

Rabbi Bleich is the author of the seven-volume series *Contemporary Halakhic Problems*. A second edition of *Contemporary Halakhic Problems* volumes I through III has now been published by Ktav Publishing House. A second edition of *Contemporary Halakhic Problems* volume IV and of his book of readings *With Perfect Faith* are in press.

METHODOLOGY OF PSAK

I. INTRODUCTION

Zot ha-Torah lo tebe muhlefet;¹ 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 hayyim*. 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 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.

But the process is not as simple as it might appear. Were 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

¹ Maimonides’ Ninth Principle as formulated in the Prayerbook.

TRADITION

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 “adjudicative” is rarely used in common parlance, but it is an adjective readily constructed from the verb “to adjudicate.” 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.

II. 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* – i.e. the 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-bigi'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-bigi’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 parzufeihen domin zeh la-zeh, kakh ein da’atan domah zeh la-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 of 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

TRADITION

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 hayyim*. 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 scholarly infallibility. 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!”

“*Elu va-elu divrei Elokim hayyim* – 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 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 *Shulhan Arukh* of R. Joseph Karo for the purpose of deriving halakhic rulings. As will be discussed,

TRADITION

Maharal regarded an undertaking of such an endeavor as potentially antithetical to the halakhic process.²

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 others 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 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 *Kizur Shulhan 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.

² See R. Judah Loew ben Betzalel, *Derekh Hayyim*, *Avot* 6:6 and *idem*, *Netivot Olam*, *Netiv ha-Torah*, chap. 15.

Later, when the *Shulḥan Arukh* appeared, it met with the same opposition. R. Moses Isserles (*Rema*), disagreed with R. Joseph Karo 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*³ and R. Solomon Luria (*Maharshal*)⁴ 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.⁵ 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 hayyim* applies precisely to the type of substantive *psak halakha* 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 how the

³ *Loc. cit.* See also the elder brother of *Maharal*, R. Chaim ben Betzalel, introduction to *Vikkuah Mayim Hayyim* (Amsterdam, 5472).

⁴ See *Maharshal*, introduction to *Yam Shel Shlomoh, Hullin*; see also introduction to *Yam Shel Shlomoh, Gittin*.

⁵ *Netivot Olam, Netiv ha-Torah*, end of chap. 15.

TRADITION

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

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 *Shulhan Arukh* – or parallel, albeit not identical, decisions in the process of *le-assukei shema'teta aliba de-bilkhata*. 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 students who had not exactly mastered *Yoreh De'ah*. Their apologia was that they granted *semikhah* because the student was a *lamdan*, a *talmid hakham* who knew how to approach a complex talmudic topic and analyze it properly. The student was also a *yerei 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

TRADITION

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 *Hiddushei Aggadot*, *Sotah* 22a. *Maharsha* bemoans the fact that, already in his day, scholars were relying upon the *Shulhan 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 *Shulhan 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 *Shulhan Arukh* and engaged in superficial comparisons. Their conclusions were frequently incorrect, not simply because they were following the *Shulhan 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 *Shulhan Arukh* or a Restatement that covers every possible contingency. Later scholars cited by *Pithei Teshuvah*⁶ comment that the *Maharsha*'s criticism was on target when it was written but now that the commentaries of *Bet Shemu'el* and *Helkat Mehokek* as well as of *Shakh* and *Taz* have been incorporated in all published editions of the *Shulhan 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 *Pithei 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 *Shulhan Arukh*. Moreover, novel problems that could not possibly have been anticipated in earlier times arise on an ongoing basis.

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

⁶ See *Pithei Teshuvah*, *Yoreh De'ah* 242:8.

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 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.

TRADITION

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. 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.”

“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 *nevelah*, or carrion. Since the animal was not properly slaughtered, the animal has the status of a *nevelah* and the blood is also subject to the prohibition against carrion. Uncooked and cooked *nevelah* are equally forbidden. Consequently, the cooked blood remains biblically prohibited, not as ‘blood,’ but as ‘*nevelah*.’ 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 *Pesahim*. *Tosafot*, *Pesahim* 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.⁷ In that version, R. Chaim pointed out

⁷ See R. Shimon Yosef Miller, *Uvdot ve-Hanbagot 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.

that the animal that the non-Jewish woman was cooking was a *terefah*, i.e., had suffered a trauma that rendered it non-kosher rather than a *nevelah*. 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 was bought from a Jewish butcher. Jewish butchers who found an animal to be *terefah* 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 *terefah*. The blood was then the blood of a *terefah* rather than the blood of a *nevelah*. The blood of a *nevelah* 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 *terefah*, even though it is indeed distinct from the animal, is nevertheless *yozei min ha-terefah*, a substance that “emerges” from, or is produced by, a *terefah* while the animal is still alive and, therefore, it is biblically prohibited. The blood of a *terefah* 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 *terefah* its blood is a product of *terefah*, whereas the animal cannot be a *nevelah* while it is still alive and subsequent to its death an animal can no longer produce blood. Hence, the blood of a *nevelah* is not a *yozei min ha-nevelah*. A person who consumes the *yozei* of a *terefah*, 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.

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.⁸

⁸ R. Iser Zalman Meltzer is quoted as remarking that the primary function of *roshei 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

TRADITION

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 honantanu*,” 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 *shemoneh 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 honantanu*?” 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 honantanu*” 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 honantanu*.” Is “*atah honantanu*” integral to the *ma’ariv* of *moza’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 honantanu*” should be recited as part of the second *shemoneh esreh*. Or was “*atah honantanu*” 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 that he should recite “*atah honantanu*” in the first of the two *shemoneh esreh* prayers. R. Chaim argues that proper understanding of the nature and import of “*atah honantanu*” 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 the form of two possible theories regarding the theoretical underpinning of a halakhic principle. The halakhic principle is “*ta’am ke-ikkar* – taste is the equivalent of

valuable as a means of developing analytic ability. The *Brisker Rav* is cited as disapproving of such exercises. See *Nihuhah shel Torah*, ed. C. A. Tambeck (New York, 5763), pp. 143-144.

