

למדות:

*The Conceptual
Approach to Jewish
Learning*

edited by

Yosef Blau

Robert S. Hirt, Series Editor

THE MICHAEL SCHARF PUBLICATION TRUST
of the YESHIVA UNIVERSITY PRESS
NEW YORK



5

The Brisker Derekh and Pesak Halakhah

Mordechai Willig

The story is told of a man who wished to construct a house based on the mathematical principles found in the Talmud. Consulting his rabbi, he built the house as per the latter's instructions. When the house collapsed, the perplexed builder approached the Rabbi and expressed his wonderment at the unfortunate result. Why, he asked, did a house built with the precision of Talmudic architecture and engineering collapse? The rabbi nodded sagaciously and declared: "That's *Tosafot's* question."

The litmus test of any theoretical system is its rate of success in practical application and the conceptual approach to Talmud study is no exception. Admittedly, *talmud Torah* differs from abstract science in two ways. First, it has intrinsic value unrelated to real-world practice. Indeed, the *Beit ha-Levi*, the forerunner of the Brisker dynasty, considers this so fundamental a principle that, in his view, the Jews were exiled for failing to adhere to it.¹ Secondly, its applicability to the real world is more difficult to test: A mistaken

pesak is not as discernable as a fallen house. Nonetheless, since it is axiomatic that the Torah represents divine truth, any authentic method of Torah study must be relevant to the normative truth of practical Halakhah.

The purpose of this essay is essentially three-fold. It begins by arguing that the method under discussion actually developed out of a historical change in *talmud Torah* methodology. Following that is an analysis of the distinct attitudes of nineteenth-century and modern *lamdanim* toward *pesak Halakhah*. The paper concludes with examples of how the Brisker *derekh* can influence and affect normative Halakhah.

I

A crucial change in *pesak Halakhah* and the methodology of *talmud Torah* preceded the Brisker *derekh* of conceptual analysis. While we are not privy to the *derekh ha-limud* of the classical *poskim*, the literature indicates that from the fourteenth century until the mid-eighteenth, the dominant method of halakhists was establishing precedent. This method required the gathering of an ever-widening corpus of halakhic literature before the rendering of a decision by weighing the relative authoritativeness of the sources. In the codes, this approach is evident in the *Tur* and is made explicit by the *Beit Yosef*.² The Rema's glosses reflect merely a slightly different accounting of the *Rishonim*,³ and the super-commentaries, most prominently the *Shakh*, often dazzle us with their phenomenal *beki'ut*.⁴ Responsa of this period employ a similar reliance on precedent as the foundation of a halakhic decision.

This *derekh* places the greatest emphasis on recent sources in the spirit of *hilkheta ke-batra'i*.⁵ More fundamentally, the Talmud is studied as one of many sources, unique only in its absolute authoritativeness. Practically, scholars worked their way up, from the codes, commentators and responsa to the Talmud.⁶

It was the *Ga'on* of Vilna who revolutionized both the method of study and the decision-making process by restoring the primary role of the Talmud. His *derekh ha-limud* calls for an in-depth analysis of the Gemara and early *Rishonim* before confronting the

more recent codes, commentators and responsa. Moreover, if his analysis yielded a different result than the prevailing view, he ruled in accordance with the former, despite both scholarly and practical precedent.⁷ These changes, essentially representing two sides of the same coin, gradually gained acceptance in Lithuania, with far-reaching impact on both study and practice.⁸ When R. Hayyim of Volozhin, the *Ga'on's* greatest disciple, established his yeshiva in the early nineteenth century, he naturally introduced his mentor's insistence on the primacy of Talmudic analysis over the study of the codes, both chronologically and authoritatively. When in 1880, his descendant and namesake R. Hayyim Soloveitchik began his teaching career in Volozhin, the time was ripe for the next step.

