The Conceptual Approach to Jewish Learning

edited by

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The Orthodox Forum, convened by Dr. Norman Lamm, Chancellor of Yeshiva University, meets each year to consider major issues of concern to the Jewish community. Forum participants from throughout the world, including academicians in both Jewish and secular fields, rabbis, rashei yeshiva, Jewish educators, and Jewish communal professionals, gather in conference as a think tank to discuss and critique each other's original papers, examining different aspects of a central theme. The purpose of the Forum is to create and disseminate a new and vibrant Torah literature addressing the critical issues facing Jewry today.

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Contents

Contributors viii
Series Editor's Introduction xi
Preface xiii

Yosef Blau

1 The Conceptual Approach to Torah Learning: The Method and Its Prospects 1
   Aharon Lichtenstein

2 The Impact of Lomdut and Its Partial Reversal 45
   Yosef Blau

3 Polyphonic Diversity and Military Music 55
   Shalom Carmy

4 Lomdut and Pesak: Theoretical Analysis and Halakhic Decision-Making 87
   J. David Bleich

5 The Brisker Derekh and Pesak Halakhah 115
   Mordechai Willig

6 Conceptual Approach to Learning and Hinnukh 131
   Yosef Adler

7 The Role of Lomdut in Jewish Education 145
   Jeremy Wieder
“What” Hath Brisk Wrought: The Brisker Derekh Revisited
Mosheh Lichtenstein

Reflections on the Conceptual Approach to Talmud Torah
Michael Rosensweig

From Reb Hayyim and the Rav to Shi’urei ha-Rav Aharon
Lichtenstein – The Evolution of a Tradition of Learning
Elyakim Krumbein

The Brisker Method and Close Reading – Response to Rav
Elyakim Krumbein
Avraham Walfish

Beyond Complexity – Response to Rav Avraham Walfish
Elyakim Krumbein

The Orthodox Forum Eleventh Conference
List of Participants

Index

Editor’s Note: At times, we have used the term Lomdus rather than Lamdanot to describe erudition, as it is popular common usage.
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Rabbinic Authority and Personal Autonomy
*edited by* Moshe Z. Sokol

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Reflections on the Conceptual Approach to Talmud Torah

Michael Rosensweig

I

“Ve-Talmud Torah keneged kulam” (Pe‘ah 1:1). This simple yet far-reaching statement establishes the singular prominence of talmud Torah (Torah study) in the hierarchy of halakhic values. While the very opportunity to intellectually and experientially engage devar Hashem (the Divine Word) justifies this lofty characterization, talmud Torah’s broader role, itself anchored in its status as devar Hashem, further contributes to this assessment. Jewish law and thought perceives Torah study to be an indispensable component in the total development of the religious persona.1 Torah study directly impacts upon a wide range of related halakhic experiences and institutions, including ahavat Hashem (love of God), yir’at shamayim (fear of heaven), derekh eretz, teshuvah (repentence), the sacrificial
order and even the festivals.\textsuperscript{2} It is, of course, critical to the proper observance of all halakhic norms. Even the narrower obligation of Torah lishmah (study for its own sake) is extensive and ambitious. The obligation encompasses both the effort to master and internalize the entire vast corpus of Jewish law in all of its majestic sweep (Kiddushin 30a.), as well as the need to focus concentration on each detail and every nuance. The Ga\textsuperscript{on} of Vilna explains the view that one could satisfy his daily study obligation simply by reciting the kri\textsuperscript{at} shem\emph{a} twice a day (Menahot 99a) by reflecting upon the overriding importance and infinite depth of every detail of Torah.\textsuperscript{3}

While centrality of talmud Torah and its wide agenda are axiomatic, the balance between its different, sometimes competing components has been subject to quite different perspectives. The complex relationship between theoretical talmud Torah and its various pragmatic and instrumental functions – to promote observance, to build character and to advance scholarship – is sometimes crystallized in discussions of the definition and scope of “Torah lishmah,” or the interrelation between study and deed.\textsuperscript{4} Understandably, different methodologies and a variety of educational strategies aimed at attaining the multiple and diverse goals of Torah study have been employed in different eras and settings, reflecting different priorities and approaches. Generally, one does not master a vast corpus in the same manner that one mines its nuances. Achieving proficiency in halakhic decision-making may require an emphasis and program that diverges significantly from the purist pursuit of theoretical Torah lishmah.

While the educational and programmatic import of the different perspectives on Torah study affecting the pace, subject matter and depth of study is undeniable, it is evident that there are also significant issues regarding the orientation and methodology of talmud Torah that transcend educational strategy. These of course seriously affect educational policy as well. The dual character of Torah as Divine text (Torah she-Bikhtav) and oral tradition-analysis (Torah she-Be\textsuperscript{al} Peh) already demands special attention. The fact that the principles and oral traditions of Torah she-Be\textsuperscript{al} Peh were ultimately, if reluctantly, consigned to textual form adds a further
Reflections on the Conceptual Approach to Talmud Torah

dimension to the conceptual and educational challenge of Torah study. As a series of Divine texts and rabbinic sources in which form, structure, context and formulation are crucial (notwithstanding the significant differences between Divine and rabbinic texts), Torah requires careful contextual interpretation. As the repository of halakhic norms, values and concepts that are designed to be implemented in a variety of conditions and circumstances and that are intended to shape man’s spiritual personality, Torah also demands creative analysis, human input and relevant application, all of which dictate the extraction of the norm from its textual origin. These two dimensions are by no means mutually exclusive. Indeed, they are ideally complementary. However, they do promote discrete textual and conceptual models, or at least emphases of talmud Torah. Is talmud Torah primarily concerned with comprehending and mastering texts, or is its fundamental goal the extrapolation, application and internalization of concepts and ideals?

Moreover, the working assumptions of different views, schools and methods of talmud Torah with respect to both its texts and concepts are hardly uniform either. Some halakhists perceive Talmudic literature to be a fundamentally unified and consistent corpus in which apparent conflicts demand substantive resolution in absence of explicit disagreement. Other authorities project a greater range and diversity of opinion for the Talmudic world. They are less likely to seek legal distinctions and conceptual solutions, preferring to ascribe discrepancies to debate and dispute. The different approaches are reflected in Talmudic discourse itself and in the tendencies of distinct schools of halakhic thought. The issue is evident in the diverse foci of Talmudic commentary and is exemplified by the contrast between the parochial textual focus of the ge’onim and sfrut de-bei Rashi and the global perspective of the Tosafists, whose sweeping dialectics sought to harmonize apparently disparate Talmudic evidence.

The perceived conceptual distance between acknowledged opposing halakhic views constitutes yet another variable in the methodology of talmud Torah. While the nature and scope of halakhic debate cannot be reduced to a single unified or exhaustive principle,
there are unquestionably discernible patterns that differentiate the perspectives of several halakhic cultures. A school of talmudists in the fifteenth and sixteenth centuries labored mightily to bridge the gap between halakhic disputants, minimizing the scope and significance of points of conflict. The unstated premise underlying this orientation is that prominent halakhists anticipate competing interpretations and arguments and that an exhaustive analysis of all relevant data and considerations should produce a single legal perspective that is more compelling than its alternatives. Proceeding on these assumptions, some halakhists concluded that most disagreements centered on fine points of interpretation or application. In sharp contrast, other halakhic schools, including predecessors and adherents of the conceptual approach to talmud Torah in the modern era, often tend to accentuate halakhic ambiguities and magnify even apparently minute points of halakhic contention, projecting them as fundamentally different perspectives on a particular theme.

Identifying issues central to halakhic problem solving may facilitate a better understanding of recent halakhic developments. Confronted with textual or logical difficulty, what are the preferred methods of halakhic resolution and how transforming are those resolutions likely to be? The constraints of this paper do not allow for concrete examples that would illustrate various perspectives, but some general remarks may help to highlight and put into context the conceptual revolution in Torah studies that has occurred in the past century and a half.

Practitioners of a certain type of pilpul seek solutions to halakhic problems by creatively discovering and projecting previously unknown or unclear relationships, interlinking positions, issues and especially texts and sources in a manner in which difficulties are resolved. The process, esthetically edifying and intellectually impressive for the mental energy and magisterial control of vast material it reflects, can be quite elaborate and tends to range over and reshuffle several sugyot. Projected solutions entail and often further stimulate a reexamination of various issues and interrelationships, but they are not initially or primarily motivated by logical analysis of the
relevant doctrines. In any case, the goal of the exercise is simply to neutralize the difficulty.

By contrast, medieval and early modern Talmudists with a more analytical orientation, produce halakhic solutions by probing the assumptions underlying a particular question, by reassessing the character of problematic cases or concepts, or by determining the presence or absence of external considerations that may be decisive in a particular context. Often analytical distinctions introduced in order to neutralize specific problems have wider repercussions, affecting not only the application, but also the very formulation of basic concepts. Still, only occasionally and sometimes only after the considerable passage of time in which the idea took root, were these implications pursued and fully articulated. First and foremost, the principle adduced was perceived and projected as a solution to a given halakhic dilemma.

R. Tam’s doctrine of the interrelationship between shi’bud ha-guf and shi’bud nekhasim (personal indebtedness and property liens) is a case in point.8 Introduced as a solution to an apparent contradiction regarding the capacity to transfer a debt contract and the ability of the original creditor to cancel the debt despite that transfer, this doctrine could potentially have reshaped medieval discussions of shi’budim (halakhic mortgage law).9 In fact, the doctrine and its implications were largely ignored, probably as it was initially perceived narrowly as one of a number of solutions to a particular difficulty. Centuries later, this doctrine was destined to be invoked prominently in the commentaries to Hoshen Mishpat when it became recognized as a core principle in shi’budim.10

The prominent halakhists of the past century and a half, on the other hand, particularly those associated with the Brisker method, generally adopt a fundamentally different approach to problem solving. They generally seize the opportunity provided by problematic positions and even ambiguities to refine and in some cases, to dramatically reassess the character and scope of basic halakhic doctrines. Generally, they move beyond a case-orientation to a conceptual approach. Invariably, R. Hayyim’s clarification of a difficult Rambam entails a reexamination and reformulation of halakhic
definitions that significantly transcend the difficulty that engendered his analysis. While *Hiddushei Rabbeinu Hayyim ha-Levi al ha-Rambam* is technically devoted to the illumination of difficult statements in the Rambam and undoubtedly Rambam’s challenging stances served as important catalysts inspiring rigorous reassessment and precise classification, it is obvious that the importance of the work lies in its highly conceptual methodology and in the broader halakhic principles that are developed. The process of identifying, isolating and testing the interrelationships between components or motifs that comprise a particular halakhic category often yields consequential insights, even breakthroughs that ripple across the system. R. Hayyim’s analyses of the relationship between the requisite level of intention in transactions and the demand for the witnessing presence of *eidei kiyum*, his amplification of the distinctive characteristics of *kodeshei bedek ha-bayyit* and *kedushat ha-guf* and his expansive view of the scope of *eidei shetar* (the testimony of contract witnesses) rooted in an ambitious reading of Reish Lakish’s principle of "עדים החתומים בשטר, נעשה כמי שנחקרה עדותן בבית דין."