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 deduces 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 *hakirah* 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 Sofer, *Teshuvot Hatam Sofer, Yoreh De’ah*, no. 19. Suppose that a non-Jew has a small piece of *ever min ha-hai*, i.e., a limb torn from a living animal, that falls into a pot of food. He then removes the *ever min ha-hai* but the “taste” of that piece of meat has permeated the entire mixture. Is the meat in the pot permitted to the Noahide? The intuitive response would be that there is no rule of *ta’am ke-ikkar* with regard to the Noahide commandments. Thus, the pot of meat would be “kosher” for a Noahide. But, observes *Hatam Sofer*, neither is there a principle of nullification by means of *rov*, or majority, in the Noahide Code. Consequently, since “taste” originates in a substance and there cannot be “taste” without substance even though the quantity of the substance represented by the taste is minute, the substance that gives rise to “taste” is not subject to nullification. The result is that “taste” is forbidden, not because it is taste,

but because the rule of nullification does not apply to the underlying forbidden substance. Applying a halakhic version of Occam's razor, one must deduce that *ta'am ke-ikkar* is not a novel rule even for Jews. Cancellation of the principle of nullification would suffice in itself to render food containing the "taste" of forbidden food non-kosher.

An additional example of greater relevance: *Hazakah ein adam oseh be'ilato be'ilat zenut* (*Yevamot*, 107a; *Ketubot* 73a; and *Gittin* 81b), viz., the halakhic presumption that, given a choice, a person intends his act of coitus to be for the purpose of contracting a marriage rather than an act of promiscuity. The principle certainly has the flavor of a *hezkat kashrut*, a presumption that, given the option, people act licitly rather than illicitly. But what if the person in question is a notorious evil-doer who could not care less about such matters? Does such a person's lifestyle vitiate the *hazakah* of *ein adam oseh be'ilato be'ilat zenut*? The practical effect would occur in cases of civil marriage, non-halakhic religious marriage ceremonies, etc., followed by the couple establishing a common domicile and publicly identifying as man and wife. Is it to be assumed that consummation of the relationship is for purposes of establishing a valid marriage?

The matter was indeed the subject of dispute in earlier generations. In our time, the late Rabbis Joseph Elijah Henkin and Moshe Feinstein assumed opposing positions. Rabbi Feinstein maintained that *hazakah ein adam oseh be'ilato be'ilat zenut* is simply a *hezkat kashrut*, i.e., that people are presumed to be law-abiding and hence the principle is not applicable in situations in which the parties are notorious transgressors.⁹ Rabbi Henkin claimed that *ein adam oseh be'ilato be'ilat zenut* is not a *hezkat kashrut*; rather, it is a *hezkat hanhagah*, i.e., a principle of human comportment based upon the psychological presumption that no man allows his wife to be promiscuous.¹⁰ The presumption, argues Rabbi Henkin, is that a person entering into such an enduring conjugal relationship, even if it is not contracted in accordance with halakhic formulae, wishes a monogamous relationship and will not countenance promiscuity on the part of his wife. That is simply human nature, asserts Rabbi Henkin, and such is the import of the principle *ein adam oseh be'ilato be'ilat zenut*. Since a halakhically valid marriage can be established by cohabitation alone, a public and notorious relationship as husband and wife – the equivalent of common law marriage in other legal systems – rises

⁹ See R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, nos. 5, 74-77, II, no. 19, III, no. 25 and IV, nos. 80-81.

¹⁰ See R. Joseph Elijah Henkin, *Peirushei Ivra* (New York, 5704), part 1, chaps. 3-4, reprinted in *Kol Kitvei ha-Grya Henkin* (New York, 5741), vol. I.

to the level of a halakhic marriage. The dispute clearly turns upon the correct substantive analysis of the nature of the *hezakah* in question. Whether or not a *get*, or religious divorce, is required to dissolve the relationship is a matter of analytic *psak*.

Many talmudic dicta literally beg for such analytic scrutiny. For example: “*Tav le-metav tan du me-le-metav armelu* - Better to live as a couple than to live alone,” (*Yevamot* 118b and *Bava Kamma* 111a). That talmudic dictum is often cited as a declaration that every woman prefers marriage over spinsterhood. The statement is made by the Gemara in the context of a discussion of levirate marriage in which the prospective husband is a brother-in-law who suffers from a malodorous dermatological condition that renders physical contact repugnant (*mukkeh shehin*). Thus, the ostensive import is that every woman would prefer even the most loathsome of marriage partners to a lifetime without a husband. As cited, the Gemara is purported to state a universal truism about the female psyche.

But such an assertion is demonstrably untrue. There are, to be sure, women who make no attempt, or have ceased to attempt, to find husbands. There are countless women who reject prospective suitors even though they fully realize that they have no realistic chances of finding a more desirable mate. Ergo, the Sages of the Talmud must have been laboring under some type of delusion. Or, more charitably, the world in which we live is different from the world described by the Talmud. A dramatic change must have occurred in female psychology, either a fundamental evolutionary change or a change of mindset as a response to differing economic, sociological and/or cultural factors. If that is indeed the case, the halakhic provisions predicated upon the announced empirical principle should no longer pertain. In particular, at least in some extreme circumstances, a woman should be released from levirate bonds because, had she been aware of the fate in store for her, *ab initio* she would not have consented to the marriage. Arguably, this result should not be limited to childless marriages in which there are levirate obligations but should also be the case with regard to all marriages in which a husband becomes afflicted with a degenerative physical malady or develops insufferable character traits.

However, such a conclusion is the result of a faulty understanding of the words of the Gemara. The conclusion rests upon reading into the words of the Gemara much more than those words serve to establish. A correct understanding of the text reveals that the Gemara does not make a universal assertion about every woman. The Gemara does not state that *every* woman prefers a *mukkeh shehin* to spinsterhood. In

TRADITION

context, the Gemara is considering the case for retroactive nullification of a marriage in which a woman faces levirate marriage with a *mukkeh shehin*. The contention is that she would not have entered into the marriage in the first instance had she known that her husband would die without issue and that, consequently, she would find herself with a *mukkeh shehin* as a spouse. Hence, the marriage was contracted in error and should be regarded as void *ab initio*. To be sure, were the marriage to have been expressly conditioned upon the nonoccurrence of a future event, the occurrence of that event would retroactively invalidate the marriage.

However, in the absence of such a stipulated condition, the marriage can be considered conditional in nature only if such condition can be imputed to the parties. But, in order for an unexpressed condition to be implied, it must be a condition that would have been intended by everyone and, hence, is self-evident to the point that verbalization of the stipulated condition would be unnecessary. Ordinarily, to be effective, conditions must be expressed. A mental reservation does not rise to the level of a condition unless the reservation is known not only to the stipulating parties but would be imputed to the parties by all persons. That which is “in the hearts of all people” is as if it had been expressed verbally; *anan sabadei* – all members of the public at large are witnesses to the existence of such a condition. If a matter is known to all and sundry express articulation is superfluous. That would indeed be the case with regard to an “*umdena be-libo u-be-lev kol adam* – an understanding in his heart and in the heart of every person.” Such a condition would indeed be imputed in a world in which no woman would, under any circumstances, consent to marry a *mukkeh shehin*. If, however, there is even a remote possibility that some woman would agree to marry such an individual, it cannot be said that such an implied condition exists. Marriages involving a *mukkeh shehin* certainly do occur. Some women accept proposals of marriage from men suffering from inordinately severe disabilities. Some women even agree to marry men who have already repeatedly abused other women repeatedly. Some women, for whatever reason, choose to accept an onerous marital situation rather than a life of loneliness.