The Brisker *derekh*, named for the city in which R. Hayyim served as *rav*, succeeding his father after the Volozhin yeshiva closed in 1892, places much greater emphasis on pure, conceptual analysis of Gemara and *Rishonim*. This approach strives to analyze a Halakhah in minute and exquisite detail, often discovering that it embodied two distinct concepts, or “*tzvei dinim*.” At times, this duality reflected a difference between a personal prohibition or obligation and the status of an object, hence the frequent use of the expressions *gavra* and *heftza*.⁹

R. Hayyim insisted on clear definitions of each term and concept and his *shi'urim* were exemplars of both profundity and clarity. In his view, a lack of clarity in explanation reflects a lack of clarity of one's own understanding.¹⁰ This method places greater emphasis on concepts and thus inevitably, less attention is paid to the intricacies of the Talmudic give and take. It is not surprising that R. Hayyim's *sefer*, published posthumously, is a commentary on the Rambam and not on the Gemara. While R. Hayyim's depth was coupled with and founded upon knowledge of the entire Talmud, he relied on his logic in perhaps unprecedented fashion. Once, when confronted with a claim that *Tosafot* opposes his basic assumption or a given point, he responded that no such *Tosafot* exists. He later explained that in making this assertion he had not relied on *beki'ut* but on rationality, as the position attributed to *Tosafot* was illogical!¹¹

The Brisker *derekh* had its detractors; R. Hayyim was derided

as a chemist, who divided and combined concepts in his Talmudic laboratory.¹² Nonetheless, his brilliance had lasting impact, capturing the minds of Volozhin's leading scholars. His disciples continued his conceptual approach, albeit in a somewhat altered form, in other Lithuanian *yeshivot*, which later migrated to Israel and the United States.

II

R. Hayyim, famous for his enormous talent for Talmudic theory, never made a reputation for himself as a *posek*. In the tradition of many Lithuanian rabbis, he referred most practical questions to the *dayyan*, R. Simha Zelig Reguer, who, presumably, ruled based on the *Shulhan Arukh* and commentators. Two notable exceptions to R. Hayyim's restraint, however, bear mention.

One such exception were *she'ailot* concerning issues in *pikuah nefesh*. R. Hayyim's "*kulot*" in this regard affected many areas of Halakhah. One such area are the laws of fasting on *Yom Kippur*. In opposition to the prevailing view, R. Hayyim insisted that a *holeh she-yesh bo sakanah* eat normally and not in small portions less than a *shi'ur*.¹³ Furthermore, he demanded extensive *hillulei Shabbat ve-Yom Tov* when he felt that a Jewish life was at stake. In one famous instance, he postponed the communal recital of *kol nidrei* until sufficient funds were collected to buy the life of a Bundist on captial trial.¹⁴ Finding a sick baby on his doorstep one *Shabbat* afternoon, he castigated a household member who hesitated in fetching a candle for the baby's medical examination. R. Hayyim insisted that *pesakim* such as these are not leniencies, but rather stringencies in the laws of *pikuah nefesh*.

The second exception is more important for our discussion at the end of this essay. While R. Hayyim may have left communal *pesakim* in the hands of his able *dayyan*, he was enthusiastically *mahmir* on his personal household. For instance, while Brisk had an *eruv*, R. Hayyim refused to rely on it and even refrained from wearing *tzitzit* in the street. Unlike most European Jews, he never ate any food made of *hadash* flour. R. Hayyim also personally observed *Shabbat* late into the night.

One might theorize that his lack of enthusiasm for *pesak Halakhah* is not a fear of the responsibility, but rather a manifestation of R. Hayyim's ability to see ambiguity and two sides to every issue.¹⁵ Dedicated to finding the Talmudic truth, he knew that were he to occupy the *posek's* pedestal he would have had to rule against traditional precedent, as did his intellectual ancestor the *Ga'on*. Thus, in his private life he conducted his halakhic lifestyle in the more stringent untraditional fashion that he felt to be the correct one. This theory seems further substantiated in light of the story in which R. Hayyim sent a complex question to R. Yitzhak Elhanan Spektor of Kovno. He asked for a terse response without any reasons. Apparently, he feared that he would find fault with R. Spektor's logic and therefore, preferred a simple reliance on the latter's authority.¹⁶

Be that as it may, the wider acceptance of the Brisker *derekh* in Lithuanian *yeshivot* drew its students even further away from practical *Halakhah*. Some viewed *pesak* with a sense of *bittul*, preferring the pure logical Talmudic analysis to the technical and often tedious research employed in *pesak Halakhah*.