Changing trends in *talmud Torah* are also reflected in the genre of published *hiddushei Torah* (novella) and in the style of oral halakhic presentations (*shi’urim*). In the medieval and early modern eras, the clarification of problematic positions and texts predominated, alongside the more practical responsa literature. Increasingly, self-initiated inquiries into the nature and character of halakhic norms and categories have achieved prominence in recent halakhic writings. While the formulation of *hakirot* (conceptual inquiries) has earlier roots, it has certainly become far more ubiquitous, even dominant with the shift to a more conceptual approach. In the framework of such inquiries, tangible consequence and concrete ramifications (*nafkah minah*) and the resolution of apparent difficulties generally no longer trigger the discussion, but are instead employed to illuminate the diverse perspectives that have been formulated. The difference in style reflects an important difference in orientation. Moreover, many contemporary halakhists cling to the classical style of difficulty-resolution merely as a dramatic point of departure and as a method of presentation.
The movement toward a more conceptual orientation has profoundly affected *talmud Torah*. We shall focus particularly on the world of Brisk. The *Rav* (Rav Yosef Dov Soloveitchik) zt”l has credited his grandfather, R. Hayyim, with revolutionizing the methodology and epistemology of *talmud Torah*, redefining the mode of halakhic thinking and reshaping entire areas of halakhic thought.14 He has further argued that R. Hayyim’s combination of rigor and creativity has allowed *talmud Torah* to compete successfully for the minds and hearts of a generation that has been exposed to and influenced by the intellectual rigor of the scientific method.15

According to the *Rav*’s analysis, the worldview of Brisk perceives Halakhah as an *a priori* system of ideals and constructs embodied in and reflected by detailed halakhic norms.16 These constructs constitute the ideal reality that the real world can only imperfectly approximate and serve as the value prism through which man assesses his reality and purpose. Halakhic Man’s spiritual mandate is to internalize the ideal values and to implement perfect Halakhah in the real world.17 The halakhist attempts to extrapolate principles from Talmudic case law by discriminating between that which is essential and defining, and that which is incidental, tangential, or extraneous. He systematically scrutinizes individual or groups of *halakhot* in an effort to identify and isolate constituent components, establish interrelationships and articulate the inner coherence of legal categories that constitute these *a priori* principles.18

The preeminent role of analysis in this process fosters significant autonomy and individuality in the interpretation of sources and data, as well as in the formulation of ideas. Personal and creative insight (*hiddush*) is particularly valued and encouraged in this system.19 However, the role of creativity and autonomy within the Brisker orbit has generated serious controversy. Because of *talmud Torah*’s multiple agenda, alluded to previously, both substantive and stylistic issues have been raised.

Harsh critics have rejected the self-reliance entailed by this analytical methodology as excessive and have further charged that it may breed arrogance. At minimum, they question whether the
independence employed is conducive to promoting the reverence and “yir’ah” that is a sine qua non for Torah achievement. Others, disturbed by the self-confidence implied by an unmediated reading of sources, have simply challenged the authority to bypass previous interpretations. Still other detractors have contended that practitioners of this approach are actually involved in self-study of their own logical categories, which are then superimposed upon the halakhic sources and data they aspire to interpret. In particular, skepticism has been expressed whether Brisker methodology can be legitimately applied to the Rishonim who appear to operate with their own distinctive interpretive and analytical orientation.

Obviously, no perspective is immune to either challenge or constructive criticism and many of the misgivings articulated by opponents of this derekh resonate strongly. Moreover, discussions stimulated by these and other considerations have sharpened the debate not only with respect to the Brisker derekh, but with regard to the nature of talmud Torah itself. At the same time, we should be cognizant that many of the themes formulated in assessing Brisker innovation echo responses to previous shifts in darkei ha-limmud (Talmudic methodology). The reaction to the Tosafist movement illustrates this.20 This phenomenon is unsurprising, as many of the issues are indigenous to the very idea of change within a traditional framework, particularly change that projects greater reliance upon individual insight and input.

Addressing some of the arguments may facilitate our understanding of the foundations of this approach. It is self-evident that the Brisker derekh requires no justification, as it was initiated by some of the most prominent halakhists of the past century and has subsequently been embraced by much of the Torah world. The purpose of these brief remarks is simply to put some of the issues in perspective.

The overriding imperative to seek halakhic truth while relating reverently to the interpretations and conclusions of halakhic predecessors, has ample precedent in the Talmud and in subsequent rabbinic literature.21 The factor of “kevod shamayim” (Divine Glory), an obvious outgrowth of yir’at shamayim, was frequently invoked
Reflections on the Conceptual Approach to Talmud Torah

precisely to justify departures from the status quo ante in the pursuit of halakhic authenticity. The capacity of human intellect to penetrate devar Hashem within the halakhic process and on the basis of an acceptable halakhic methodology, is, of course, implicit in the very self-sufficiency of Halakhah. It is reflected in such basic halakhic axioms as the perfection of the Torah as a legal system ("Torat Hashem temimah"), the rejection of Divine intervention ("lo ba-shamayim hi," Bava Metzi‘a 59b) and the exclusion of a role for prophetic insight ("ein navi rashai le-hadesh davar me-atah," Megilah 2b) in halakhic decision-making and interpretation. The supreme, even fanatical dedication to halakhic truth achieved by means of analytical rigor that is a central feature of the Torah of Brisk and that often produces innovative and independent conclusions, stands in a long and noble halakhic tradition.22

One should be particularly sensitive to the dual charge that this approach is more likely than others to introduce extraneous individual sensibilities or theories into the halakhic process and that it implies and inspires insufficient yir’ah. In this respect, many of the critics have overlooked an important dimension of Brisker thought which, at least in theory, mostly neutralizes these arguments. A critical feature of the Brisker outlook is the notion that halakhic thought constitutes an inner logic, one which need not cohere with and certainly does not require the validation of other systems or modes of thinking.23 This perspective is, of course, fully consistent with the view that Halakhah constitutes a Divine blueprint and is both a priori and ideal. In order to create within the halakhic system, one must first submit to its overriding authority and subordinate one’s own sensibilities to its inner logic. The ideal Halakhic Man of Brisk is an individual whose very personality has been shaped by the categories and sensibilities of Torah. His sole motivation in the pursuit of halakhic truth, which is necessarily also informed by his own halakhic insights, is to further identify, clarify and advance these categories and values. This perspective powerfully projects the theme of “yir’ato kodemet le-hokhmato” (the priority of reverence over wisdom, Avot 3:9), as it entails a surrender of heart and mind to the halakhic process and to its categories. It is surely no coinci-
dence that the towering intellectual giants of Brisk have also been acknowledged as giants of *yir'at shamayim*, whose ethical, moral and pietistic standards serve as inspirational models.24

The inner-logic and idealist orientation of Brisk is linked with and responsible for many of its other characteristic manifestations. Most of Brisker analysis is devoted to describing and formulating halakhic phenomena.25 Rarely is the effort undertaken to actually explain these phenomena, certainly not to relate them to external matters, unless the explanation constitutes a component or dimension of the Halakhah itself (sometimes characterized as a “kiyum”).26

The Rav zt”l often distinguished even in discussions of hashkafah and Jewish philosophy between “Why” and “What” questions. His critique of *ta’amei ha-mitzvot* (rationalization of the commandments) centers on this distinction between rationalizing and reconstructing the norm.27 Halakhists, especially of the school of Brisk, certainly focus almost exclusively on reconstruction. If Halakhah is a totally self-sufficient system, indeed the *a priori* foundation for an ideal reality, it requires no external validation, certainly no justification. The purpose of study and observance of the norm is simply to identify, internalize and implement the categories. The use of a highly abstract and descriptive terminology to represent halakhic phenomena is consistent with these motifs. The halakhic vocabulary of classic Brisk is self-contained; it does not invoke concepts or language whose origins lie beyond the world of Halakhah.28

The idealist halakho-centric orientation of Brisk also impacts upon other branches of Torah study. The tendency to translate or at least recast *aggadah*, Midrash and *parshanut* (Biblical commentary) into halakhic categories is perfectly understandable given the perspective of halakhic idealism.29 It is surely no coincidence that Brisker idealists have concentrated disproportionately on *Zera’im*, *Kodashim* and *Taharot*.30 These domains are particularly conducive to formalistic description and the identification and development of an inner logic, as they defy any analogue outside of the world of Halakhah.

It is equally intriguing to chart the course of Brisker analysis in the apparently more pragmatic worlds of *Hoshen Mishpat*, *Even ha-Ezer* and even *Orah Hayyim*. One can easily discern the proclivity
to conceptualize even pragmatic elements into abstractions. In many cases, the results are extremely compelling and even profound. R. Hayyim’s apparent understanding of the factor of “hav le-aharini” (detrimental impact on third parties) that requires a witnessing presence (eidei kiyyum) to a transaction such as a marriage (Kid-dushin 65b) illustrates this point. The traditional interpretation narrows the role of this factor, as well as the significance of its impact. It establishes simply that one cannot rely on a personal admission of obligation or commitment (“hoda’at ba’al din”) that also may adversely affect other parties. Hence, transactions that affect others always require witnesses. R. Hayyim, however, discerns a broader conceptual pattern in the laws that distinguish marriage from other transactions. He develops an integrated theory based upon the cumulative evidence that marriage constitutes a profound transformation that redefines personal status. In this view, the very fact that marriage between two individuals may be legally consequential to other parties indicates that it is a transforming commitment and not merely a narrow agreement between the parties. According to this perspective, the role of witnesses in marriage is not to secure the interests of other parties, but to formalize and solemnize this profound change in personal status. The absence of witnesses is not simply an extraneous problem of insufficient evidence. In fact, the absence of the solemnizing and formalizing presence constitutes a fundamental flaw in the quality and therefore in the legality of the ceremony. It is unsurprising that a further link is established between the requisite level of commitment (da’at) and the requirement for a witnessing presence, as both of these functions are indispensable to the creation of this new legal status (halot ishut).