R. Joseph Ber Soloveitchik, *Bet ha-Levi*, III, no. 3, explains that, to ratify the ongoing validity of a marriage under newly arising onerous circumstances, all that is necessary to defeat the contention that there exists an implied condition that would serve to nullify the marriage is evidence that *some* women would wish to continue living in a marriage even under such conditions.

Thus, the dictum *tav le-metav tan du me-le-metav armelu* is not a universal proposition. It does not reflect the notion that *all* women have such a preference. It reflects only the proposition that *some* women have such a preference. The Sages of the Talmud did not err in their assessment of women, nor has feminine psychology changed. Recognition that even a very small number of women manifest such a preference defeats the notion of an implied condition since such an implied condition can be imputed only if a condition of that nature could be presumed to be the unexpressed stipulation of all women.¹¹

But, how does an aspiring halakhic decisor hone analytic skills? As noted, *psak halakhah* is an undertaking that involves elements that should be described as art rather than as science. And how does one teach an art? I strongly doubt that it is possible to teach a person to be a musician. If a student lacks musical talent he will never be a musician. That does not mean that a musician is born as a musician. What it does mean is that, if a person has musical aptitude, he can be trained to become a musician. And how does one train a student to become a musician? One trains a student to become a musician by having him practice scales, by practicing the playing of music. The student progresses from simple musical pieces to ever more complex and more nuanced arrangements.

Chinese folklore describes how an apprentice learns to become an expert in judging jade. How does the novice learn to distinguish between genuine jade and imitation jade? There are master teachers. The master is an expert. He can distinguish between genuine jade and false jade almost intuitively. The master hands the apprentice jade; the master passes him one piece, two pieces, three pieces. And so it goes on day after day. By feeling the jade, the apprentice comes to discern the properties of jade and the subtle differences between various types of jade. The student continuously has difficulty distinguishing between the real and the imitation until one fine day the master passes one of those pieces of jade to him and the apprentice raises his eyebrows and says, "This is not jade!"¹² One learns by practice; one becomes proficient through experience. That is what the Sages of the Talmud meant when they said, "*Gedolah shimmushah shel Torah yoter me-limmudah* – The *shimmush* (observation and apprenticeship) of Torah is greater than its study" (*Berakhot* 7b). It is through the process of observation and experience – through the

¹¹ For further examples, see J. David Bleich, *Contemporary Halakhic Problems*, V (Southfield, Michigan), pp. xxv-xxxii.

¹² See E. B. DeVito, "Graduates," *American Scholar* vol. 58, no. 2 (Spring, 1989), p. 282.

TRADITION

process of apprenticeship – that the ability to engage in *psak halakhah* is mastered.

III. ADJUDICATIVE PSAK

Elu va-elu divrei Elokim hayyim is a halakhic axiom that pertains to the transcendental world of truth. “*Torah kadmah le-beriyato shel olam*” (*Midrash Rabbah, Bereshit* 8:2) – Torah precedes and hence transcends the created universe. In the created universe A and ~A cannot exist simultaneously. It is impossible to apply the contradictory rules of both *Bet Shammai* and *Bet Hillel* at one and the same time. Perforce, one must choose between incompatible positions because failure to do so would result in halakhic anarchy. There are quite a number of canons, or rules, that serve to adjudicate such conflicts. Those canons, as announced, are not necessarily absolute but they are objective and integral to the system of Halakhah.

What are those canons or axioms? Many, if not most, are well known: Doubt with regard to a matter of biblical law is to be adjudicated stringently. Doubt with regard to a matter of rabbinic law is to be adjudicated leniently. Normative rulings are in accordance with the position of the majority. In matters of ongoing controversy, the ruling is in accordance with the later scholars. In matters pertaining to laws of mourning, the normative rule is in accordance with the permissive view. And many, many more. Those canons sound quite simple. It might seem that halakhic decision-making is a process of mechanical application of broad, universal rules to particular questions. However, the rules of decision-making are not as straightforward as they might appear to be.

R. Elchanan Wasserman is reported to have made a remarkable observation. R. Elchanan pointed to two fundamental principles of Halakhah. One such principle establishes that the normative rule is in accordance with the opinion of the majority. However there is a question with regard to the ambit of that principle. Suppose that the majority is composed of qualified scholars whereas the minority is composed of extremely bright and sharp persons, individuals acknowledged to be of highly superior intellect and clearly more erudite and more proficient than those in the majority. What happens if the majority, composed of qualified but relatively unexceptionable scholars, are of one opinion but persons who are *mehadedei tefei*, sharper and more erudite, are in the minority? The Gemara, *Yevamot* 14a, records a controversy with regard to whether the Halakhah is according to the majority as opposed to the

more erudite minority or whether the Halakhah is in accordance with the sharper, more incisive scholars even though they constitute a minority.

The protagonists were members of *Bet Hillel* and *Bet Shammai*. *Bet Hillel* proclaimed that the Halakhah is always in accordance with the majority while *Bet Shammai* ruled that the Halakhah is in accordance with the position of the *mehadedei tefei* even if they are not the majority. It happens to be the case that *Bet Shammai* were the *mehadedei tefei*, sharper, brighter and possessed of intellects keener than the members of *Bet Hillel* while *Bet Hillel* were the more numerous. Was it self-interest that motivated *Bet Shammai* to prefer the *mehadedei tefei* over the majority? I am fully confident that both *Bet Shammai* and *Bet Hillel* overcame all feelings of pride and any subjective bias they may have felt and formulated their opinion solely on the basis of selfless conviction.

