosher chicken leg who proceeded to throw it into the pot. The intuitive response would be that the ratio of kosher legs to non-kosher legs is only fifty-five to one – less than the requisite proportion of sixty to one required for *bittul,* or nullification. Hence, the non-kosher chicken leg does not become nullified and the entire pot is non-kosher. *Shimmushah shel Hora'ah* points out that such a conclusion would be incorrect. Chicken legs contain bones. Bones are not meat but they are absorbent. Consequently, in a mixture of food that includes both kosher and non-kosher bones, in establishing the ratio for purposes of nullification, the non-kosher bones, which do not emit "taste," may be ignored while the kosher bones, which do absorb "taste," are included in establishing the ratio of dominant kosher food in the mixture. The weight or mass of fifty-five chicken legs from which bones have not been removed is far more than sixty times that of the meat of a single chicken leg minus its bone. If all the chicken legs are approximately the same size, the ratio of fifty-five legs, including bones, to the meat of a single leg minus its bone is certainly more than sixty to one with a result that, *ceteris paribus,* the non-kosher chicken is nullified and all the contents of the pot are kosher.

Another example that is well-known in yeshivah circles: The story, which may well be apocryphal, involves R. Chaim Soloveitchik of Brisk and an unnamed Polish rabbi who met at a wedding. R. Chaim

10. See also my earlier discussion of Maharsha, *Contemporary Halakhic Problems,* V (Southfield, Michigan, 2005), xvi–xvii.

commented that one cannot engage in *psak halakhah* unless one is a *lamdan*, i.e., trained in penetrative halakhic analysis. The Polish rabbi countered that Polish *rabbanim* had no need for Brisker methodology. R. Chaim is reported to have responded by posing a seemingly elementary question: Suppose that two women, one Jewish and the other non-Jewish, were both cooking outdoors in separate pots. Some of the contents of the non-kosher pot accidentally spilled into the kosher pot. Whether or not there was sixty times more food in the kosher pot than in the non-kosher one is a matter of empirical doubt. Does the food remain kosher?

The Polish rabbi replied that since the situation involves foodstuffs of a single nature and classification and since the "tastes" are identical, the non-kosher food is biblically nullified even if only the majority of the mixture is kosher; the requirement of the larger proportion of sixty to one is a matter of rabbinic edict. Accordingly, since it is certain that the mixture contains a greater quantity of a permissible substance, the contents of the pot are definitely permissible as a matter of biblical law. The question presents a matter involving doubtful applicability of a rabbinic edict requiring a quantity of a permissible substance sixty times that of the non-kosher substance. Hence, the applicable principle is *safek de-rabbanan le-kula* – doubt with regard to the applicability of a rabbinic prohibition is to be resolved permissively.

To that answer, R. Chaim responded, "I said that this was a non-Jewish woman who was cooking. Non-Jews do not soak and salt their meat before cooking, so there must have been some residual blood in the meat. The blood in the meat is of a category quite distinct from that of the meat itself. Therefore, the situation involves a question of *min be-she-eino mino*, a non-kosher item of one class mixed with kosher items of a different class. Since they are of different classes, and of dissimilar 'taste,' a ratio of sixty to one is a biblical requirement.[11] Consequently, the issue is a matter pertaining to biblical permissibility and must be adjudicated stringently." "All right," said the Polish rabbi, "I was in error."

11. Cf., however, *Ginat Veradim, Yoreh De'ah, klal* 1, no. 29, cited by R. Shlomoh Eger, *Gilyon Maharsha, Shakh, Yoreh De'ah* 69:57. *Ginat Veradim* cites *Shakh, Yoreh De'ah* 78:6, who rules that *min be-she-eino mino* is defined by taste rather than by nomenclature and asserts that the taste of meat and the blood within that meat is *min be-mino.*

"But," countered R. Chaim, "In conceding errors once again you missed the point! Don't you realize that for the majority of decisors, blood that has been cooked is no longer biblically prohibited? 'Cooked' blood is subject only to a rabbinic prohibition and the applicable principle would be *safek de-rabbanan le-kula*, doubts with regard to applicability of a rabbinic edict are to be adjudicated permissively." The Polish rabbi conceded that his nemesis had caught him in a second error.