The de-emphasis of pragmatic elements affects even areas of Halakhah in which these factors appear to predominate. The Rav zt”l invoked the theme of shetarot (contract law) when he spoke of R. Hayyim’s revolutionary contribution to halakhic thought. R. Hayyim did not negate the central role of hazakot (presumptions) and umdena’ot (assessments-estimations) in this context. The Talmud explicitly precludes that the signatories to a contract may have been disqualified as witnesses or that the obligation may already
have been honored on the basis of presumptions. R. Hayyim did however, completely redirect the emphasis in *shetarot* by elegantly integrating the presumptions into an expansive notion of testimony (*eidut*) projected by the holder of the contract (*ba’al ha-shetar*) based on the license initially granted by the obligated party (*da’at ha-mithayev*) in the name of signatories who in fact may not even have witnessed the transaction. This analysis explains the overlap between the *hazakot* that are prominent in contract law and Reish Lakish’s foundational theme (“נсим החתומים בשטר, נעשה כמי שנחקרה עדותיה” Ketubot 18b, Gittin 3a), which projects an expanded notion of testimony. The projection of testimony on the authority of the signatories is limited by that which is deemed plausible based upon the rules of presumptions and estimations.

It is evident that integrating apparently pragmatic factors into conceptual halakhic frameworks constitutes a significant challenge for adherents of the analytical approach. R. Hayyim’s effort to cast the factor of a non-Jew’s independent motivation (“נכרי על דעת עצמו הוא א소”), which precludes his ability to attain the status of “lishmah” (purity of motive) that is necessary to invest Torah, *tefillin* or *mezuzah* with sanctity, into the mold of a fundamental legal exclusion, typifies the difficulties inherent in this challenge. Indeed, some halakhic schemes simply do not easily account for pragmatic elements. In any case, it is consistent with the theme of Halakhah as *a priori* and ideal that *hazakot* themselves are generally idealized and objectified in this system, perceived not simply as sociological trends, but as ontological and existential truths.

**III**

We have tried to highlight some of the singular features of the conceptual approach that has swept the halakhic world in the past century. However, it is also important that the dimensions of this transition not be misconstrued or exaggerated. Certainly, the conceptual method did not arise in a vacuum, nor does it represent any discontinuity in the unfolding of the *mesorah*. Although the exact lines of development may be ambiguous and they are certainly beyond the ken of this paper, the roots of this *derekh* are clearly evident...
Reflections on the Conceptual Approach to Talmud Torah

in countless Talmudic passages. In some tractates, like Keritot and Sanhedrin, whole sections read like conceptual dialogue. Numerous trenchant examples of this mode of formalistic and conceptual thought can be adduced from the literature of Rishonim and acharonim.

Undoubtedly, these formulations and doctrines made a striking impression on those who projected this derekh. When the Rav encountered a particularly sharp or profound conceptual development in the Rishonim, he would sometimes comment with great excitement that its author was the forerunner of the Brisker derekh. It matters not that the same appellation was invariably applied to different Rishonim and poskim on different occasions: Ri Migash, Rambam, Raavad, R. Tam, Ramban, Shakh, Netivot etc. Primarily, the Rav intended to bestow his highest compliment. On another level, he conveyed that this mode of thought and emphasis validated and inspired the conceptual method.

It is interesting to note that it was not unusual for R. Hayyim to come (apparently independently, as there is no attribution) to the conceptual conclusions and formulations of his halakhic predecessors. Like the Shakh (Hoshen Mishpat 61:126), he proposed that the initial reciprocal relationship between an owner and bailee (ba’alav imo) constitutes not merely the basis for an exemption of obligation, but a negation of the very status of bailee (shomer). With this principle, Raavad’s objection against Rambam’s doctrine (Hilkhot Sekhirut 2:3) equating the negligence of a shomer hinam (gratuitous bailee) with an act of destruction based on this specialized exemption for a bailee could be neutralized. R. Hayyim’s fundamental distinction between liens guaranteeing loans with and without contracts echoes one of Ramban’s formulations on this topic. Other famous doctrines reflect an unmistakable conceptual orientation. Ri Migash and Raavad’s subtle distinction between disqualified witnesses (such as eid pasul) and principles (such as ba’al davar) in a legal dispute who are excluded from the whole category of witnesses and testimony attests to this mode of thinking. Ri Migash’s analysis of two distinct classes of mashkon (pawns), Ritba’s doctrine of eidei kiyumu and numerous other views could easily be mistaken for vintage Brisker
Many of Rambam’s doctrines and especially his classificatory schemes, a primary focus of Brisker analysis, certainly bespeak of a clear conceptual orientation.

As previously noted, the Rav did not hesitate to characterize R. Hayyim as a revolutionary. He incisively delineated his many contributions. Yet, on other occasions, he remarked that it was absolutely absurd to think that R. Hayyim’s innovative approach was not directly related to the line of halakhic development that included: the ge’onim; Rishonim of Ashkenaz, Provence and Spain; the Shakh and Taz; the Ketzot and Netivot etc. These two perspectives are hardly contradictory. They simply reflect the unique halakhic view on innovation within tradition captured by the enigmatic rabbinic comment that Mosheh Rabbeinu was privy to all of the innovative ideas that would be advanced by sophisticated halakhic thinkers throughout the generations (“כְּלָה שֶׁשִּׁלַּחַם וּיהֵן חֵי לִדּוּת תְמוּנָה להָלָה הַלָּאָשָׁה”). R. Hayyim did not invent conceptual halakhic thinking. It was his systematic, sustained and disciplined methodology, his unique halakhic vocabulary, his descriptive disposition, his focus on inner logic and coherence and his conviction that Halakhah is a system of ideal constructs that was innovative. His total perspective changed the direction of talmud Torah, while its constituent components are all firmly anchored in traditional sources.

The theme of continuity not only validates this approach; but also justifies its application to sources associated with halakhic schools of different orientations. Obviously, one must be careful not to generalize, as each issue and every piece of evidence must be evaluated on its own merit. Some analyses are persuasive; others are simply speculative. We have previously referred to R. Hayyim’s views on eidet kiyyum and shetarot. The proof that numerous Rishonim believe that some hazakot integrate into the contract’s expanded testimony is overwhelming, particularly according to those, like the Rambam (Hilkhot To’en ve-Nit’an 4:8), who demand an oath to neutralize the implications of a presumption of non-payment when there is only one signatory! That a group of Rishonim implicitly adopt the broader interpretation of “hav le-aharini” is also extremely compelling. Absent R. Hayyim’s analysis, these implicit positions
Reflections on the Conceptual Approach to Talmud Torah

might have been overlooked or at least not fully understood. Moreover, a distinct advantage of an analytical approach is precisely its general applicability to all doctrines, irrespective of how they are produced. Notwithstanding their underlying motivation and intent, halakhic positions reflect basic perspectives and often affect other halakhic categories. Thus, it is perfectly reasonable to attempt to reconstruct the assumptions and implications inherent in any view whether arrived at by a process of pilpul, intuition, analogy or analysis. The “what” question becomes the relevant focus even if the “why” is attributed to other factors.

Furthermore, it is often nigh impossible to determine precisely what complex combination of forces really are determinative. Conceptual considerations may unconsciously shape viewpoints although other factors are projected as decisive. Advocates of a position may be unaware that they are drawn to a certain theme or formulation, while detached observers might detect a pattern in the consistency of rulings or a clue in the use of language. It may not be so simple after all to determine the appropriate resolution of a “shvere Rambam,” even when evidence does not seem to point in a conceptual direction. While one should exercise caution in imposing conceptual schemes on halakhists who seem to be operating with methodologies distant from that mode of thinking, one should still consider that rulings may reflect definite conceptual predispositions.

Again, each case needs to be assessed in its own right. Sometimes it is obvious that one consideration is conclusive or that different factors are mutually exclusive. It should be noted, however, that the analytical approach has a distinct advantage over other derakhim, specifically when the attribution of a proposed solution to a given authority has proven to be inaccurate. Most analyses, while they may be inspired by specific difficulties or doctrines, attain independent value, as they are anchored in a broader discussion of the topic and its various components. The very engagement of substantive issues and often, some of the insights that emerge from such an engagement constitute an important contribution to abstract talmud Torah even when it is determined that what has been developed has no
bearing on the specific doctrine that initially motivated the endeavor. R. Hayyim’s analysis of ta’am ke-ikkar (the status of taste vis à vis the substance) or tashbitu (expelling hametz before Pesah) expands and enhances our appreciation of these concepts even if it could be demonstrated that they reflect nothing about the Rambam’s stance and therefore, are not validated by his authority. Moreover, the insights produced, perhaps with some necessary adjustment, may resonate in the positions adopted by others. At minimum, the fact that a prominent halakhist, attuned to the topic and total system, perceives an approach to be plausible is meaningful for the range of theoretical talmud Torah, if not for normative Halakhah.