R. Elchanan points to a paradox that might readily have arisen. There is yet a separate, independent rule of decision-making. The Gemara, *Yevamot* 14a, reports that a heavenly voice proclaimed that in disputes between *Bet Hillel* and *Bet Shammai* the Halakhah is in accordance with *Bet Hillel*. We are confronted by two separate canons: (1) the principle establishing that the Halakhah is according to *Bet Hillel*; and (2) the derivative principle establishing the majoritarian rule even in face of *mehadedei tefei* since such was the opinion of *Bet Hillel*. Were the positions espoused by *Bet Hillel* and *Bet Shammai* reversed with regard to a controversy between a majority and a minority that is *mehadedei tefei* the result would have been a paradox. The classic model of that paradox is: All Cretans are liars. I am a Cretan. Therefore, I am a liar. But, if I am a liar then I must be lying when I say, "All Cretans are liars." If so, "All Cretans are liars" is not a lie. It then follows that all Cretans *are* liars. If so, I do not lie in saying, "All Cretans are liars." But if I am a liar then... and so on *ad infinitum*.

R. Elchanan does not allude to that paradox but the formal nature of the two paradoxes are one and the same. Were *Bet Hillel* to have declared that the Halakhah is in accordance with the *mehadedei tefei* and if the *mehadedei tefei* happened to have been *Bet Shammai* it would have been tantamount to *Bet Hillel* saying the Halakhah is in accordance with *Bet Shammai*. But, in that hypothetical universe, *Bet Shammai* would have announced that the Halakhah is in accordance with the majority, i.e., *Bet Hillel*. But *Bet Hillel* would have concomitantly declared the Halakhah to be in accordance with the *mehadedei tefei*. And so, we go round and round without end. R. Elchanan adds that the determination that the principle that the Halakhah is according to *Bet Hillel* and that *Bet Hillel*

TRADITION

were also the ones that maintained that the Halakhah is in accordance with the majority is not a mere coincidence. R. Elchanan regarded the alignment of the parties in that controversy as nothing less than a miracle.

One need not necessarily term the fortuitous alignment of the opinions of *Bet Hillel* and *Bet Shammai* as miraculous. It would seem sufficient to categorize them as the product of divine inspiration. Had the positions been reversed we would have been confronted with an irresolvable paradox. The divine Lawgiver would not allow that to happen. He gave us certain canons of halakhic decision-making and they must be serviceable; else, they are purposeless. That is simply another way of saying that halakhic decision-making principles are also divinely ordained; they, too, are integral to the corpus of divine law.

I would be so bold as to say that these categories of *psak halakhah* are the halakhic analogue of the Kantian categories which, according to Kant, are imposed by human reason upon the empirical universe. Kant's thesis was that concepts such as causality are not extrapolated from our observance of the universe. Rather, the opposite is true. We look at the universe and we understand it according to the categories of human reason that are brought to bear upon our perceptions. The Kantian categories are not derived from observation but are imposed by reason upon observation. The process could not have been different. Similarly, reason demands that Halakhah be applied by means of established canons just as Kantian epistemology required that our understanding of the empirical universe be regulated by means of categories. We look at the corpus of Halakhah and we derive the *psak halakhah*, not simply from the substantive corpus itself, but, when not explicitly formulated within the corpus, from the vantage point of the categories that we impose upon the raw material of Halakhah. Formulation of those canons is also part of the halakhic tradition, which is simply another way of saying that those canons are divine in their inception.

The divine role in the decision-making process is explicitly acknowledged in a number of sources. R. Jonathan Eibeshutz, in his monograph "*Kim Li*," incorporated in the *Urim ve-Tumim*, declares that no one can plead "*Kim li*" against an opinion definitively accepted by both *Shulhan Arukh* and *Rema*, i.e., if the authors of the *Shulhan Arukh* and *Rema* are in agreement, one cannot point to another contradictory authority and claim "*ha-mozi me-havero alav ha-ra'ayah* – the burden of proof is on the plaintiff." An opinion rejected by those two authorities is utterly disregarded; it is as if it were non-existent.

Why is that so? What is the difference whether an opinion was explicitly rejected by *Shulḥan Arukh* or *Rema* or whether it is otherwise categorized as an individual, marginal opinion? “*Kim li*” is a principle that serves to confirm possession on the part of the defendant despite the weight of legal authority in support of the plaintiff. The defendant pleads reliance upon a non-normative opinion. The burden of proving the cited authority to be incorrect falls upon the plaintiff and can never be met. *Elu va-elu divrei Elokim ḥayyim*: the relied-upon opinion is also Torah and hence must also be correct in the transcendental world of truth. In that realm, the opinion of an early-day authority who disagrees with the author of *Shulḥan Arukh* and *Rema* is just as valid as the jointly-held opinion of those scholars. If *elu va-elu divrei Elokim ḥayyim* why can the defendant not plead “*Kim li*” against the jointly held view of *Shulḥan Arukh* and *Rema*?

There is no *elu va-elu* in terms of adjudication between conflicting opinions for purposes of application in the terrestrial world simply because Halakhah requires at least a modicum of universal normative application. But that does not explain why the jointly held views of *Shulḥan Arukh* and *Rema*, when they are in agreement, are accorded preference over other authorities. *Tumim*’s answer is this is the case because “*Ruah ha-kodesh hofi’a be-bet midrasham*” – divine providence guided the Jewish community in their acceptance of *Shulḥan Arukh* and *Rema* as the definitive arbiters of Halakhah. Not only is the corpus of theoretical Halakhah divine in nature but the *masorah*, or tradition, of halakhic decision-making is also controlled by divine providence. Accordingly, if world Jewry accepted the jointly held opinion of *Shulḥan Arukh* and *Rema* as dispositive, it is because such was the divine will. Since such is the divine will, no litigant has capacity to claim that any doubt remains regarding normative adjudication of the Halakhah. *Tumim*’s explanation certainly stands for the proposition that *elu va-elu* does not apply with regard to simply picking and choosing between various authorities.

A more recent source is the introduction to the first volume of R. Moshe Feinstein’s *Iggerot Mosheh*. Rabbi Feinstein’s unassuming nature is legendary. Nevertheless, he writes, in effect, that he is an authoritative *posek* because the Master of the Universe charged him with being a *posek*; he acknowledges his role as a *posek* to have been ordained by providence. Rabbi Feinstein was not engaged in self-praise; he was, in all humility, stating his role as a simple matter of fact. Rabbi Feinstein asserted that some rabbinic scholars become recognized as *poskim* because the Master of the Universe guides His people to such acceptance; the *masorah* of Halakhah is determined by providence.

TRADITION

In cases of disagreement, canons of halakhic decision-making are to be applied in adjudicating between conflicting opinions. The first question to be resolved is: who is a *posek*? Whose opinion is a credible expression of *elu va-elu*? It is only with regard to disagreement between bona fide *poskim* that principles of *rov*, *safek de-oraita*, *safek de-rabbanan*, etc., apply. An eighth grader's answer to a question on an examination does not rise to that level. The opinion of a novice is not placed on a scale together with those of mature *poskim*.

