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Lomdut and *Pesak*: Theoretical Analysis and Halakhic Decision-Making

J. David Bleich

> "If you walk in My statutes and observe My commandments…." When [Scripture] states "and observe My commandments" [observance of] commandments is denoted. How then will I fulfill "If you walk in My statutes?" That you travail in [the study of] Torah.
>
> *Sifra*, Lev. 26:3

As I have written elsewhere, to my mind, halakhic decision-making is primarily a science but it is also an art.[1] Halakhah is a science in the sense that, in its pristine form, there is no room for subjectivity. That is not to say that there is no room for disagreement. Disagreement abounds in the natural sciences no less so than in Halakhah. But, in picking and choosing between contradictory and conflicting

theses, the scientist acts on the basis of the canons of his discipline as understood by his quite fallible intellect, not on the basis of subjective predilections. The halakhic decisor faces the same constraints.

The decisor must seek neither the stringent ruling nor the lenient ruling but the view that is most authoritative. Moreover, there usually is a view that has been accepted in practice by the majority of *poskim* as the accepted standard. Thereupon, such a ruling becomes normative and deviation cannot be considered other than by virtue of compelling reasons. It was the view of many of the most renowned personages in the annals of halakhic scholarship that the rulings accepted as authoritative by the community of Israel were accepted as such by virtue of the operation of divine providence.[2]

To be sure, not all minds think alike. As expressed long ago by the Sages, "Just as their countenances are not similar one to another, so are their intellects not similar one to another" (*Yerushalmi Berakhot* 1:9). One person may regard an argument as compelling; another may not. One person may assign greater weight to a precedent or to the position of a given authority while another may assign lesser weight to the same precedent or position. Each may regard his assessment as crystal clear and regard the opposing view as ill-informed.

But halakhic decision-making is indeed an art as well as a science. Its *kunst* lies precisely in the ability to make judgment calls in evaluating citations, precedents, arguments etc. It is not sufficient for a halakhic decisor to have a full command of relevant sources. If so, in theory at least, the decisor *par excellence* would be a computer rather than a person. The decisor must have a keen understanding of the underlying principles and postulates of Halakhah as well as of their applicable ramifications and must be capable of applying them with fidelity to matters placed before him. No amount of book learning can compensate for inadequacy in what may be termed the "artistic" component. The epithet "a donkey carrying books" is the derisive reference employed in rabbinic literature to describe such a person.[3]

This talent is partially innate and partially acquired. No one springs from the womb as an accomplished musician; training and

practice are necessary prerequisites. Some teachers are certainly better pedagogues than others; some are certainly more proficient than others in transmitting subtlety in analysis, novelty in interpretation and sophistication in execution. But no amount of instruction and practice will make a musician of one lacking in musical talent. Any teacher of high school math will certify that a student who experiences little difficulty in solving problems presented in mathematical form but who scores significantly lower in analyzing verbal problems is the rule rather than the exception. Law school examinations typically take the form of hypotheticals and fact patterns designed to test, not simply knowledge of the law, but the ability to identify multifaceted issues as well as agility in applying legal theories to novel situations. Quite apart from breadth of knowledge, it is recognition of applicable categories and principles as well as depth of analysis with regard to substantive matters that distinguish the consummate halakhic scholar from the neophyte. When confronting conflicting positions and precedents, it is nuanced sophistication in applying canons of decision-making that is the hallmark of a proficient decisor.[4]

In order to understand the role of *lomdut* it is necessary to focus attention upon the process by means of which definitive rulings are derived from fundamental principles. Only by means of the halakhic dialectic is it possible to appreciate the halakhic process as it is employed *le-hasik shema'tteta aliba de-hilkheta*, in reaching definitive conclusions on the basis of pertinent sources.