By the same token, one may encounter in halakhic literature significant conceptual formulations, even breakthroughs that are ultimately abandoned. Others are not fully pursued or consistently implemented. While normative Halakhah focuses necessarily on the final ruling, the significance of even the musings of Torah giants should not be discounted with respect to the range of serious halakhic thought and debate. Even a casual aside may reflect the conceptual predisposition of halakhists whose intuitions are unusually attuned to the abstract constructs of the halakhic system. Discoursing on the theme of heter okhel nefesh (the permissibility of work associated with food preparation) on Yom Tov, one of the Rishonim articulates an extremely sharp formulation of “hutrah”, arguing that these categories of melakhah were never included in the festival’s work prohibition. As he continues to develop the theme, however, he implicitly undermines this formulation by casually acknowledging that these permitted categories of work cannot be performed on behalf of non-Jews or animals. One might just discount the initial formulation, as it has proved inaccurate. It is highly conceivable, however, that a proclivity to the hutrah view of heter okhel nefesh has been established, even as the halakhist struggles with and has yet to assimilate the implications of the overall evidence. Moreover, it then behooves us to examine if one may salvage or rehabilitate this perspective by reformulating or readjusting it in a manner consistent with all the evidence. It is not difficult to achieve this result in the case of heter okhel nefesh.
Reflections on the Conceptual Approach to Talmud Torah

The Rav has noted that Ramban is particularly inclined to approach and then shy away from, or at least not fully develop, some halakhic breakthroughs. Furthermore, the halakhist’s struggle to define and characterize certain halakhic institutions is sometimes reflected by and produces multiple formulations. Unquestionably, these exercises afford a precious glimpse into the analytical process. But how are we to relate to tentative theories, musings, or inconclusive suggestions? Surely, the very fact that a halakhist of Ramban’s stature is predisposed to a given perspective establishes its significance, at least with respect to abstract talmud Torah. Conceptual talmud Torah often focuses attention on the initial or formative Talmudic assumptions (havah aminot) in much the same way. These often reflect sensibilities that survive in modified or moderated forms. Although the particular application has been summarily dismissed, the total discussion has certainly been advanced and enhanced.

IV

Given the recent dominance of conceptual talmud Torah, how should one relate to previous contributions and methodologies? I have previously argued that it is entirely appropriate to apply an analytical standard to halakhic material that was generated by other methodologies. This, of course, presupposes a posture of reverence vis a vis previous developments and a conviction that doctrines produced by different halakhic schools remain absolutely relevant, in some cases even authoritative. It is axiomatic that Torah she-Be’al Peh consists of the collective sum of all the insights and principles that have been developed by hakham ha-mesorah employing diverse methodologies throughout halakhic history. Halakhic literature has been immeasurably enriched by the diversity of different darkei ha-limud, each of which brings a different perspective to the multiple, ambitious agenda of talmud Torah. The fact that differences are often one of emphasis and that discrete orientations are rarely incongruous reinforce this outlook. Even as one anchors students in a particular derekh, it is important to transmit to them an abiding appreciation for the rich history of halakhic study. The exposure to other modes of halakhic thinking and to other schools of halakhic
thought should be patterned after the educational policy outlined in the Talmud (Avodah Zarah 19a) with respect to the desirability of multiple rabbinic mentors. The Talmud distinguishes between mastery of the text and tradition (“Gemara”), which should be taught by a single mentor and a broader exposure to different ideas and insights (“sevarah”), which should come from multiple sources. The objective should be to expand knowledge and horizons and enhance understanding and experience, while avoiding the kind of distraction and confusion that would deflect from the development of a definitive derekh. In this way, students will acquire a critical perspective on the nature and lines of halakhic development even as they progress in a particular methodology. Ultimately the capacity for independence is also facilitated by a wider exposure, as each individual strives to find his personal path and special contribution in talmud Torah and yir’at shamayim.

V

What direction is conceptual learning likely to take in the near future? What challenges might it encounter? Is the present intellectual, social, technological and cultural climate conducive or counterproductive to its advancement? Let us first address the question of possible internal developments.

Halakhic conceptual analysis has far from run its course. We argued earlier that halakhic history constitutes a definite continuum, despite important shifts and transitions. Halakhic development typically unfolds in a progression that is inherently linear and incremental. Prolonged, progressive analysis entails an intensive search for textual evidence and precedent, the exploration of interpretive options, the examination of doctrines and the refinement of formulations. When this process commands the attention of successive generations of halakhists, particularly of the same school, the results are invariably impressive. Our appreciation for the conceptual structure of Kodashim, for example, continues to be significantly enhanced as different insights and principles have been advanced, assimilated, critiqued and refined, and as the interrelation between different concepts continues to be explored. The same can be
Reflections on the Conceptual Approach to Talmud Torah

said about numerous areas that have been subjected to sustained scrutiny.

Moreover, whole domains of Halakhah and vast sections of rabbinic literature await systematic analytical treatment. Brisker Torah in particular has concentrated attention on certain areas and on the works of specific Rishonim: primarily Rambam, Ra'aavad, Rashi and Tosafot and to a lesser extent, Ramban and Rashba. This narrow focus reflects the reality of a limited library, but it is also perhaps a function of the perceived need for excessive rigor, especially at the derekh's inception. Dr. Haym Soloveitchik, invoking Sir Isaiah Berlin's typological distinction between “foxes” and “hedgehogs,” has suggested that it takes tunnel-vision and an initially limited, systematic program to pioneer a methodology. In any case, having established its approach, credentials and exacting standards, the conceptual method is poised to extend its scope. The Rav zt"l, for example, made dramatic inroads in the previously neglected areas of Orah Hayyim. The publishing explosion of the past two decades has dramatically enlarged the library of the Torah world, affording access to a plethora of Rishonim and aharonim, whose views and insights might be assimilated into and in turn, considerably expand the horizons of halakhic discourse. This process has begun in some circles in our generation, notably in the shi'urim of Mori ve-Rabbi, ha-Rav Aharon Lichtenstein shlit'a. Systematically applying the conceptual approach to other halakhic material is extremely consequential, not only because of the opportunity to further test or give more concrete expression to principles that have already been articulated, but also because it engenders qualitative amplification and refinement, not to mention the derivation of new principles. Every new doctrine and insight potentially reconfigures the entire system by illuminating alternative approaches or combinations and by forcing the reassessment of previously held views. Even a more nuanced variation on an existing theme, sometimes reflected precisely by subtle differences in presentation or in seemingly minor disputes governing applications, can profoundly impact upon the character and scope of a halakhic concept. Such is the glorious nature of the unfolding mesorah process. Thus, one may anticipate that
the systematic integration of other halakhic material will contribute to both the qualitative and quantitative enhancement of conceptual talmud Torah.

Applying the analytical approach to a wider range of rabbinic literature constitutes not a dilution but an intensification of the conceptual method. Examining subtle yet important disparities between halakhic positions would especially promote a more microscopic analysis of details and nuances that would ultimately lead to even greater precision, as well as to a greater appreciation for the sophistication, subtlety and richness of halakhic thought. Expanding the traditional horizons of conceptual talmud Torah, however, should not be allowed to come at the expense of the clarity that is a hallmark of this derekh. In the spirit of tafasta merubeh lo tafasta (too much ambition can be counterproductive), it would be educationally counterproductive to indiscriminately impose a more comprehensive purview, which is inherently more complex. While such an approach might be extremely valuable for advanced students and for conveying a methodology, it might be confusing and distracting to audiences with more limited backgrounds or attention spans.48

A more comprehensive approach relates not only to the full range of views on the topic, but also to its totality. Previously, the conceptual method was depicted as projecting themes and concepts that considerably transcend the inherent difficulties that initially capture the attention of halakhists. Notwithstanding this salient feature, only rarely do we find this kind of analysis applied exhaustively to the entire topic – to the impact upon all relevant details, to the integration of textual evidence and particularly, to the interrelationship between different parallel, overlapping and interlocking themes. Now that much of the foundation has been established and many of the building blocks have been painstakingly assembled by pioneers of the conceptual derekh, the opportunity to significantly integrate and add to the structure presents itself. Increased comprehensiveness calls for opposing but complementary strategies. It entails both a more microscopic lens, as well as a broader overview. Published Brisker Torah on shetarot focus on different problems and
Reflections on the Conceptual Approach to Talmud Torah

themes: The role of the commitment of the obligated party (da’at ha-mithayev) and the relationship to depositions (“mi-pi ketavam”), the impact of possession of the contract (tefisat ba’al ha-shetar), the implications for transferring the contract to others (otiyot niknot be-mesirah), the scope of the expanded testimony and how that is limited by that which is deemed plausible based on hazakot, the application of other rules and disqualifications of testimony (like hazamah and eidut she-batlah miktzatah) to this institution. Each presentation stands on its own merit as a discrete unit and contribution. A comprehensive approach—overview would fill in the gaps by relating to additional details and a greater variety of positions with respect to each discrete analysis and more importantly, would attempt to integrate these interconnected motifs into a broader holistic perspective that would transcend the sum of its parts, and further illuminate each unit.

VI

The expansion and intensification of conceptual talmud Torah, designed to attain a more profound understanding of devar Hashem as embodied in halakhic constructs, might also include other avenues of exploration. The relationship between the written and received Torah is inherently complex. The occasional apparent dissonance between the two dimensions of Torah in halakhic matters is particularly challenging. Why does the Torah formulate “an eye for an eye” when halakhic tradition (Bava Kama 83b–84a) determines definitively that monetary compensation is intended? Why does the Torah indicate that the mitzvah of matzah extends throughout Pesah, when in fact, the obligation is limited to the first night (Pesahim 120a)? Why does the Torah represent the damages paradigms of shen (tooth) and regel (foot) with the emphatic terms “ve-sheelah”, “u-bi’er” when the Talmud actually concludes that there is no prerequisite either for being dispatched or for utterly consuming the damaged property (Bava Kama 3a)? These represent but a sampling of the serious discrepancies between the Torah’s textual presentation and the halakhic literature’s normative conclusion.