As noted, the late R. Joseph B. Soloveitchik, of blessed memory, is quoted as saying that the *Me'iri* is "a mere curiosity."¹³ *Me'iri* is widely quoted with regard to a small number of idiosyncratic positions attributed to him. None of those positions is particularly relevant to the present discussion. In none of those instances would *Me'iri*'s opinion affect halakhic decision-making in any way. But the import of Rabbi Soloveitchik's observation is far more profound. To describe *Me'iri* as a "mere curiosity" does not mean that a *rosh yeshivah* will not consult the *Me'iri* in the course of preparing a lecture. If the *rosh yeshivah* has a novel insight that can be substantiated by citing *Me'iri* he will certainly quote *Me'iri* with alacrity and joy. At the same time, if the point to be demonstrated depends solely on *Me'iri* and if *Me'iri*'s statement is contradicted by other early-day authorities, the rabbinic scholar who relies on *Me'iri* alone is skating on perilously thin ice.

It goes without saying that *Me'iri* was a respected authority. Rabbi Soloveitchik meant only that the works of *Me'iri* are not part of the received *masorat ha-psak*. Applied halakhic decision-making is also subject to *masorah*. *Me'iri* is not part of that tradition. Although the reason why *Me'iri* is not part of the *masorah* is not germane to this discussion, I believe that the reason is not difficult to discern. *Hazon Ish* and others have recognized that all newly-discovered manuscripts are suspect because we are ignorant of the provenance of those manuscripts. We have no assurance that tampering did not occur; we do not know whether *Me'iri* himself was the author of those works or whether one or another of his disciples compiled the manuscripts. A student of *Me'iri* is not necessarily entitled to the same degree of deference that would be accorded to the master. Chronologically anomalous as it may seem, there were *Aharonim* who thrived in the period of the *Rishonim*. One should not assume that the distinction between *Rishonim* and *Aharonim* is merely one of

¹³ See R. Hershel Reichman, *The Commentator*, Nov. 5, 2006, p. 21. See also J. David Bleich, *The Philosophical Quest: Of Philosophy Ethics, Law and Halakhah* (Jerusalem, 2013), p. 52, note 47.

chronology; the distinction lies in scholarship and erudition rather than in an accident of history. It is not to be assumed that every scholar who flourished in the historical period of the *Rishonim* is to be accorded the deference due to *Rishonim*.

Moreover, I am fully certain that, with regard to at least some of the matters for which *Me'iri* is widely quoted, he is being misquoted either because the text is corrupt because of influence of the censor or because *Me'iri* was misled, purposely or otherwise, with regard to fundamental Christian dogma.¹⁴ Furthermore, even were those statements to be authenticated as genuinely reflecting *Me'iri*'s acceptance of the underlying hypotheses, they would nevertheless constitute no more than a "mere curiosity." An isolated opinion from a single early-day authority contradicted by a plethora of authoritative decisors is certainly of intellectual value but it is equally certain that such an opinion is outside the *masorah* of halakhic decision-making.

It seems to me that it was the latter point that Rabbi Soloveitchik meant to emphasize. "Everything is dependent on *mazal*, even the Torah scroll in the Ark" (*Zohar, Va-Yikra*, p. 134). Halakhic decision-making is guided by *hashgahah*, i.e., by divine providence. Rabbinic scholars did not have access to the bulk of *Me'iri*'s writings until they were discovered in the Cairo *genizah*. That was not an accident of history. The Master of the Universe saw to it that material later found in that repository would not be placed upon the scales of *psak halakhah* in the age in which conflicting positions were weighed and precedents established.

The *masorat ha-Halakhah*, or tradition of halakhic decision-making, is an ongoing process. Apart from the historical distinction between *Rishonim* and *Aharonim*, there is a principle that is a bit more vague and a bit more amorphous, viz., the doctrine of *stare decisis*, or precedent, within the period of the *Aharonim*. Precedent, in and of itself, is little more than legal inertia, i.e., the status quo should not be disturbed other than for good reason. In addition, the precedent has already been implemented and, in that sense, has already entered and become part of the *masorah*. But, then, how does one act when contradictory traditions have been espoused by earlier decisors? How does a jurist decide which precedent is to be regarded as controlling and which is to be relegated to the dustbin of legal history?

The most obvious resolution of that question would be invocation of a majoritarian principle. *Rov* is a halakhic construct derived from rabbinic exegesis of the verse "after the majority to determine" (Exodus 23:2).

¹⁴ See *The Philosophical Quest*, pp. 40-52.

TRADITION

Two halakhic rules are derived from that passage. The first is the principle of *bittul*, or nullification. The halakhic identity of a prohibited substance is submerged and nullified when it becomes part of a larger mixture. The second principle is the rule that when there exist two sets, one composed of many members and one composed of fewer members, an entity that strays from its original set and whose identity is unknown is regarded as having been a member of the major set and hence retains the status of its original set. The principle of *rov* applies in adjudication of conflicting claims or in determination of particular rules to be adopted by virtue of invocation of and amalgam of both principles of *rov*. The ruling is regarded as having emerged from the major set of scholars. At the same time, when the members of the *bet din* disagree, the decision is not simply that of the majority; it represents the decision of the full complement of the *bet din*. The majority are not competent to issue a ruling without participation of the dissenting minority. Members of the minority are able to participate in the judgment, because their identity is submerged within the identity of the majority.¹⁵

However, *rov*, as an iron-clad rule of adjudication, applies to resolution of controversy only when scholars assemble, deliberate and issue a collective opinion. In that context, *rov* determines the position of the group as a collective; the view of those in the minority is submerged in, and nullified by, the view of the majority. Thus, the position of the group as a collective is determined by the majority of its members. That notion finds eloquent expression in a rule applicable in judicial decisions that prohibits identifying the members of the minority. The members of the minority count as part of the complement of judges required to hear the case. Accordingly, even in dissent they are necessary for the issuance of a judgement. However, in weighing precedents, there is no confrontation or interaction between members of the majority and members of the minority; hence there is no collective body to which a unitary opinion can be assigned.