On the other hand, many *poskim* viewed the conceptual approach as a dangerous academic and intellectual exercise, which could lead to disrespect for classical, normative *Halakhah*. Hasidic and Sephardic scholars and *yeshivot* generally continue not only to resist the Brisker *derekh* but even the more modest revolution of the *Ga'on* of Vilna, although the Lithuanian method has made some inroads.

In recent years, Lithuanian *yeshivot* have become much more hospitable to the rigorous study of *pesak Halakhah*. The largest advanced *yeshivot* in Israel and the U.S., Mir and Lakewood respectively, include large *habburot* focusing on many practical areas. The reasons for this phenomenon are not entirely clear, but these are some suggestions:

- a. As scholars spend more years in *kollelim*, they tire of the repeated study of *Nashim* and *Nezikin*, which dominated the curriculum since their teens. These scholars deal with this repetition in one of two ways. Some, especially today's Briskers,

- opt for *Kodashim* – completely free of any present practicum. Other scholars and veterans of *Kodashim kollelim*, look to practical halakhic topics as a creative outlet. Here their theories can be tested and their potential value to the community increased.
- b. In the post-war world, the role of *rashei yeshivah* in *pesak* grew dramatically. Towering figures, such as R. Shelomo Zalman Auerbach of Kol Torah, R. Moshe Feinstein of Tiferet Yerushalayim, R. Aharon Kotler of Lakewood and R. Yosef Dov Soloveitchik, R. Hayyim's grandson, of Yeshivat R. Yitzhak Elhanan, rendered decisions in areas formerly monopolized by community *rabbanim* and *dayyanim*. These decisions, relying more heavily on analysis and originality than on pure precedent, represented a fusion of Lithuanian *lomdut* and *pesak*. Disciples and admirers of these *gedolim* viewed practical *pesak* as the crowning achievement of years of Brisker training and not as technical drudgery.
 - c. In Israel, the state-sponsored *beit din* system attracts some of the most prominent alumni of Lithuanian *yeshivot* such as Hevron and Mir. Many train in special programs where they are mentored by universally respected *gedolim*, such as in former years, R. Yosef Shalom Elyashiv. Others study for the state *rabbanut*, while still in the yeshiva or afterwards. The ripple effect of this development is a greater general respect for *pesak* in the yeshiva world.
 - d. The American scholarly world has experienced a dramatic shift away from purely academic liberal arts curricula, with much more emphasis now being placed on career oriented practical courses. The yeshiva world may be influenced by these outside forces and therefore, the more pragmatic, utilitarian orientation of American society at large and of its academies of higher education in particular, has entered the advanced *yeshivot* as well. As such, more *kollel* members focus on practical Halakhah than heretofore.¹⁷

Unfortunately, there is often a bifurcation, which leads former

students of Lithuanian *yeshivot* to abandon their training when rendering halakhic decisions. Apparently, the combination of *lomdut* and *pesak* is an elusive goal. However, with the burgeoning growth of *yeshivot* in Israel and the U.S., it is likely that scholars who combine the profundity of the Brisker approach and the practicality of the world of *pesak* will emerge as *poskim* whose works will live on forever.

III

R. Moshe Besdin would frequently chastise both teachers and students to learn ‘it,’ and not about ‘it.’ In this spirit, a few examples of the affect of the conceptual approach, as opposed to presumed precedent, on *pesak Halakhah* are in order. In our discussion, it is important to consider several factors in gauging the conceptual approach’s effect on a particular subject in Halakhah. How revolutionary is this new, Brisker *pesak*? Has it uprooted a traditional approach? Are there large practical ramifications? Are said ramifications personal or communal? Yet another issue is how the Brisker *derekh* can be utilized not merely in pure *pesak*, but assisting the Soloveitchikian enthusiasm for *humrot* discussed above.