If themes, values, and principles are central to Torah and Hala-
khah as has been argued, this emphasis should be reflected, at least subtly, in the Divine text itself. It is possible that by underscoring certain motifs, especially those seemingly at odds with normative demands, the Torah effectively articulates its conceptual vision with respect to various halakhot, notwithstanding the superficial impression sometimes conveyed by the normative application. This conclusion should be considered, provided of course, that this vision coheres with and reinforces other halakhic evidence. By formulating conceptual truths, Torah she-Bikhtav magnificently complements the normative halakhic process. This compelling hypothesis neatly accounts for the discrepancies delineated above and many more. “An eye for an eye” possibly establishes that the monetary payment mandated by the Halakhah in cases of personal injury is not compensation for what the victim has lost, but a kind of symbolic ransom-atonement or payoff (“kofer”) for what the assailant theoretically deserves to suffer. A close examination of the Talmudic discussion (Bava Kama 83b–84a) and of the Rambam’s formulation (Hilkhot Hovel u-Mazik 1:3–6; Moreh Nevukhim 3:41) strongly reinforces this conclusion. Although the obligation to eat matzah is confined to the first night of Pesah, the Torah may be indicating that there is an inextricable dialectical bond between matzah and hametz (which certainly extends to the entire Pesah), something well established in the Halakhah itself. Moreover, it is possible that the matzah consumed on the first night is of such significance that it sets the tone for the entire seven-day festival. This suggestion is particularly compelling according to those (Hizkuni, Gra etc.) who rule that eating matzah, though not obligatory, constitutes the fulfillment (kiyum) of a mitzvah during the entire seven-day period. Shen and regel may not actually require the involvement of the owner or the utter destruction of the damaged object, but the Torah, through its emphasis and terminology may be conveying that the negligence that enables an animal to wander into and consume another’s field, is legally and morally tantamount to a more active and directed destruction. This conclusion coheres with and illuminates the legal evidence that distinguishes these forms of damages from others.

Armed with this perspective, one should attempt to probe an
even subtler enigma. Is it significant that some halakhot are derived via the thirteen hermeneutic principles while others are explicating in the text of Torah she-Bikhtav? This question is particularly intriguing when various components or alternative modes of the same institution are treated differently. Why does the Torah explicate kiddushei bi’ah (marriage through physical relations), while kiddushei kesef (marriage by monetary transaction) is derived from a gezerah shavah (Kiddushin 2b)? Obviously, one may only speculate on such matters. However, intelligent speculation that flows from and is anchored in serious halakhic analysis may reinforce and enhance halakhic discourse. While some Rishonim emphatically deny that there is any legal (or conceptual) relevance to the origin of a Halakhah, this view is certainly not uniformly held. Let us return briefly to the example of marriage. It is possible that kiddushei bi’ah is the quintessential method of marriage, as it integrates the interpersonal relationship of husband and wife as the basis for the formal kinyan (mode of acquisition). The fact that the Gemara (Kiddushin 10a) weighs the possibility that this method will complete the marriage by accomplishing the nesu’in in conjunction with the erusin surely reflects a special status. There are numerous other indications that this form of marriage differs from the others. Kiddushei kesef, on the other hand, accents the formal and legalistic aspects of marriage that require a mode of acquisition. This method is derived indirectly from the laws of real estate transactions, precisely because it is a foreign import from the world of Hoshen Mishpat (Jewish civil law), albeit an effective method of initiating marriage. Thus, the different Biblical sources for the various methods of initiating marriage accurately reflect a hierarchy of values that has many echoes in the normative Halakhah. This conclusion stands notwithstanding the fact that Hazal (Kiddushin 12b) decided to reverse the desired emphasis at one point, projecting kiddushei kesef as the preferred method. A careful reading of Rambam’s formulations on this matter corroborates this analysis.

I believe that Rambam’s puzzling use of “divrei soferim” may also be explained in this way. Rambam utilizes this designation to indicate that a law is derived hermeneutically. The commentators
debate whether such laws are rabbinic or Biblical. The extensive debate about Rambam's position regarding *kiddushei kesef*, which he defines as "*divrei soferim*," crystallizes the different views. However, a thorough examination of the evidence reveals glaring discrepancies and inconsistencies on this point. Evidently, the significance of this designation transcends this question. The common denominator in the Rambam's use of "*divrei soferim*" is that it reflects a legal and/or conceptual hierarchy. If the law in question is indeed of biblical origin, the fact that it is not directly explicated in the Torah's text but is derived in a secondary manner is significant. This may point to a secondary legal status or at least a different conceptual foundation.

We have already proposed that the derivation of *kiddushei kesef* from a real estate context contrasts sharply to the explicit Biblical reference to *kiddushei bi'ah* and demonstrates a different foundation and perspective. If the law associated with a hermeneutic derivation is in fact rabbinic, the fact that it is formulated in terms that link it to Biblical sources underscores that it may yet impact or partake of some Biblical law, or that it is perceived as a rabbinic extension of Biblical law, not simply a new rabbinic creation.

In any case, it is reasonable to assume, at least according to many halakhic authorities, that the implications of structure, context, location, multiple references, contrasting treatments, juxtapositions and suggestive terminology in the written Torah may also provide important perspectives and insights on various institutions and interrelationships, supporting or inspiring parallel insights in *Torah she-Be'al Peh*. The fact that the damages paradigms of *bor* (pit) and *keren* (horn) are separated from the rest of the *avot nezikin* (damages paradigms) in *parshat Mishpatim* (*Shemot* 21:28 – 37) is consistent with the conceptual conclusion based on the legal evidence that these constitute inherently destructive forces. This assessment is further reinforced by the Torah's emphasis on the digging of the pit and on the actions of the ox. In sharp contrast, the role of the owner-overseer is accentuated in the Torah's delineation of *shen, regel* and *aish* (fire) (*Shemot* 22:4–5), buttressing the impression conveyed by the halakhic material.

The Torah's presentation of the four *shomerim* in *Mishpatim*
(Shemot 22:6–14) is noteworthy. Sokher (renter) surfaces only in the context of sho’ēl (borrower), though technically it shares the legal fate of either shomer sakhar (paid bailee) or shomer hinam (gratuitous bailee). As the Mikhilta (Shemot 22:13) notes, sho’ēl is never depicted in the Torah as a shomer. These formulations fully conform to halakhic conceptual models that perceive sokher as a diluted sho’ēl and that view sho’ēl’s liability as deriving from his rights of usage, rather than from his commitment as a shomer.

The correlation between the various presentations dealing with festivals in the written Torah, particularly in the sections in parshat Emor and parshat Pinhas that focus on the holidays and the halakhic evidence regarding the unique character and sanctity of each festival is, I believe, compelling. Different usages of the ubiquitous phrase “mikra kodesh,” and the challenging discrepancies between presentations in Emor and Pinhas and elsewhere are extremely conceptually suggestive. According to Ramban’s celebrated interpretation of “melekhet avodah” (Ramban, va-Yikra 23:7), the Torah formulates heter okhel nefesh in dramatically different ways. In parshat Bo (12:16), this allowance is depicted as a license and in parshat Emor, by means of the designation of “melekhet avodah” – these types of activities simply do not qualify as prohibitions. The two presentations correspond to two theories (hutrah and dehuyah) that are debated throughout halakhic literature, as alluded to earlier.

A detailed conceptual analysis of the various korbanot would reveal very strong parallels between the two Torot that would be mutually reinforcing and illuminating. The order of treatment and the specific association of various halakhot common to all korbanot with either hattat or olah are just some of the issues that may further illuminate the hierarchy and interrelation of korbanot, supporting and enhancing our analysis of the halakhic norms that regulate this realm. It would be important to understand why korban Pesah is omitted from the larger context of korbanot in Sefer va-Yikra and why it is repeatedly referred to as “pesah la-Hashem.”

Although a close examination of Torah she-Bikhtav has undoubtedly occasionally been integrated into conceptual talmud Torah, I do not believe that this avenue of halakhic research has been
pursued sufficiently and certainly not systematically and program-
matically. In conjunction with the thorough analysis of halakhic
legal sources, diligent attention to the implications inherent in the
various dimensions of Torah she-Bikhtav, enumerated above, holds
great promise in expanding the horizons of talmud Torah.

While we are mindful of the important differences between
rabbinic and Divine texts, it is also possible to incorporate insights
that emerge from a closer textual study of Talmudic and halakhic
literature. Greater attention to language, formulation, location, order
and context is in order. Interesting linguistic and substantive pat-
terns may spotlight motifs that would contribute to a more precise
understanding of the topic. The order in which the shomerim are
presented in several mishnayot (Bava Metzi’a 93a; Shevu’ot 49a; Bava
Kama 4b) – “שומר ת놈 והשואל, נושא שכר והשוכר” – which may accent
the conceptual groupings of shomer hinam – shomer sakhar and
sho’el – sokher or which may underscore that the obligations of both
shomer hinam and sho’el differ significantly from the other two, is
a case in point.61 The Gemara’s characterization (Bava Metzi’a 93a)
that these laws constitute four shomerim but three norms is certainly
suggestive.62

VII

We alluded previously to the Rav’s critique of ta’amé ha-mitzvot
(rationalization of the commandments). Expanding and intensify-
ing conceptual talmud Torah both in terms of a more detailed and
thorough investigation, as well as a broader and more integrated
overview may afford a greater opportunity to respond to the chal-
lenge to develop an authentic philosophy of Halakhah. The Rav
articulates this aspiration as follows: “To this end, there is only a
single source from which a Jewish philosophical Weltanschauung
could emerge: The objective order – the Halakhah. In passing on-
ward from the Halakhah and other objective constructs to a limitless
subjective flux, we might possibly penetrate the basic structure of our
religious consciousness. We might also evolve cognitive tendencies
and aspects of our world interpretation and gradually grasp the mys-
teries of the religious halakhic act. Problems of freedom, causality,
Reflections on the Conceptual Approach to Talmud Torah

God-man relationship, creation and nihility would be illuminated by halakhic principles. A new light could be shed on our apprehension of reality. The halakhic compass would also guide us through the lanes of medieval philosophy and reveal structural standards by which to judge and evaluate the philosophical thought of that golden age. It would help us discriminate between the living and the dead in Jewish philosophy. What for instance, is of halakhic nature in the Guide and the Kuzari and what merely an echo of Platonic-Aristotelian philosophy? The purpose of such an analysis is not to eliminate non-Jewish elements. Far from it, for the blend of Greek and Jewish thought has often times been truly magnificent. However, by tracing the Jewish trends and comparing them to the non-Jewish, we shall enrich our outlook and knowledge. Modern Jewish philosophy must be nurtured on the historical religious consciousness that has been projected onto a fixed objective screen. Out of the sources of Halakham, a new world view awaits formulation."