Although in such situations the principle of majority rule does not apply in the strict sense of the term, determinations are nevertheless made in accordance with what might be termed “weighted precedent.” To paraphrase George Orwell: Equal faith and credit must be assigned to the opinion of all scholars but some scholars are more equal than others. The opinion of every qualified scholar must be considered, but the opinion of some will weigh more heavily than the opinion of others. The ultimate

¹⁵ See R. Chaim Soloveitchik, *Hiddushei ha-Grah ve-ha-Griz al ha-Shas* (n.d.), pp. 226-228.

determination will depend upon assigning appropriate weight to the opinion of each individual and then balancing the collective weight of each side, one against the other. Accordingly, adjudicating between conflicting authorities is essentially a determination of how much weight to assign to any given halakhic decisor.

By way of analogy: Assume that a Chinese patient presents with a malignancy. Ten “barefoot doctors” prescribe a macrobiotic diet and one board-certified oncologist advises chemotherapy. A discerning patient will find no difficulty in determining which regimen to follow. Folk medicine should not be disparaged but scientific expertise is crucial in determining proper medical treatment. The weight of numbers is irrelevant when countered by medical expertise. If R. Akiva Eger issued a ruling that is contradicted by a number of published responsa authored by individuals of significantly lesser stature there is scant question that majority rule does not apply. When presented with conflicting opinions expressed by recognized halakhic decisors, part of the process of halakhic decision-making is to determine how much weight to assign to any given authority in reaching a decision. *Elu va-elū divrei Elokim ḥayyim* is certainly operative within the world of transcendental truth; but the world of transcendental truth is the world of theoretical Halakhah. In the realm of applied Halakhah, *elu va-elū divrei Elokim ḥayyim* is not relevant to adjudication between conflicting claims.

But in weighing the opinions of recognized *poskim*, how does one assign relative weight to diverse decisors in determining which opinions shall serve as precedent? To a certain extent, authoritativeness is established by reputation and acceptance on the part of other decisors. Medicine again serves as an apt analogy. Physicians achieve prominence as outstanding practitioners on the basis of acknowledgement as such by their peers. Fellow physicians are certainly in the best position to evaluate the expertise of members of their profession. Such evaluation is part of the art of medicine. Similar evaluation is part of the art of halakhic decision-making.

This is not to deny that, not infrequently, disagreement arises in evaluating the relative weight to be given to the opinion of one authority over another. But just as often – and probably more often – a consensus develops. As time passes, and certainly over a period of generations, the authoritativeness of certain decisors and of certain decisions become part of *masorat ha-Halakhah*. That, too, is in no small part by operation of providence.

There is also a clear difference between a firmly held opinion formulated *sua sponte* by an authoritative *posek* and a decision based upon

announced opinions of other decisors. A qualified *posek*, proficient in *Shas* and *Poskim* who has analyzed an issue, applied the relevant sources and arrived at a reasoned conclusion is not bound by canons such as *halakhah ke-divrei ha-meikil be-avel*, i.e., the law in matters of mourning is in accordance with the permissive view, *safek de-oraita le-humra* i.e., doubt with regard to a matter of biblical law is to be resolved stringently or *safek de-rabbanan le-kula*,¹⁶ i.e., doubt with regard to a matter of rabbinic law is to be resolved permissively. A qualified scholar who is confident that he has not overlooked relevant sources and has reached a firmly held conclusion is duty-bound to rule in accordance with his own opinion.¹⁷ Should such a *posek* demur because he is afraid that he has arrived at an erroneous conclusion? In response one can only shrug one's shoulders and say, "What do you mean by saying he is wrong? He cannot be wrong; it is axiomatic that his conclusion is correct." Whatever decision the *talmid vavtik*, or proficient student, reaches was revealed to Moses at Sinai (*Midrash Rabbah, Va-Yikra 22:1*). The reticence of a qualified *posek* is born of what I would term judicial humility. There is but a thin line separating justified reticence and unjustified humility. The scholar fears that he has not reached the status of a *talmid she-higi'a le-hora'ah*, i.e., that he is not fully competent, that he is but an insufficiently qualified student. That too is a judgment call but a judgment call best made by peers.

How should a *posek* who has less than full confidence in his halakhic prowess conduct himself? It seems to me that such an individual may recuse himself if he so chooses. He may refer the interlocutor to someone whom he believes to be a more consummate scholar, a greater *talmid hakham*. That course of action constitutes recusal and would be appropriate under the circumstances. However, I do not think that he has the right to respond by saying, "Such and such a scholar has a different opinion. You should accept that scholar's ruling rather than follow my opinion."¹⁸ That would be intellectually inconsistent and would constitute dereliction of duty.

¹⁶ See the letter of Rabbi A. I. Karelitz, known as *Hazon Ish*, quoted in *Nihohab shel Torah*, p. 111.

¹⁷ Cf., the quite emphatic statement of R. Moshe Feinstein in the introduction to his *Iggerot Mosheh, Orah Hayyim*, vol. I.

¹⁸ The Gemara, *Hullin 99b*, discusses whether the sciatic sinew has a "taste" such that when transferred to other foodstuffs it renders those foodstuffs impermissible. R. Ami maintained that food cooked together with the sinew is forbidden. On one occasion, when such food was brought before him, he directed the parties to R. Isaac ben Halav "who was wont to rule permissively in accordance with R. Joshua ben Levy, but [R. Ami] did not agree." Clearly, R. Ami felt constrained not to inform the parties that R. Isaac ben Halav held a contradictory view and to counsel them to rely

The foregoing is the case with regard to what I would term substantive *psak* because it is only with regard to substantive *psak* that *elu va-elu divrei Elokim hayyim* is applicable, i.e., the decision is made by a person who has earned the right to an opinion and whose opinion is substantiated by analysis of sources together with application of his intellect. That is quite different from a situation of a person who does not have, or is not entitled to have, an independent opinion. Decisions rendered in such circumstances are entirely dissimilar.

Again, a very simple parallel. There are numerous varieties of mushrooms, some poisonous and some nonpoisonous. There are horticulturists who are trained to recognize which are poisonous and which are not. The horticulturist has no problem distinguishing between the various species. The ability to distinguish between them is an art, a science, or a bit of both. When buying mushrooms in the supermarket, the consumer relies upon the purveyor to ascertain that his wares pose no danger. But as a non-expert I would not take a basket and go foraging for mushrooms in the forest. I recognize that I am not proficient in *hilkhot* mushrooms; I am afraid that I might pick a poisonous mushroom. I know there are “kosher” mushrooms in the forest and there are “non-kosher” mushrooms in the forest. I am certainly not going to stake my life upon an unreliable hunch with regard to which mushrooms are poisonous and which are not. By the same token, if there are two people guiding me and one says, “This mushroom is poisonous” while the other says, “It is not poisonous,” you may be certain that I will run from the mushroom as quickly as my feet can carry me.