However, R. Chaim relentlessly pressed on: "You again failed to recognize that because the meat was not kosher, the blood in the meat is prohibited not only because it is blood but because of another prohibition as well. Cooking blood obviates only the biblical prohibition against consuming 'blood'; it has no effect upon the prohibition against consuming *neveilah*, or carrion. Since the animal was not properly slaughtered, the animal has the status of a *neveilah* and the blood is also subject to the prohibition against carrion. Uncooked and cooked *neveilah* are equally forbidden. Consequently, the cooked blood remains biblically prohibited, not as 'blood,' but as '*neveilah*.' So, we are again left with a doubt with regard to a biblical prohibition."

By that time, the Polish rabbi was exceedingly embarrassed. R. Chaim then delivered the *coup-de-grâce*,"You have overlooked an explicit statement of *Tosafot* in *Pesaḥim*. *Tosafot*, *Pesaḥim* 22a, declare that *dam*, or blood, is not *be-khlal behemah,* i.e., blood is not included in biblical references to an animal, and hence blood is not subject to the prohibition against consuming carrion. Accordingly, we are back to a doubt only with regard to the nullification of cooked blood, a rabbinically proscribed substance, to which the principle *safek de-rabbanan le-kula* applies."

That is the anecdote as I first heard it. There is another version in which one further step is added.[12] In that version, R. Chaim pointed out that the animal that the non-Jewish woman was cooking was a *tereifah*, i.e., had suffered a trauma that rendered it non-kosher rather than a *neveilah*. I do not know how R. Chaim knew that such was actually the case. Perhaps in his hypothetical he added that the non-kosher animal

12. See R. Shimon Yosef Miller, *Uvdot ve-Hanhagot le-Bet Brisk* (Jerusalem, 5779), I, 217–218. The source of that anecdote is apparently a report of R. Menachem Mendel Chen published in *Moriah*, vol. 4, no. 3–4 (Sivan, Tammuz 5732), p. 9.

was bought from a Jewish butcher. Jewish butchers who found an animal to be *tereifah* regularly sold its meat to non-Jews. If a gentile bought meat from a Jewish butcher it might readily be inferred that the animal had been slaughtered properly but the meat was later sold to non-Jews because, upon examination, the animal was found to be a *tereifah*. The blood was then the blood of a *tereifah* rather than the blood of a *neveilah*. The blood of a *neveilah* is not prohibited as carrion because it is regarded as distinct from, and not integral to, the flesh of the animal. However, the blood of a *tereifah*, even though it is indeed distinct from the animal, is nevertheless *yoẓei min ha-tereifah*, a substance that "emerges" from, or is produced by, a *tereifah* while the animal is still alive and, therefore, it is biblically prohibited. The blood of a *tereifah* is, halachically speaking, quite unlike the blood of carrion in that blood is produced during the lifetime of an animal and if the animal is a *tereifah* its blood is a product of *tereifah*, whereas the animal cannot be a *neveilah* while it is still alive and subsequent to its death an animal can no longer produce blood. Hence, the blood of a *neveilah* is not a *yoẓei min ha-neveilah*. A person who consumes the *yoẓei* of a *tereifah*, generated while the animal is still alive, may not incur the punishment of lashes but such foodstuffs are nevertheless biblically prohibited.

To be sure, the non-Jewish woman might just have likely been cooking a pot full of pork. If so, the first issue would be: Are pork and beef considered to be a single *min*, *viz*., meat, or are they considered to be separate categories of food? That is just another factor in the relevant issue-spotting.[13]

13. See also another account of this incident in *Contemporary Halakhic Problems,* V, xvii–xxi.

One final example to illustrate how an incomplete analysis can overlook matters subject to controversy: It transpired on one occasion that R. Moshe Soloveitchik was late for *shaḥarit* on *Rosh Ḥodesh*. Praying without benefit of a *minyan*, he reached the *shemoneh esreh* prayer of *shaḥarit* just as the congregation was beginning the *shemoneh esreh* of *musaf*. Instead of reciting the *shemoneh esreh* of *shaḥarit* he proceeded to recite the *shemoneh esreh* of *musaf* together with the congregation. Had he done otherwise he would have been compelled to recite *musaf* without benefit of a *minyan*. By using this expedient he sought to satisfy the requirement of communal