The ambitious effort to distill the values and themes that issue from the nuances of halakhic conceptual analysis into a broad religious outlook should not be confused with the unvarnished halakhic reading of aggadah and parshanut that one encounters in various works. The Rav delineates the appropriate methodology: “For were we to analyze the mystery of the God-man relation as reflected in the Jewish religious consciousness from both traditional and modern aspects, it would be necessary that we first gather all objectified data at our disposal in the Holy Writ pertaining to divinity and divine attributes; the norms regulating the God-man contact such as the norm of love and fear of God; moments of tension between God and man, as in the case of Job; many halakhic problems where certain attitudes of man towards Divinity have found their expression; all forms of cult liturgy, prayer; Jewish mysticism, rational philosophy, religious movements, etc. Out of this enormous mass of objectified construct, the underlying subjective aspects could gradually be reconstructed. The latter, in turn, should be compared to central structural facts of modern psychology, typology and the philosophy of religion.”

This grand vision can be achieved, however, only if we exercise
self-restraint and are vigilant about not putting the cart before the horse. Extraordinary care must be taken to insure that the integrity of halakhic analysis in all of its dimensions is not compromised by the pursuit of a worthy goal. Moreover, it would be spiritually inappropriate as well as strategically counterproductive to relate to the basic units of *talmud Torah* as if they are simply the building blocks for a larger, more compelling scheme. The Gra’s perspective on the inherent value of every word of Torah certainly militates against this approach. Thus, the priority and predominance of detail-by-detail, case-by-case, institution-by-institution analyses that directs and charts the course of broader perspectives is a prerequisite for success. At a later stage in the process, however, it would be valuable and productive to begin to juxtapose the conclusions, constructs and insights gleaned from the intensive research of discrete, but broadly related topics in an attempt to discern patterns that would enhance our broader understanding of Halakhah. In this respect, Torah can be characterized as both *megilah nitnah* (revealed in parts) and *hatumah nitnah* (presented in totality) (*Gittin* 60a).

Elsewhere, I have tried to demonstrate how a partial halakhic perspective on kinship and family structure can be reconstructed from a detailed study of the halakhic categories of disqualification for testimony due to family ties, (*pesulei kurvah le-edut*), the hierarchy of inheritance (*nahalah*), the rules governing mourning (*aveilut*) and the laws of family burial obligations for *kohanim* (*tumiat kohanim*).64

A comprehensive investigation into the different modes and objects of acquisition, as well as the various models of classic and quasi-ownership – *sho‘el*, *gazlan*, *shi‘bud*, *mashkon*, *murshah*, *uman* etc. – might illuminate the concept and value of property in halakhic thought. It might further our understanding of the relationship between titular ownership, pragmatic control, rights and obligations. The positions of specific authorities in different contexts would be highly revealing both with respect to what does and does not conform to the anticipated conceptual patterns.

The exclusion of landed property, slaves, and contracts in connection with oaths, pricing laws (*ona‘ah*), *shomerim* and theft
Reflections on the Conceptual Approach to Talmud Torah

suggests that Halakhah perceives these categories as being fundamentally different from *mobilia*. Assimilating the principles, identifying the exceptions and limits of exclusions, first in each application, then in a more global purview, very likely will facilitate a more precise and profound understanding of all of these categories.

Investigating the relationship between *kiddushin* and *nisu’in*, the two phases of marriage, would form the basis for an assessment of the unique halakhic conception of marriage and its relationship to the broader concept of sanctity. It would reveal (according to a significant group of halakhists) that *kiddushin* is essentially a legal contract (*kinyan*) requiring the presence of witnesses (*eidei kiyum* – whose formalizing role was noted earlier) that establishes a formal legal bond. *Nisu’in*, on the other hand, represents the culmination of the marriage and the onset of the intimate relationship between husband and wife. Faced with these conclusions, reconstructed from extensive halakhic material, a philosophy of Halakhah might then legitimately speculate why the Halakhah innovated this seemingly artificial division. This speculation does not seek rationalization, but another level of reconstruction – the attempt to comprehend and internalize the values underlying this singular halakhic approach to an otherwise universal institution. Upon reflection, it seems evident that the initial focus on legal status and formality is designed to promote a committed and transcendent relationship that reflects the Torah’s ideal of sanctity (*kedushah*). Ultimately, this division serves to enhance the interpersonal relationship initiated by *nisu’in* by providing for a context which excludes casual interaction and which elevates even the physical aspect of marriage to that of an act of sanctity (*davar she-bi-kedushah*). These broader conclusions cohere with and shed further light on the detailed halakhic evidence. They also suggest a general approach to the relationship between objective formal-legal demands and subjective experiential motifs, which would have to be tested in numerous other halakhic contexts.

Core issues of *avodat Hashem* (Divine service) are reflected in the diverse models of sanctity of time (*kedushat ha-zeman*) and of place (*kedushat ha-makom*) and in the protocols and functions of different sacrifices. Conceptual halakhic analysis effectively identifies
and amplifies these themes, sometimes in all their complexity. The holidays of Yom Kippur, Sukkot, and Rosh ha-Shanah represent altogether different perspectives on the appropriate balance between physical celebration and spiritual reflection as expressions of sanctity.

Olah, asham, and hattat neutralize past transgressions and re-establish a productive spiritual relationship between man and God by employing very different mechanisms and strategies. The halakhic demands of Beit ha-Mikdash, Yerushalayim and Eretz Yisrael perhaps exemplify different emphases in navigating the interaction between national and personal spiritual aspiration. Halakhah’s multidimensional approach is extraordinarily ambitious. Clearly, the values in question are not perceived as mutually exclusive, as each value is unequivocally accentuated. Context, timing and emphasis emerge as crucial factors.

Yet, the further effort to correlate themes and values across the domains of Orah Hayyim, Yoreh De’ah and Kodashim produces a far more complex, nuanced and intriguing picture. A brief example might illustrate this. While the domain of Kodashim projects the theme of exclusive spiritual devotion (kulo la-Hashem) by means of the basic and ubiquitous olah, the same theme is embodied in the world of Mo’ed (festivals) by the most singular, inimitable day in the calendar, Yom Kippur. And while Yom Kippur’s capacity to neutralize sin is unmatched, olah appears to be only minimally effective in this realm.\(^6\)\(^5\) The very significant difference in frameworks may easily account for any perceived discrepancies, as might other factors. Indeed, these apparent discrepancies may provide the most important insights. The point, however, is that any effort to pursue a broader, nuanced philosophy of Halakhah must anticipate complexity and avoid narrow or artificial categories.

**VIII**

Finally, we should briefly address the possible impact of contemporary currents on conceptual talmud Torah. While there are definite opportunities for significant advancement, there are serious challenges and potential obstacles, as well. We live in an extremely
Reflections on the Conceptual Approach to Talmud Torah

fast-paced society dominated by a culture of sound bites, intellectual passivity and extremely limited attention spans. Individuals have more leisure time, yet seem less energized to serious, rigorous pursuits. This general environment is extremely hostile to the kind of methodical and meticulous, multi-layered analytical process described previously as the basis for conceptual learning.

Certain trends in the Torah world may not be all that conducive to the advancement of conceptual talmud Torah either. While there has been an impressive resurgence of Torah study, it is conceivable that there has actually been a decline in rigorous analysis, certainly in personal initiative. The heavier emphasis on practical Halakhah, the introduction of daf yomi into yeshivot and the proliferation of sifrei likkut (compilations) and even ‘how-to’ handbooks points in this direction. Conceptual talmud Torah may not thrive in an atmosphere which encourages immediate spiritual gratification (daf yomi) and in which complexity and creativity are viewed with some ambivalence. The emphasis on practical Halakhah, which in theory need not come at the expense of abstract talmud Torah, may often deflect attention away from concepts. I recall being struck some years ago when a group of younger students were able to accurately quantify the measures (shi’urim) of kezayit bi-kedei akhilat peras (a halakhic measure of time to combine acts of eating) and various levels of illness with respect to Shabbat issues, but could not identify the corresponding halakhic category or terminology.

Even in those circles in which Brisker Torah holds sway, a change may be discerned: The Torah of Brisk is being taught with great reverence, but the Brisker derkh is not necessarily being encouraged. Indeed, it is quite possible that conceptual talmud Torah has partially fallen victim to its own success and stature, as it is often treated not as an ongoing process, but as a series of authoritative conclusions. In some cases, the published works of leading conceptual halakhic thinkers are treated as canonical texts. Reportedly, the protocol of some habburot in Kodashim revolves around the shi’urim recorded in the Hiddushei ha-Griz, rather than on the sugyot! These developments are quite ironic given the foundations and implications of the conceptual approach. At the same time, an
opposing tendency, far more disturbing, has surfaced. A number of years ago, several handbooks circulated outlining simple formulae in a few basic steps that would produce high quality Brisker Torah in any sugya! It is hard to imagine anything more antithetical to the spirit of conceptual talmud Torah.

Notwithstanding the prevailing trends, it is important that advocates of conceptual Torah study continue to encourage responsible personal input based on a true engagement with the topics in all of their manifold dimensions. In this way, the opportunities to build upon more than a century of conceptual advances wrought by pioneering intellectual-spiritual giants will not be squandered.

How is conceptual talmud Torah affected by the technological revolution of the past decade? The emergence of personal computers and the availability of vast Torah databases that provide instant access at the strike of a key may have significant impact on trends in Torah study. This technology may seriously facilitate an expansion of the quantitative base and even enhance the quality of conceptual talmud Torah. In particular, it allows for a convenient framework for the juxtaposition of different positions and formulations that can be very enlightening.

At the same time, several cautionary notes should be voiced. The computer screen does not discriminate between different types of works. It knows no distinction between halakhic and aggadic material; nor can it differentiate between major and minor commentators. The selective use of sources is a critical part of analysis. Moreover, one who is enamored with this technology may be under the mistaken illusion that bek’ut (quantitative proficiency) has been rendered obsolete. This perception is flawed from two perspectives. In fact, the most influential source may not contain keywords that would bring it to screen. Furthermore, often the most decisive finding is an omission, or a parallel phenomenon that exerts some analytical influence. More importantly, conceptual analysis is not simply a technique that is applied to an objectively established pool of relevant sources; it is a fundamental approach to devar Hashem that is directed by a halakhic intuition that is attuned to the total system. Mastery of the whole corpus (articulated in Kiddushin 30a)
Reflections on the Conceptual Approach to Talmud Torah

immeasurably enhances the ability to plumb the depths of every single detail of Halakhah (Gra’s theme). A broad perspective relating to the total corpus is indispensable to both the culture and mentality of true halakhic scholars beyond the access it provides to specific sources.