A) It is prohibited to command a gentile to do a *melakhah* on *Shabbat*. Yet after *Shabbat*, one may take the gentile to task for not performing a specific *melakhah* on *Shabbat*, so that he will know to perform the desired action the following week. In an apparently similar ruling, the *Shulhan Arukh* permits one to say a suggestive statement to a gentile on *Shabbat* such as “We’ll see if you do this *melakhah* tonight.”¹⁸

More careful analysis reveals that there are two separate prohibitions (*tzvei dinim*) regarding commands to gentiles. Firstly, commanding a gentile to perform an action that mentions one of the thirty-nine *melakhot*, is proscribed as such, based on the Talmud’s interpretation of *ve-dabber davar*. Indeed, the mere mention of a *melakhah* in one’s own plans is similarly forbidden.¹⁹ This prohibition is of course limited to commands issued during *Shabbat*.

An entirely different *issur* applies to a command enunciated before or after *Shabbat*. A gentile who performs a specific *melakhah*

on *Shabbat* in response to a Jew's explicit command before or after *Shabbat*, is viewed as an agent (*shaliah*) of the Jew and it is as if the Jew himself performed the *melakhah*. An indirect request however, such as "Why didn't you do this *melakhah* on *Shabbat*?" is insufficient to create *shelihut* (halakhic agency) and is thus permissible.²⁰

According to this analysis, it must be prohibited to even mention one of the *melakhot* to a gentile on *Shabbat* so that he should perform it at night. Perforce, the word *melakhah* must refer to work in its colloquial sense, involving an action not limited to the thirty-nine *melakhot*.²¹ This example, which includes the use of both "two *dinim*" and a reinterpretation and more careful definition of a familiar term (*melakhah*), is relevant each week, but only in certain circumstances.

B) If one forgot to *daven ma'ariv* on *motza'ei Shabbat* one must recite the *shaharit amidah* twice on Sunday morning. The *Mishnah Berurah* rules that *attah honantanu* (normally said in the *amidah* of *motza'ei Shabbat*) is said in the second *shemoneh esrei*.²² His reasoning is simple: The first *amidah* is intended for *shaharit*, while the second is *tashlumim* for the previous *ma'ariv*. Since *attah honantanu* belongs in *ma'ariv*, it is said in the second *amidah* on Sunday morning.²³

Rav Hayyim disagrees. He argues that *attah honantanu* is not an addition to the *ma'ariv amidah* per se, but rather an addition to the first *amidah* recited after the end of *Shabbat*. Therefore, since in this case the first *amidah* recited after *Shabbat* is during *shaharit* of Sunday morning, *attah honantanu* should be recited at that point (in the first *amidah*). This example, in which a term is defined in a painstakingly precise manner and leading thereby to another result, also only has practical ramifications in rare instances.

C) From *Shabbat*, we move to *Hannukah*. The *Taz* assembles numerous proofs that normatively, if a person performing a *mitzvah* has the explicit intent (*kavannah*) not to fulfill that *mitzvah* with his actions, this negative intent is effective and nullifies the *mitzvah*. The individual must perform the *mitzvah* anew and recite a second *berakhah*. This rule applies equally to *ner Hannukah*. The *Taz* disagrees with the Maharshah who claims that negative *kavannah* is ineffec-

tive specifically by the *mitzvah* of *ner Hannukah* and that a second *berakhah* in this case would be *le-vatalah*.²⁴ Conceptually however, *ner Hannuka* is different from all the examples cited by the *Taz*. It is not a personal *mitzvah* incumbent upon every individual, but is rather restricted to one *ner* per household. It is arguable that obligations of a resident, such as *ner Hannukah* and *mezuzah*, are fulfilled automatically by all residents when the action is performed and are not subject to nullification by the negative *kavannah* of any particular resident. This conceptual distinction between, if you will, *gavra* and *heftza*, rebuts all precedential proofs by the *Taz*²⁵ and has practical ramifications which are usually masked by other considerations.

D) The Rema rules that the *berakhah* of *she-asah nissim*, like all other *birkhot ha-mitzvah* should be said before the kindling of *nerot Hannukah*.²⁶ *Masekhet Soferim* however, requires that the *nerot Hannukah* be lit first, so that *she-asah nissim* be said as a *birkat ha-ro'eh*. Nonetheless, the universally accepted practice is to follow the *pesak* of the Rema.