3. Theoretical Analysis

There is yet another form of substantive *psak halakhah*, *viz.*, analysis of the intrinsic nature of the matters involved. This type of analytic *psak* is different from identification of relevant halakhic principles. Analytic *psak* involves examination of the very essence and nature of an applicable halakhic provision.[14]

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prayer for at least one of the *Rosh Ḥodesh* services. Rabbi Soloveitchik reasoned that his *shemoneh esreh* qualified as *tefillah be-ẓibbur* even though his prayer was *shaḥarit* whereas the congregation's prayer was *musaf*.

Upon conclusion of the services, he asked his father, R. Chaim of Brisk, whether his decision was correct. R. Chaim responded, "You are right! You are right! But you are *not* right!" The meaning of that response was: 1) You are right in assuming that the requirement of juxtaposing the blessing of "Redeemer of Israel" and *shemoneh esreh* is equally satisfied by juxtaposition of the blessing with the *musaf* prayer. 2) You are right that the *musaf* may be recited before *shaḥarit* for purposes of fulfilling *tefillah be-ẓibbur*. 3) But you are not right in assuming that it is necessary to resort to that expedient in order to achieve *tefillah be-ẓibbur*. An individual who has reached the *shemoneh esreh* of *shaḥarit* when the congregation is preparing to recite the *shemoneh esreh* of *musaf* and who then proceeds to recite the *shemoneh esreh* of *shaharit* simultaneously with the *musaf* prayer offered by the congregation also satisfies the requirement of *tefillah be-ẓibbur*.

R. Chaim's position that the requirement of *tefillah be-ẓibbur* is fulfilled in the recitation of a *shemoneh esreh* that is not identical to the *shemoneh esreh* recited by the congregation is contradicted by *Magen Avraham* 90:17 and 591:8. Secondly, on first analysis, *shaḥarit* should always precede *musaf* on the basis of the principle *tadir ve-eino tadir, tadir kodem*, i.e., performance of the more frequent requirement takes precedence over performance over the less frequent requirement. See *Zevaḥim* 89a. However, in instances in which one *miẓvah* is *tadir* but the second *miẓvah* is endowed with a greater sanctity (*mekudash*), the two are regarded as equal. See *Zevaḥim* 90b and *Menaḥot* 49a. R. Chaim evidently regarded *tefillah be-ẓibbur* as endowed with greater sanctity than individual prayer. That issue is the subject of discussion by R. Yitzchak Elchanan Spektor, *Be'er Yiẓḥak*, no. 20. A further issue arises because of the very nature of the *shemoneh esreh* prayers. Those prayers were ordained as parallels to, and replacements of, the Temple sacrifices. In the Temple, the *tamid shel shaḥar*, i.e., the daily, morning sacrificial offering, always preceded the *musaf* sacrifice of *Rosh Ḥodesh* and the Festivals. Whether that consideration itself is a reason for requiring recitation of the *shemoneh esreh* of *shaḥarit* before the *shemoneh esreh* of *musaf* is also a matter of significant discussion. See R. Moshe Feinstein, *Iggerot Mosheh, Oraḥ Ḥayyim*, I, no, 68. See also R. Zevi Aryeh Klein, *Naḥalat Ẓevi* (Jerusalem, 5782), pp. 451–454.

14. R. Iser Zalman Meltzer is quoted as remarking that the primary function of roshei

It is commonly known that if a person has failed to recite the *shemoneh esreh* he is obligated to incorporate a second recitation of the *shemoneh esreh* in the next prayer service. Thus, if a person forgets to recite the afternoon service, he recites *shemoneh esreh* twice during the evening service. If he forgets the evening service, he recites *shemoneh esreh* twice the following morning. Assume that a person has forgotten the *shemoneh esreh* during the evening service following the conclusion of *Shabbat*. Obviously, he must recite *shemoneh esreh* twice on Sunday morning. However, the *shemoneh* esreh of Saturday evening includes an insertion beginning with the words "*atah ḥonantanu*," a form of *havdalah* or liturgical separation of the Sabbath from the ensuing weekdays.