There is finally one other consideration. The rapid and wide-ranging access that computer databases and screens afford may tend to encourage non-serious analysis but efficient organization or mobilization of sources. While this task has its value, computer generated lists of related and relevant sources are no substitute for the analysis and the internalization of halakhic values that is central to conceptual talmud Torah. In recent years, there has been considerable discussion about the effect of the computer revolution on literature and perceptions. In a book written a few years ago, it has been suggested that “the shift from book to screen may, in its eventual impact on our sense of what knowledge is, be as transformative as the shift from Newtonian to Einsteinian physics.” The author argues that reading a book is a more concentrated activity than reading data on a screen. While reading a book requires immersion, data is assimilated by a “movement across the vast surface of the grid.” He concludes, “We have all but lost that sense of immersion, as we move over the surface like water striders.” Certainly, the Sea of Talmud demands no less than absolute immersion.

NOTES

1. The study of Torah is viewed as the means by which man can establish a link with the shekhinah (Divine presence). See for example, Berakhot 6a, 64a and Avot 3:6. Teaching is equated with parenting (Sanhedrin 19b) because the Torah personality is forged through Torah study. Hazal view Torah study as the antidote for many ills (Berakhot 5a, Eruvin 54a, Taanit 7a, Kiddushin 30a, Avodah Zarah 5a) and the basis for spiritual sustenance and religious development (Yerushalmi Berakhot 9:5, Kiddushin 32b, Pesahim 87a).

2. See Rambam, Sefer ha-Mitzvot, aseh 3; Avot 3:9,17; Avot 2:5; Berakhot 5a; Menahot 110a; Yerushalmi Shabbat 15:3.


4. See Pesahim 50b. These issues are already reflected in the different formulations regarding the interaction between “talmud” and “mā‘aseh” in Talmudic literature.
and are further amplified by the diverse interpretations of these sources. See, for example, *Kiddushin* 40b, *Bava Kama* 17a. See also, R. Hayyim of Volozhin, *Nefesh ha-Hayyim*, *sha`ar* 4 and the discussion in R. Norman Lamm, *Torah Lishmah: Torah for Torah’s Sake* (Hoboken, N.J.: Ktav, 1989), 138–189.

5. See for example, *Bava Metzi`a* 41a, *Shabbat* 86a.


9. See *Ketubot* 85b [*Alfasi* 44a-b] s.v. *ha-mokher*. See also *Tosafot Ketubot* 85b s.v. *ha-mokher* and the Tosafist literature on the parallel sources in *Kiddushin* 48a, *Bava Batra* 147b. See also R. Hayyim Soloveitchik of Brisk develops this same principle (*Hiddushei Rabbeinu Hayyim ha-Levi*, *Hilkhot Ishut* 16:25; *Hilkhot Edut* 3:4, 5:6.

10. The works of the *Mishneh le-Melekh*, *Sha’aqat Aryeh* and *Minhat Hinukh*, are particularly noteworthy and influential in this regard.

11. The same is true for many works technically written as responsa or even in the responsa format. *She’elot u-Teshuvot Beit ha-Levi* is a case in point.
Reflections on the Conceptual Approach to Talmud Torah

15. *Mah Dodeikh mi-Dod*, 213. This perspective is undoubtedly linked to the *Rav’s* frequent use of the physicist and mathematician as a frame of reference in describing the Brisker method. See *Halakhic Man* (Philadelphia: Jewish Publication Society, 1981), 16–23, 55, 59, 83; *Mah Dodeikh mi-Dod*, 221.
19. *Halakhic Man*, 71, 78–82, 99, 105; *Mah Dodeikh mi-Dod*, 231–232, 235. The final section of *Halakhic Man* is devoted to this theme. See, also, *Griz al ha-Torah, parshat be-Shalah*.
21. See *Eruvin* 63a (Rashi, *Sanhedrin* 5b s.v. Rabbi Hiyya) with respect to the problem of rendering halakhic decisions in the presence of one’s mentor. When there is an actual dispute between mentor and disciple, the matter is more complicated. See *Yoreh De’ah* 242:3; *Shakh*, 242:3, *Pithei Teshuvah* 242:2; *She’elat Ya’avetz* 15. For a succinct description of the use of “kevod shamayim” to justify the intellectual freedom of medieval authorities, see Isadore Twersky, *Rabad of Posquieres: A Twelfth Century Talmudist* (Philadelphia: 1979), xx-xxv.
22. The *Rav* strongly emphasizes this theme in his description of Brisker methodology. See, for example, *Halakhic Man*, 79, 89–90, 90–92; *Mah Dodeikh mi-Dod*, 232, 238.
24. The convergence of intellectual independence, the pursuit of halakhic truth, and unshakeable piety in the application of halakhic norms constitutes an important theme in *Halakhic Man* (90–92 n. 87) and *Mah Dodeikh mi-Dod* (218–220, 232, 238).
25. This focus distinguishes R. Hayyim’s approach from that of his father (R. Yosef Ber), notwithstanding the highly conceptual character of the *She’elot u-Teshuvot Beit ha-Levi* and the strikingly halakho-centric approach of the *Beit ha-Levi* commentary on the Torah, both of which significantly foreshadow later developments. While the accent on inner coherence and formulation introduced by R. Hayyim generally characterizes the subsequent Torah of Brisk, my impression (without any systematic study of the issue) is that the de-emphasis of any explanation or rationalization is particularly pronounced in the writings of R. Yitzhak Zev (ha-Griz) Soloveitchik. A careful study of the published works of the major figures of Brisk – *Beit ha-Levi*, *Hiddushei Rabbeinu Hayyim ha-Levi*, *Hiddushei ha-Gram ha-Levi*, *Hiddushei ha-Griz ha-Levi*, *Iggerot ha-Grid ha-Levi*, *Hiddushei ha-Gram ve-ha-Grid* – would help to determine and identify differences in style and substance in an effort to chart the evolution of the derekh. Such a study would require clear methodological guidelines.
if it is to penetrate subtle differences and neutralize the obvious divergences due to the dynamic of different topics. An examination of overlapping treatments of particular topics might serve as a useful point of departure, as a way of neutralizing some extraneous factors. The relationship between the more formal written works, the oral presentations (shi’urim) and student’s notes or recorded insights also needs to be considered in any broader study. In a recent article (“On the Development of the Brisker Methodology: From Reb Hayim and the Rav to Rav Lichtenstein,” Netu’im 9 (2003)), Rav Elyakim Krumbein examines the Rav’s contribution to Brisker methodology [see R. Krumbein’s “From Reb Hayyim and the Rav to Shi’urei ha-Rav Aharon Lichtenstein – The Evolution of a Tradition of Learning,” reprinted in this volume]. It is noteworthy that his assessment largely glosses over potentially significant genre differences, relying heavily on the Rav’s public yahrtzeit shi’urim despite the fact that they were directed to a much wider audience and included a companion derush component (71 n 39). He discounts the possibility that the recently published Iggerot ha-Grid substantially alters the Rav’s intellectual portrait.

While I concur with a number of his conclusions, I think that ignoring the potential impact of different genres is a significant flaw in the analysis which skews or at least exaggerates the final conclusion.

26. See Halakhic Man, 59–60. The identification of inner correlatives designed to be stimulated by the external halakhic act is a pervasive theme in the Rav’s halakhic thought. The Rav’s conclusion that mourning practices are not primarily prohibitions but are designed to foster the experience of loss (“kiyyum ba-leiv”) is not a justification, but a coherent reconstruction of the halakhot themselves. The Rav’s depiction of tekia’t shofar as a form of prayer is not intended as a rationalization but as a halakhic definition that is supported by and further illuminates various halakhic details associated with the commandment. (It is ironic that the story recorded in Halakhic Man, 60–63 to underscore the impropriety of halakhic subjectivity or of the introduction of extraneous feelings into the halakhic norm is one in which R. Moshe Soloveitchik z’l admonishes that there is no room for different emotional responses to the mitzvot of shofar and lulav. One could defend the maligned toke’a’s behavior based on the Rav’s own purely halakhic analysis of shofar which demonstrates that ze’akah is a critical halakhic component. At the same time, we note that this conclusion does not yet necessarily justify the external or public emotional expression.) The distinction between explanation and description may seem blurred, but is determined by the existence of compelling internal halakhic evidence.


28. This is especially noteworthy and challenging given the high level of abstraction and sophistication inherent in Brisker analysis. The contrast to the writings of the Rogotchover Ga’on, or to the school of Sochotchov (Avnei Nezer, Eglei Tal etc.) reinforces this point.

29. The Beit ha-Levi al ha-Torah and Hiddushei Maran Riz ha-Levi al ha-Torah exemplify this approach; although works like the Mishneh la-Melekh’s Parashat Derakhim
serve as precedent for this genre. Sometimes this approach can produce rather extreme conclusions. The Beit ha-Levi's argument that the historical exodus from Egypt was necessitated by the halakhot of the holiday illustrates this. The Rav's approach to Biblical commentary and Midrash differs significantly from that of the Beit ha-Levi and Perush ha-Griz. While halakhic concepts dominate his thinking, in keeping with the philosophy of halkho-centrism that he consistently espouses, the Rav does not halakhasize Midrash and parshanut. Acutely mindful of the varying orientations of the respective disciplines, he integrates halakhic themes into discussions of aggadah as part of a broader holistic effort to extract halakhic values.

30. The Rav notes this in Halakhic Man, 23–26, but only to underscore that classical halakhic thought ascribes equal significance to those areas which are currently impractical.

31. Comparing R. Hayyim's formulation (Hiddushei ha-Grah, Bava Kama 27a) that a judicial majority constitutes the consensus of the total court based on the principle of rubo ke-kulo (the majority represents the total) with a parallel explanation of R. Moshe ibn Habib (Kuntres ha-Sefekot 6:2) that focuses on the obligation of the minority judge to join the majority decision, also exemplifies the difference between a pragmatic and conceptual approach.