I am not at all fazed by a competent scholar who tells me that it is possible to construct a valid *eiruv* in the city of New York or in another large metropolitan area. If a person tells me that he has mastered *Shas* and *poskim* and is an expert in *hilkhot eiruvim* as well and that he has resolved the underlying halakhic issues in a manner different from the late R. Moshe Feinstein, of blessed memory, and of virtually every other recognized *posek*, fine; he has a right to do so because he has earned the right to an opinion. I become perplexed when a layman tells me, “I carry in my city on *Shabbat* because Rabbi *Ploni* – not *Ha-Rav ha-Ga'on Ploni* – said you may do so.” Would the same individual be willing to rely upon a person who is not an expert in “*hilkhot* mushrooms?” If not, is he more

upon that permissive view but instead referred them directly to R. Isaac ben H̄aluv. R. Ami might recuse himself and send the parties elsewhere but himself to counsel reliance upon R. Isaac ben H̄aluv would have been perversion of his own view. See Rashi and Rabbenu Gershom, *ad locum*. For further sources supporting this point, see *Contemporary Halakhic Problems*, V, xiv, note 5.

concerned with regard to his body than his soul? In matters of *psak halakhah*, can a prudent person rely upon an individual who is less than fully proficient? It is one thing for a person to resolve an issue on the basis of his own erudition, his own insight and expertise in *Shas* and *poskim*. It is quite another for him to tell me that he is relying upon Rabbi X when there are other experts who are equally competent, if not more so, who declare that the *eiruv* cannot be relied upon. What is the source of a license to accept less than competent halakhic advice?

That is but one example. More generally, a person does not have the right to rely upon a *da'at yahid*, an individual opinion, even when expressed by an early *Aharon*, by invoking the principle *eilu ve-eilu divrei Elokim hayyim*. Yes, "These and those are the words of the living God." Whatever that authority wrote or said is absolutely true in the realm of transcendental Halakah but the veracity of his pronouncements has nothing to do with applied *psak halakhah*. *Psak halakhah* takes place in an entirely different universe. In that universe, applications of canons of applied *psak* are determinative. The late R. Ya'akov Yitzchak Ruderman, of blessed memory, once told a visitor, "If you knew as many *teshuvot* as I do, you would be a *goy gamur!*" What did he mean? The visitor was not a person of great spiritual probity. The visitor had embraced many diverse leniencies. He managed to adopt all sorts of permissive opinions because he succeeded in finding the ones that he was seeking. Rabbi Ruderman accurately informed his visitor that he was much more proficient in the responsa literature with the result that, were he to pick and choose between them in order to reach predetermined conclusions, he would find it quite possible to comport himself in a manner indistinguishable from a gentile. The residual Judaism that would remain after accretion of multiple leniencies would be unrecognizable.

Several years ago, I was involved in an exchange regarding a ruling of one of the Israeli rabbinical courts. The ruling was far from clear-cut; there was respected authority in support of each side of the question. Perhaps the Israeli court decision was correct, perhaps it was not. Perhaps the applicable principle would be *elu va-elu divrei Elokim hayyim*. A certain gentleman published a letter in which he applauded the *bet din* as having the "courage" to issue the *psak* that it issued. I took umbrage at the term "courage." If someone were to tell me that the issue was a matter of dissension and that some proficient scholar assured us that he had reexamined all the relevant sources and discovered a welcome leniency which he intended to implement, I would regard his conduct as courageous. Courageous would be an appropriate description and would

convey the message that the scholar has the courage of his convictions and is mindful of the admonition “You shall not be afraid of the face of any man” (Deuteronomy 1:17). But in this case, the *bet din* was praised for no apparent reason other than that it had the “courage” to pick and choose between precedents for no defensible reason other than justification of what it considered to be a welcome outcome. That is not an act of courage. It does not take any courage whatsoever to choose precedents selectively in order to attract accolades; it is simply subversion of the halakhic process.

Adjudicating between conflicting opinions requires the ability to assess competing precedents and to determine how much weight to assign to any given precedent. Such determinations must be dispassionate and intellectually honest. The process is more akin to an art than to a science. That, too, is included as part and parcel of the *masorah* of *psak halakhah*.

IV. PROPHYLACTIC PSAK

Finally, almost as a postscript, let me indicate what may be the most important area of contemporary *psak halakhah*. I call it prophylactic *psak*, that is, avoiding the question in the first place.

In commercial and financial matters there is an available option that serves to avoid a hard and fast application of pertinent halakhic rules. Rabbinical courts uniformly urge litigants to accept arbitration rather than to insist upon a judgment strictly in accordance with the letter of the law. In part, that is because the rabbinical judges seek to avoid the responsibility of adjudicating between competing authorities. In matters of religious law one can avoid acts which are even only possibly forbidden. That is tantamount to cutting off the problem at the pass. But there are times when it is impossible to avoid the issue. As a student, I once asked a *rosh yeshivah* what one should do if one forgot to recite *ya'aleh veh-yavo* and realizes his omission immediately after concluding the blessing “*ha-mahazir Shekhnato le-Zion.*” The proper answer is a matter of dispute between *Mishnah Berurah* and *Arukh ha-Shulhan*. *Arukh ha-Shulhan* says one thing and *Mishnah Berurah* says another. So, what I was actually asking is “What is the *hakbra'ah*? How does one decide between those two authorities?” His answer in Yiddish was, “*Vos men vet tohn is gut.*” In effect, the reply was that there is no *hakbra'ah*. Neither the *rosh yeshivah* nor I had any halakhic grounds to prefer one position over the other. There is no absolute determination and no applicable canon of decision-making. It is an instance of *elu va-elu*. Where there is no *hakbra'ah*, even

TRADITION

in matters of applied *psak* the principle is *elu va-elu*. That is so because there is no way to escape between the horns of the dilemma. In the midst of *shemoneh esreh* it is possible either to go back to *Rezeh* or to recite *ya'aleh ve-yavo* before *Modim* but a choice must be made and there is no third viable alternative.