The question then is: Assuming that the person required to recite a second *shmoneh esreh* has as yet not recited the *havdalah* prayer over wine, in which of the two *shemoneh esreh* prayers recited Sunday morning must he include "*atah ḥonantanu*?" The substitute for the missed evening prayer is the second *shemoneh esreh* on Sunday morning. Accordingly, it would stand to reason that he should recite "*atah ḥonantanu*" in the make-up *shemoneh esreh*, i.e., the second *shemoneh esreh* recited on Sunday morning. That is, indeed, the ruling of *Mishnah Berurah* 294:2.

However, R. Akiva Eger and R. Chaim Soloveitchik ruled quite differently. R. Chaim explained that one must analyze the nature of "*atah ḥonantanu*." Is "*atah ḥonantanu*" integral to the *ma'ariv* of *moẓa'ei Shabbat*? If that is the case, in the case of our forgetful worshipper, it is the second *shemoneh esreh* on Sunday morning that is a substitute for the evening *shemoneh esreh*. If so, "*atah ḥonantanu*" should be recited as part of the second *shemoneh esreh*. Or was "*atah ḥonantanu*" ordained to be recited as part of the first *shemoneh esreh* after *Shabbat*? If so, for the person who forgot to pray Saturday evening, his first *shemoneh esreh* after *Shabbat* is on Sunday morning and, consequently, it would follow

yeshivah is to train students in that type of analysis and such analysis should be presented even when it is accompanied by evidence demonstrating that that analysis is incorrect. In other words, it is more important to train students to "think like a lawyer" than to teach them the law. Hence, even incorrect insights are pedagogically valuable as a means of developing analytic ability. The Brisker Rav is cited as disapproving of such exercises. See R. Moshe Shmuel Shapiro, *Niḥoḥah shel Torah*, ed. C.A. Tambeck (New York, 5763), pp. 143–144.

that he should recite "*atah ḥonantanu*" in the first of the two *shemoneh esreh* prayers. R. Chaim argues that proper understanding of the nature and import of "*atah ḥonantanu*" reveals that its integral relationship is to the first *shemoneh esreh* after the conclusion of *Shabbat* rather than to the service of Saturday evening.

Another example may be found in two possible theories regarding the theoretical underpinning of a halakhic principle. The halakhic principle is "*ta'am ke-ikkar* – taste is the equivalent of substance." The import of the principle is that, not only is a proscribed substance forbidden, but even the "taste" given off by such a substance is also forbidden. The Gemara adduces a biblical source from which the principle is derived. Now the question: Is *ta'am ke-ikkar* simply a novel prohibition superimposed upon the prohibition attendant upon the proscribed substance? Or is the prohibition more subtle in nature? "Taste" exists without substance only when a prohibited substance is dipped into a quantity of a permitted substance and removed leaving behind only "taste" but no recognizable substance or when the proscribed substance loses its identity because it has become nullified in a larger quantity of a permitted substance but the taste of the forbidden substance remains recognizable to the palate. Since in both cases some residual substance remains it is not clear that *ta'am ke-ikkar* is a novel prohibition. The more subtle theory can be expressed as an assertion that the usual principle of *bittul*, or nullification, is not operative if the "taste" of the forbidden substance remains. Expressed in other words: Is *ta'am ke-ikkar* a novel halakhic principle or does *ta'am ke-ikkar* represent merely mitigation of, or an exception to, the rule of nullification of forbidden substances?

Someone may cogently ask, "What difference does it make?" Logical positivists assert that the meaning of a proposition is its mode of verification. I have added a codicil: Halakhic positivism is the notion that the meaning of a halakhic proposition lies in its mode of halakhic verification. The import of a *ḥakirah* in Halakhah, i.e., possible theoretical alternative analyses of a halakhic principle, is to be found in a *nafka mina*, or difference, that is manifest in applied Halakhah. Verification of the theoretical nature of *ta'am ke-ikkar* is to be found in its application or non-application with regard to its role in the Noahide Code regarding a limb torn from a living animal. That issue is addressed by R. Moshe