In light of R. Hayyim's overall analysis, I have projected this explanation of the factor of hav le-aharini. The different perspectives on eidei kiyyum and hav le-aharini may be reflected in numerous issues. Two examples will suffice. Rashi (Kiddushin 65b s.v. hav) documents the wider ramifications of marriage that precludes reliance upon personal admission, by pointing to the impact of marriage upon relatives of each side. Rashba (ad loc. s.v. hav) takes issue with this view, noting that one should then conclude that a marriage between two converts (where there is no extended family) should not require witnesses. According to R. Hayyim's doctrine, however, the issue is the transformative character of marriage as a legal institution, not the practical consequences of each marriage. It is evident that the marriage of two converts is halakhically indistinguishable from any other halakhic marriage.

The Gemara in Kiddushin 65b clearly establishes the requirement of eidei kiyyum for erusin (the first phase of marriage), but does not address whether this condition is also necessary for nesu'in (the culminating phase of the marriage). Ri ha-Zaken (Kiddushin 10a) does require eidei kiyyum for nesu'in, while Rambam omits this requirement regarding nesu'in. This omission is particularly noteworthy in chapter 10 of Hilkhot Izhut. The Or Sameah (Rambam, Hilkhot Izhut 10:1) discusses this issue extensively and labors mightily to determine whether the addition of nesu'in to the previous erusin entails further consequences to other parties. His analysis is based on the assumption that the relationship between hav le-aharini and eidei kiyyum is direct and practical. If one adopts R. Hayyim's approach however, the issue must be confronted from a slightly more complex perspective. Inasmuch as hav le-aharini
does not generate the need for additional evidence, but generally reflects the creation of a legal status that requires a witnessing presence, it is the broader character of the nesu‘in phase of marriage that needs to be assessed. The various views on the relationship between the phases of marriage is beyond the scope of this paper. Rav Soloveitchik reports that as a matter of practice R. Hayyim demanded eidei kiyyum for nesu‘in, but on the theoretical plane was unconvinced that it was necessary given his own conclusion that erusin and nesu‘in are characteristically different. It is consistent with our analysis that the direct factor of “hav le-aharini” is not the basis of the analysis. See also Mah Dodeikh mi-Dod, 214–217 and note 4.

33. Ketubot 18b, 19a; Bava Batra 70a. See also Rambam, Hilkhut Toven ve-nit‘an 4:8. I have elaborated elsewhere [”Shitat ha-Rambam be-Inyan Ketav Yado,” Beit Yitzhak 32 (5760):, 63] on Rambam’s and R. Hayyim’s views on some of these matters. Of course, the very assumption that the transaction detailed in the contract was actually executed is based upon a pragmatic assessment of the significance of the possession of the contract.


35. The problematic role of “kala” (publicity) in the Rav’s analysis of liens that are triggered by verifiable acts of extending capital (mattan ma‘ot) is a case in point. See Bava Batra 176a; Kiddushin 13b.

36. See Mah Dodeikh mi-Dod, 222, and the Rav’s widely circulated comments in the preface to a lecture addressed to the Rabbinic Alumni of RiEtS (1975) on the topic of conversion (gerut) regarding hazakot in general and the presumption that women prize companionship (“tav le-meitav tan du mi-le-meitav armelo,” Yevamot 118b), in particular. The fact that hazakot are more than simply sociological trends is of great significance as it dictates that the halakhic principles rooted therein are a permanent part of the corpus. This perspective, however, does not preclude that an objective or ontological impulse may be overridden by other circumstances or pressures. The Halakhah contends with the issue of individual exception or temporary change, generally operating on the principle of uniformity (lo pelug). There are, however, some exceptions. See, for example, Beit Yosef, Even ha-Ezer (17:2) with respect to the Halakhah of Rav Himnuna (Gittin 64b).

37. See, for example, Sanhedrin 55b (regarding the relationship between the exemptions of being a minor and of acting unintentionally) and Keritot (15b–17a).

38. The sources are cited previously in note 33.

39. Ri Migash, Bava Batra 43a s.v. u-me‘idin, 45a s.v. lo; Ra‘avad, Hilkhut Edut 12:2.

40. Ri Migash, Shvu’ot 43b s.v. naktinan; Ritba, Kiddushin 43a s.v. itmar.

It is also often true that the singular contribution of the conceptual approach is further accented when there appears initially to be a great measure of correlation with a previous solution. The example cited earlier regarding the majority decision of a court highlights this. Another excellent illustration of this point can be found in the context of contract law. The Netivot ha-Mishpat (Hoshen Mishpat 28:7) preceded R. Hayyim (Hilkhut Edut 3:4) in proposing that the Rambam distinguished between shetarei kinyan and shetarei re‘ayah (contracts as a mode of acquisition vs.
Reflections on the Conceptual Approach to Talmud Torah

contracts that verify a transaction). However, an analysis of the two formulations reveals that they could not be more different in the explanation of this discrepancy and in the relative roles of hazakot and edut.

41. The remarks were also made in the preface to the lecture on geirut cited previously. See also Mah Dodeikh mi-Dod, 229. The description of a whole list of prominent tana'im, Amora'im, Rishonim and Aharonim as abstract thinkers devoted to halakhic constructions comes seamlessly after several pages in which R. Hayyim’s revolutionary contribution is delineated.

42. See supra note 32.

43. Shitah Yeshanah in Shitah Mekubetzet, Ketubot 7a. This formulation should also be compared with a view cited in the geonic literature (Otzar ha-Ge’onim, ad. loc.) that there are not 39 prohibited acts of melakhah on Yom Tov!

44. One might posit that an act must be inherently associated with Yom Tov in order to qualify as a “melekhet okhel nefesh,” which is completely excluded from any prohibition. Actions on Yom Tov that are undertaken on behalf of non-Jews or animals lack that crucial identification. A similar explanation could be advanced to explain Rashi’s stance on this topic. Rashi (Beitzah 12a s.v. ela) appears to adopt the view of “hutrah” and yet he (Beitzah 23b s. v. ein) also limits the exemption to actions that could not be done prior to Yom Tov. Perhaps it is his view that any melakhah that could be done in advance of Yom Tov cannot be defined as a Yom Tov activity.

45. See for example, Ramban’s views on teki’at shofar (Milhamot Hashem, Rosh ha-Shanah 33b [Alfasi 11a]), on harsha’ah (Milhamot Hashem, Bava Kama 70a [Alfasi 27b]) and the character of korban olah (Commentary on the Torah, va-Yikra 1:4).

46. A comparison between the published notes of the Griz’s shi’urim on Zevahim and those of his son, R. Yosef Dov (Hiddushei ha-Grid al Zevahim) illustrates this point.

47. This phenomenon is ubiquitous in halakhic literature. For an interesting example, see Ramban’s discussion of the nature of shoel (borrower) in his treatment of asmakhta (Hiddushei ha-Ramban, Bava Batra 168a s.v. hakhi garsinan).

48. See Me’iri’s comments on Avot 1:1.

49. See Tosafot and Me’iri ad loc.

50. Rashi in his commentaries on the Torah and on Pesahim develops this idea.

51. The relationship between eating the matzah on the fifteenth of Nissan and its aftermath and of sitting in the sukkah on the fifteenth of Tishrei and its aftermath depends on these perspectives. See Sukkah 27a and the question of Ba’al ha-Ma’or, Pesahim 120a.

52. Rashi (Ketubot 3a s.v. shavyah; Shabbat 97a s.v. ve-ela) emphasizes that laws derived from gezerah shavah are considered as if they are explicit in the Biblical text. It is interesting that Rashi in Gittin (33a s.v. be’ilat zenut) omits this more expansive comment.

53. See Hilkhos Ishut 1:3; Perush ha-Mishnayot, Kiddushin 1:1; Sefer ha-Mitzvot, aseh 213.
54. See for example, the list of sources compiled in the Frankel edition of *Hilkhot Ishut* 1:2. In some cases, it is evident that “divrei soferim” is only a rabbinic norm. In other cases, it is equally obvious that a Biblical obligation is being discussed.

55. Rambam’s view of the special status of “derusah” as a *trefah* (*Hilkhot Shehitah* 1:3) highlights the notion that applications that are not explicit in the Torah’s text may be of only secondary or inferior status. See, also, *Hilkhot Tum’at Meit* 5:5. Rambam’s stand on the mourning obligation for a spouse (*Hilkhot Avel* 2:1) on the other hand, seems to be of conceptual significance only. (See, also, the debate between Kesef *Mishneh* and Radvaz if this is a Biblical obligation.) The fact that Rambam occasionally provides his own Biblical sources for certain laws may also indicate that he invests great legal and conceptual significance in the Torah’s precise formulations. See for example, *Hilkhot Edut* 9:2,4.

Rambam is not alone in his acute sensitivity to the halakhic importance of Biblical formulations. Three striking examples demonstrate this. Ra‘avad (*Hassagot al ha-Rif*, Sukkah 43a [Alfasi 21a]) concludes that the obligation of *shofar* on Rosh Hashanah is more central in the Beit ha-Mikdash because its source appears in the context of references to *korbanot*. Rabbeinu Meshulam (*Sefer ha-Yashar*, Teshuvot no. 47) rules that one need not fully immerse simultaneously in a spring (*ma‘ayan*) the way that one must in a *mikvah*. He infers this radical doctrine by accentuating a subtle discrepancy in the Torah’s presentation of these purification processes. Mahrik (*Teshuvot Mahrik*, sheres 167) argues that ignorance of the law of adultery (*omer mutar*) does not exempt from punishment since the Torah articulates adultery as a betrayal of the husband (*u-ma‘alah bo ma‘al*), not as act of rebellion against God (*u-ma‘alah ma‘al ba-Hashem*).

56. See, for example, Rambam, *Hilkhot Nahalot* 1:8.

57. This is expressed by the factors of *kavanato le-hazik* (intent to damage) and *tehilat asiyato le-nezek* (initial function and creation is in order to damage) that are developed in the first chapter of *Bava Kama*.

58. See, also *Sefer ha-Ra‘avan* no.95:9; *Hiddushei ha-Rashba, Bava Kama* 3a s.v. sof sof.


61. See Tosafot *Bava Kama* 4b s.v. shomer hinam; Tosafot *Shemu‘ot* 49a s.v. shomer hinam, and Rashash *Bava Kama* 4b.

62. See supra, note 60.


65. See Zevahim 2a, 6a, 7b, 89a; Yoma 36.