R. Hayyim devised a compromise intended to fulfill both opinions whenever possible.²⁷ Every night after the first, R. Hayyim recited *she-asah nissim* after kindling the first *ner*. In this usage, the *berakhah* is considered a *birkat ha-ro'eh* for the first *ner*, and *birkat ha-mitzvah* for the remaining *nerot*. This practice is rooted in the Brisker penchant for *humra* and fulfilling as many *shittot* as possible and a willingness to deviate from standard normative practice, albeit in the privacy of the home.

E) Continuing our tour of the halakhic calendar, we encounter the *mitzvah* of *sefirat ha-omer*. The Rema rules that if one forgot to count on one day, he may not recite a *berakhah* on subsequent days, because of the requirement of *temimot*.²⁸

The *Beit ha-Levi* notes that there are two separate and distinct *mitzvot* of *sefirah*, counting both days and weeks.²⁹ Therefore, if one forgot to count on one day in the middle of the week, he may still count with a *berakhah* at the end of that and all subsequent weeks. This departure from the Rema's accepted ruling is both somewhat rare and usually unnoticed.

F) If a *berit milah* is performed on a fast day, the celebrants

must fast like the rest of the community. However, if a *berit milah* occurs on *Tish'ah be-Av she-hal be-Shabbat* that is delayed until Sunday, they need not complete the fast.³⁰ This seems to indicate that a delayed *Tish'a be-Av* is more lenient than a lesser fast, such as *Asarah be-Tevet*, which is not delayed. A pregnant or nursing woman may eat on *Asarah be-Tevet*. Based on the principle of *kal va-homer*, the *Yehaveh Da'at* rules that she may eat on a delayed *Tish'ah be-Av*, which as was demonstrated, is more lenient.³¹

However, a deeper analysis of the *Tish'a be-Av* dispensation yields a different result. This exception for the celebrant of a *berit milah* is based on the Talmudic principle that it is considered a *Yom Tov she-lo*. Such a private holiday cannot take effect on a day which has been designated as a day of mourning for the entire Jewish people. When *Tish'a be-Av* is delayed until Sunday however, a classical *haki-rah* can be raised: Is the ninth of *Av* completely uprooted to Sunday the tenth? Or is the ninth still the day of mourning, conceptually and even somewhat practically, and the delay relates only to those activities which may not be performed on *Shabbat*?

The second approach explains why a celebrant need not complete a delayed fast. Since it is not the day of national mourning, his private holiday can take effect. This permits, even demands, that he not complete his fast, even though a delayed *Tish'a be-Av* is generally more stringent than *Asarah be-Tevet*. Thus, the *kal va-homer* is rebutted and perhaps, pregnant and nursing women must fast on a delayed *Tish'a be-Av*.³² This conceptual analysis advanced by the *Rav* leads ironically, to a *humra* in the laws of fasting in a fairly common, through private situation.

G) The halakhic calendar tour concludes at the beginning of the year, *Rosh ha-Shannah*, with two revolutionary rulings of the *Rav* in very public matters.

Rashi and *Tosafot* disagree about the definition of the term *teru'ah*. According to Rashi, it denotes three very short staccato sounds, whereas *Tosafot* require nine such short blasts. For each opinion, a *teki'ah* is a single blast equivalent in length to a *teru'ah*. The Rema records the custom to follow *Tosafot*, which appears to be a *humra*. However, the *Mishnah Berurah* notes that *Tosafot's shever*

(one third of a *teru'ah* – a blast of three tones) is invalid according to Rashi. According to Rashi, a blast of three tones is equivalent to a *teki'ah* and therefore the Rema's decision does not incorporate Rashi's opinion, but merely sides with *Tosafot's*.

The *Rav* in his youth suggested an ingenious way to fulfill both views at once.³³ *Tosafot's* requirement that the *shevarim* equal nine short sounds can be fulfilled with five *shevarim*, each of which extends as long as two short sounds. This method of *shevarim* is acceptable according to Rashi as well, since no single *shever* extends to the equivalent of three short sounds, which is equivalent to a *teki'ah*.