However, there are situations in which, instead of resolving the problem, it is possible to obviate the problem by “covering all bases.” In some instances, that approach has been codified and institutionalized in Halakhah. When the *shofar* is blown on *Rosh ha-Shanah*, we blow *tasbr*”at, we blow *tash*”at, and we blow *tar*”at. Why do we do so? Because the Torah says, “*Yom teruah yihiyeh lakhem* – a day of *teruah* shall be unto you” (Numbers 29:1). But we do not know with certainty what a “*teruah*” is! It may be what we call a *teruah*, it may be a *shevarim* or it may be both, one following the other. So, instead of adjudicating between the different opinions, we blow each of the sounds. Another example is *shehehianu* on the second day of *Rosh ha-Shanah*. A woman lights candles; her husband recites *kiddush*; a *ba'al tokea* blows the *shofar*. In each of these cases, there is significant doubt with regard to the propriety of reciting the *shehehianu* blessing on the second day of *Rosh ha-Shanah*. So, what is the actual practice? The solution is to acquire a new fruit that has come into season or to purchase a new garment and thereby generate an obligation to recite the *shehehianu*, an obligation that is certain in nature. Since a single *shehehianu* suffices to satisfy even multiple obligations to recite the blessing, the *yom tov* obligation can be satisfied simultaneously with the recitation of the blessing occasioned by the new fruit or the new garment. If so, there is no longer a problem: even if *shehehianu* is not necessary on the second day of *Rosh ha-Shanah* the *shehehianu* is still required because of the additional factor, *viz.*, the new fruit or the new garment. These are examples of what I call “prophylactic *psak*.” Instead of actually resolving the problem, one avoids it entirely. But what if one does not have a new seasonal fruit or a new garment? There is indeed a normative determination. The codified Halakhah is that a *shehehianu* is recited, but the adjudication is apparently so tenuous that world Jewry has opted to avoid relying upon it.

Does preparing food in a microwave constitute “cooking” for purposes of Halakhah? Assuming any other problem involved in setting the microwave oven or opening its door could be overcome by modifying the apparatus, is it possible to “cook” by means of microwaving on *Shabbat*? Does food already prepared in a microwave have the status of “uncooked” food and hence remain subject to a biblical prohibition against

conventional cooking on *Shabbat*? May one use a microwave oven to prepare food containing both milk and meat for consumption by a non-Jew? Is a Jew permitted to eat food cooked by a non-Jew in a microwave? Will it be permissible to “cook” the paschal sacrifice in a microwave oven? There are definitely conflicting opinions regarding the halakhic nature of microwaving. There are certainly people who do not have the vaguest idea why use of a microwave should be “cooking” or why use of a microwave should not be “cooking.” What is such a person supposed to do? Unless he is a responsible and competent *posek* who has arrived at his own firmly-held opinion, how is he to adjudicate between the conflicting views?

There are two possibilities: It is possible to apply the general canons of halakhic decision-making, including *safek de-oraita le-humra* and *safek de-rabbanan le-kula*, or one can avoid the question by not using a microwave in situations that give rise to such questions. The easy way is the cop-out, or better, a punt. Do not use a microwave oven for any purpose that may give rise to a matter of doubt that has not yet been resolved and leave the resolution for another day and another *posek*.

Finally, one must be clear in distinguishing between the absence of a *bakbra'ah* and matters of *humra*. People seem to believe that, in Brisk, all manner of *humrot*, or stringencies, were practiced. That is not true. It is simply a misconception. Don't take my word for it. Peruse the introduction to the *Hiddushei ha-Rav Hayyim* on *Bava Mezi'a*, published just a few years ago. Elements of the narrative may be overstated, but, as reported, R. Chaim disparaged Hasidim who adopted various *humrot*, e.g., on *Sukkot* they did not even drink water outside of a *sukkah*. Hasidim certainly had reasons for not drinking water other than within a *sukkah* but there is no early-day authority who rules that it is forbidden to drink water on *Sukkot* outside a *sukkah*. R. Chaim reportedly saw no reason to emulate that pietistic practice. Why? Simply because he had no interest in adopting *humrot*.¹⁹ But, at the same time, Brisk was notorious for not wanting to issue rulings regarding matters involving a halakhic disagreement or to engage in conduct that would require adjudicating between early-day authorities. Brisk did not want to do so because Brisk felt that we are not competent to resolve a controversy between early-day authorities. Consequently, their *psak* was often prophylactic – obviate the problem by avoiding it in the first place.

It is almost axiomatic in the legal community that a good litigator is not an attorney who prevails in litigation. Rather, a good litigator is one

¹⁹ See also *Nibuha shel Torah*, p. 230.

TRADITION

who uses his legal skills in avoiding litigation. In our day, the primary task of a halakhic decisor – particularly one who is less than fully competent – may well be not adjudication between conflicting views, but identifying or fashioning expedients in order to avoid the need for adjudication.

V. A FINAL COMMENT

Halakhah is an intellectual discipline but its pursuit is accompanied by awesome moral and religious responsibility. Halakhic pronouncements should bear a Surgeon General's warning that they may be dangerous to spiritual health and well-being. The onus of error is entirely analogous to that which in the realm of the physical accompanies the granting of a Good Housekeeping seal of approval or the issuance of a public warning of impending danger. An erroneous endorsement can easily lead to serious danger; an unwarranted interdiction can wreak havoc with human lives.

The Gemara reports that upon entering the House of Study R. Neḥuniah ben ha-Kanah would recite a prayer: "May it be Thy will, O Lord my God, that no mishap occur through me and that I not err in a matter of Halakhah... that I not declare the impure pure or the pure impure" (*Berakhot* 28b). R. Neḥuniah ben ha-Kanah well understood the awesome nature of every halakhic determination and the need for divine assistance in avoiding error. The prayer recorded in the Gemara is a poignant reminder for posterity that halakhic matters must be regarded with at least the same seriousness that attends the mundane. In its most fundamental sense *yir'at Shamayim*, or fear of Heaven, is the reflection of a conviction that halakhic error or laxity is as dangerous to the soul as other forms of error may be to the body.

In the absence of fear of Heaven, fulfillment of *mizvot*, or commandments, is, in essence, a matter of cultural expression. Folk practices may be valued, but they are unlikely to become all-consuming. Cultural inclination may dictate enthusiastic participation in ceremonies and rituals but will hardly command concern with minutiae and details. Fear of Heaven is the hallmark that serves to distinguish between cultural expression and religious observance; it is the factor that serves to separate those sectors of our community that recognize the centrality of Halakhah and its study from those that fail to accord Halakhah such primacy. For the latter, *mizvot* are a matter of taste and preference and even of personal satisfaction; for the former, they are a matter of spiritual life and health. For the

former, thirst for Torah knowledge is never quenched; for them the study of Torah is the noblest of activities and the most sublime of joys. Our sacred charge is to transmit to all members of our community the faith commitment of which genuine fidelity to Halakhah is born and in doing so hasten fulfilment of the prophecy “For the earth shall be full of the knowledge of the Lord, as the waters cover the sea” (Isaiah 11:9).