Apparently, R. Hayyim accepted the *Rav's* suggestion and some Briskers, including some family members, actually fulfill *teki'at shofar* in this fashion. This public, radical departure from the norm, which carries halakhic risks as well,³⁴ is a striking example of a conceptual definition leading to a practical solution to a halakhic problem.

H) The Gemara states that the ten *pesukim* which are recited in the three special *berakhot* of *musaf* in *Rosh ha-Shannah* are related to the *teki'at shofar* which follows each *berakhah*.³⁵ If *teki'ot* do not follow, such as in *kedushat Hashem* according to R. Yohanan ben Nuri, only nine *pesukim* should be recited. This puzzling statement requires explanation.

The *Rav* explained that the nine *pesukim* confirm the basic principles of the three *berakhot*. The tenth *pasuk* however, is considered part of the concluding *bakashah* section of each *berakhah*. Apparently, the *bakashah* is related to the subsequent *teki'at shofar*, which is a form of *ze'akah*. Therefore, if there is no *teki'ah*, the tenth *pasuk* should be omitted. In fact, the tenth *pasuk* is recited in the middle of the concluding *bakashah* section of *zikhronot* and *shofarot*. In *malkhiyot* however, whose concluding section is identical to that of the other three *tefillot*, the tenth *pasuk*, "*Shema Yisra'el*," precedes the *bakashah* to which it properly belongs. To demonstrate this point, the *Rav* required the *shaliah tzibbur* to pause after the ninth *pasuk* of *malkhiyot*. After the customary tune which denotes the end of a paragraph is sung by the congregants, the *shaliah tsibbur* says the tenth *pasuk*, and without interruption or pause, immediately begins the concluding *bakashah* section.³⁶

While perhaps of little actual halakhic consequence, this dramatic change of custom is based purely on a novel, conceptual interpretation of a Talmudic passage. This analysis, which effectively applies the “two *dinim*” approach, illustrates how precedent is overturned by the Brisker *derekh*. That the *Rav* and some of his disciples apply this conceptualization practically, is a model of the far-reaching effect of the Brisker *derekh* on *pesak Halakhah*.

NOTES

I wish to thank Meir Soloveichik for his assistance in preparing this paper.

1. R. Yosef Dov Soloveitchik, *Beit ha-Levi* (1884), *Mishpatim*, 50. The Talmud (*Nedarim* 81a) attributes the exile to the failure to recite *birkat ha-Torah*. The fundamental error was considering *talmud Torah* as a means to the end of observance. Since only the final step warrants a *berakhah* (*Menahot* 42), the Jews omitted the *berakhah* and were punished by being exiled.
2. Introduction to *Beit Yosef on Tur Orah Hayyim*. The *Beit Yosef* relies on the majority of the three pillars of *hora'ah*: the Rif, the Rambam and the Rosh, unless all or most scholars disagree and as a result, the custom is the reverse (of the ruling of the three or the majority thereof). If one of the three pillars is silent and the other two disagree, the tie is then broken by the majority of these five halakhists: the Rambam, the Rashba, the Ran, the Mordekhai and the Semag. Note the Sephardic majority of one in each case.
3. Introduction to *Darkei Moshe on Tur Orah Hayyim*. Rema mentions specifically *Tosafot*, Maharam of Rotenberg, the Ra'avya, the Mordekhai, the Rosh and the *Tur*. In addition, he emphasizes the principle of *hilkheta ke-batra'i*, the need to follow later authorities, rather than the earlier ones relied upon by the *Beit Yosef*. Presumably, the *Beit Yosef* limits this Geonic concept to dispute in the Talmud, a view attributed to the Rambam, whereas the Rema cites the Maharik, who extends *hilkheta ke-batra'i* to arguments among post-Talmudic *poskim*. See, generally, *Entzyklopediah Talmudit* 9 (Jerusalem 1959), 341–345.
4. R. Hayyim Yosef David Azulai (*Hida*), *Shem ha-Gedolim* I:2, 104, records a tradition that the *Shakh* would invoke a mystical divine name in order to find the desired sources (*beki'ut*) immediately.
5. See *supra*, note 3.
6. R. Yehuda ha-Levi Epstein, introduction to *Minhat Yehudah* (Warsaw 1877). The author bemoans the fact that he was trained in this way. He attributes the superiority of other scholars to their proximity to Vilna, where the *derekh* of the Vilna *Ga'on* prevailed.
7. In *Hut ha-Meshulash* (Vilna 1882, 39), R. Hayyim of Volozhin writes: “I was warned

- by my master the Ga'on of Vilna not to show favor (*she-lo li-sa panim*) in deciding Halakhah." Indeed, the *Bi'ur ha-Gra* on *Shulhan Arukh*, ostensibly an explanatory work merely acting the sources of R. Yosef Karo and the Rema, includes innumerable instances in which the Gra rules against the *Shulhan Arukh*. The entire work *Ma'aseh Rav* records the revolutionary practices of the Ga'on of Vilna.
8. R. Hayyim of Volozhin introduced the Vilna Ga'on's method in his yeshiva, which dominated Lithuanian scholarship through most of the nineteenth century. For a prime example of the Gra's impact on practice, see *Mishnah Berurah* 261:23. The *Shulhan Arukh* and all of its major commentaries follow the view of Rabbeinu Tam, that daytime extends until about one hour after the astronomical sunset and that nighttime does not fully begin until at least 72 minutes after sunset. The Gra strongly disagreed and his view became the normative one in Lithuania. Nowadays, the Gra's view is universally accepted *le-humra* on *erev Shabbat*, while most, though not all, commentaries even accept the Gra's view *le-kula* on *motza'ei Shabbat*. For a discussion of the force of early precedent and changing customs focused in this particular example, see R. Hayyim Druk, *Orot Hayyim* (Jerusalem, 1970) and the rejoinder of R. Yehiel Michel Tukechinsky therein.
 9. R. Shelomo Yosef Zevin, *Ishim ve-Shitot* (Jerusalem: 1957), 48–53. "Heftza" can refer to a physical object, such as *hametz*, or a halakhic entity such as *tefillat ma'ariv*. See *Hiddushei Rabbeinu Hayyim ha-Levi, Hilkhhot Hametz u-Matzah* 1:3, and *Hilkhhot Tefillah* 10:6.
 10. *Ibid.*, 60. R. Zevin adds that R. Hayyim's incomparable pedagogical skills were based in part on the tone of illustrative expression which, unfortunately, cannot be captured completely in writing, despite R. Hayyim's exacting standards and excruciating efforts to achieve total precision. See Introduction to *Hiddushei Rabbeinu Hayyim ha-Levi*. See also *Ishim ve-Shitot*, 69 for the importance of precisely defining terms, rather than merely translating them. While R. Hayyim's example, the confusion of the term *panim hadashot* used in two completely different areas, *tum'ah* and *sheva berakhot*, is referred to as a joke (*bedihah*), in other instances it is quite a serious matter. See section IIIA, for example, regarding the need for a precise definition of the term *melakhah*, which also has two meanings.
 11. *Ibid.*, 42–48.
 12. R. Henoah Agus, Introduction to *Sefer Marheshet* (Vilna, 1931).
 13. R. Shelomo Yosef Zevin, 64. See *Hiddushei Maran Riz ha-Levi, Hilkhhot Shevitat Asor*.
 14. As related by Rabbi Ahron Soloveichik, *Parah Mateh Aharon* (Jerusalem: 1997), *Hilkhhot Yesodei ha-Torah* 1:1.
 15. See *Ishim ve-Shitot*, 63: "R. Hayyim felt that he would be unable to traverse the traditional path, he would be forced to rule against the usual and accepted [*pesak*]. At a time when his brilliant mind and clear thought showed him a path different from the giants of the decisors, the pure conscience of this man of truth would not allow him to disregard his own opinion and give in. He would be forced to disregard *their* opinion, and therefore did not want [to *pasken*]."

16. *Ibid*, 64.
17. This point was suggested by Prof. David Sykes. He likened it to the statement attributed to R. Yisrael Salanter concerning the connection between the rise of intellectualism in the Western world and the greater intellectualization of Talmudic study which occurred simultaneously in Volozhin. The precise cause and effect relationship, if any, in R. Yisrael's statement is a matter of dispute.
18. *Shulhan Arukh Orah Hayyim* 307:2,7,22. See R. Yehoshua Newirth, *Shemirat Shabbat ke-Hilkhatah* (Jerusalem: 1979), 392–294, who seems to permit even the mention of one of the thirty-nine *melakhot*. (See 393, second paragraph and 394, ninth paragraph). Although the expression “taking me in your car” is not technically a *melakhah*, R. Neuwirth's permissive ruling is not based on this factor. Rather, he equates the case of a hinted command (*remez derekh tzivui*) issued after *Shabbat*, which is allowed for a real *melakhah* such as lighting a fire (*Mishnah Berurah* 307:11), with a similar command issued on *Shabbat* for a *melakhah* after *Shabbat*.
19. *Orah Hayyim* 307:1, based on *Shabbat* 150a.
20. *Shemirat Shabbat ke-Hilkhatah*, 392 n. 2.
21. See my “*Amirah le-Nokhri be-Shabbat*,” *Beit Yitzhak* 22 (1990): 82–83.
22. *Orah Hayyim* 294:2.
23. *Ishim ve-Shitot*, 61, quotes R. Hayyim's expression: If Sunday would full before *motzaei Shabbat*, one would say *attah honantanu* on Sunday. So it is for one who forgot. R. Zevin cites this as an example of a pedagogical expression which cannot be utilized in formal written discourses. See *supra*, note 10.
24. *Taz Orah Hayyim* 677:1. While the *Taz* seems to focus on negative *kavannah* specifically with respect to the *berakhah* itself, his argument is understood to have reference to the *mitzvah* of *ner Hannukah* as well. See *Mishnah Berurah* (677L16) citing the Maharshal with whom the *Taz* disagrees.
25. See *Birkei Yosef*, ad loc., for the kernel of this idea; it is further developed in contemporary works. See R. David Yosef, *Torat ha-Mo'adim* and the collected *shi'urim* of R. Zalman Nehemia Goldberg.
26. *Orah Hayyim* 676:2.
27. See *Mesorah* 4 (Kislev 1990): 7–9. The *Darkei Moshe* (676) quotes a similar practice, in which *she-asa nissim* is delayed until just before the last candle. However, he does not say that it is a compromise intended to satisfy two conflicting opinions. Perhaps he views *she-asa nissim* as having *tzvei dinim*, of serving both as a *birkhat ha-mitzvah* and as a *birkhat ha-ro'eh*.
28. *Orah Hayyim* 489:8. The precise explanation of this Halakhah is itself the subject of a controversy. Traditionally, it is held that all forty-nine days comprise one *mitzvah*. However, the *Rav* advanced a totally different approach. It is, he argued, impossible to count the third day before the second. The lack of continuity is what makes subsequent counting impossible. This leads to many practical differences, some of which are found in *Mesorah* 3 (5760): 35–38.
29. *She'eilot u-Teshuvot Beit ha-Levi* 1:38.
30. *Shulhan Arukh Orah Hayyim* 559:9 and *Mishnah Berurah* 559:35.

31. R. Ovadia Yosef, *Yehaveh Da'at* 3, no. 40. The identical *pesak*, albeit without the *kal va-homer*, is found in the *Bi'ur Halakhah*, s.v. “*ve-eino*,” cited from earlier sources (R. Akiva Eiger, who in turn quotes *Shevut Ya'akov*).
32. *Mesorah* 14 (*Tishrei* 1997): 3–7.
33. This is traditionally known as R. Hayyim's *hiddush*, but R. Hershel Shachter, *Nefesh ha-Rav* (Jerusalem:1994), 21 n. 19 writes that R. Ahron Soloveichik told him that it was the *Rav* who suggested the idea to R. Hayyim.
34. It is possible that each *shever* must be the equivalent of at least three short sounds according to *Tosafot*. If so, a *shever* of less duration is intrinsically invalid. See R. Moshe Sternbuch, *Mo'adim u-Zemanim*, 5:6.
35. *Rosh ha-Shannah* 32a.
36. *Mesorah* 14 (*Tishrei* 1997): 3–7.