There are really two distinct forms of *pesak halakhah*. The first, which at least in our day is by far the most prevalent, involves a decision-maker who either regards himself as a *talmid she-lo higi'a le-hora'ah*, who is not entitled to an independent authoritative opinion of his own, or a person who for whatever reason has no strongly held opinion with regard to the question before him. Such an individual must perforce pick and choose from positions enunciated by earlier decisors. A person in such a position must employ various *kellalei hora'ah* or canons of halakhic decision-making (e.g., majority rule, *halakhah ke-batra'i, safek de-oraita, safek de-rabbanan*) in adjudicating between conflicting positions. Application of such

rules is scientific in the sense that there is little room for subjective judgment. Of course, a determination must be made with regard to which positions are to be considered in the evaluation process and which are to be dismissed as entirely unworthy of consideration in the balancing of competing factors. More likely than not, determination is made, not with regard to the position itself, but with regard to the author of the opinion: Is the opinion that of a person whose erudition commands respect or of a *talmid to'eh* (errant student)? In principle, that, too, is a determination made on the basis of objective criteria.

A purer or more basic form of *pesak* takes place when a scholar, upon analysis of the problem and perusal of relevant sources, independently formulates an opinion to which he adheres with conviction. Assuming that the decisor is an individual who has *higi'a le-hora'ah* and that the deliberative process has been undertaken with intellectual honesty, the decisor need not feel conflicted because of opposing views and those subject to his authority may rely upon his opinion with equanimity.[5]

Apart from perusal of sources, precisely what is the nature of the deliberation that yields a *pesak halakhah*? In the vast majority of cases, it involves what in secular law schools is termed "issue-spotting." But, at least at times, it is something entirely different, *viz*., theoretical analysis of a halakhic concept or provision, that proves to be dispositive. I regard both enterprises as scientific because, if carried out properly, both are compelled by the intellect. However, at the same time, it must be candidly recognized that theoretical analysis and, to a lesser degree, "issue-spotting" as well, requires acumen that is far from universal and in that sense may be regarded as an art.

Traditionally, the curricula of *yeshivot* did not emphasize study of *pesak halakhah*. Although study of *pesak halakhah* often received scant attention, the process through which *pesak halakhah* is derived was all but ignored. And for good reason: The process cannot be taught. One does not teach a toddler how to walk; walking involves a skill that develops innately. The most that we can do is provide an example to be emulated. National law schools pride themselves on

not teaching the law but on teaching their students "to think like lawyers." And how does one teach a law student how to think like a lawyer? Not by teaching logic or epistemology, but by example. The infant observes adults walking, seeks to emulate them, tries to do so repeatedly, falls each time, finally succeeds in taking a number of faltering steps and ultimately masters the science of walking. The law school student is forced to analyze case after case, to trace the reasoning that leads from X to Y and to understand why, given the antecedent assumptions and goals, the reasoning is compelled. The student stumbles and falls repeatedly but ultimately learns by doing. The process parallels that of Eastern European *yeshivot* which concerned themselves with theory, analysis and methodology rather than with Halakhah *per se*, on the assumption that factual information can be readily obtained at any time but that theory and skills can be mastered only upon assiduous application over a prolonged period of time. It was precisely this awareness that prompted *Hazal* to observe with regard to the training process: "*Gedolah shimmushah shel Torah yoter mi-limmudah*."[6]

This is merely a verbose way of saying that (1) *pesak* is impossible without *lomdut* and (2) that *lomdut* cannot be taught other than by example. Of course, the Halakhah, once definitively formulated, can be presented in capsule form. But not every hypothetical can be spelled out and not every eventuality can be anticipated. Rambam's codification of the corpus of Jewish law in the form of the *Mishneh Torah* and later R. Joseph Karo's restatement in the form of the *Shulhan Arukh* met with opposition, not so much because of objections to specific rulings or because those rulings could not be lightly overturned but because students might erroneously believe that, having mastered the factual material, they might dispense with both the underlying theory as well as the skills necessary to derive halakhic formulations from primary sources with the result that they would be quite incapable of applying the concise, cryptic rulings presented in those works to novel situations that must inevitably arise and to complex questions that can be resolved only upon identification of component issues.[7]

Maharsha, *Hiddushei Aggadot, Sotah* 22a, remonstrated:

> In these generations, those who render halahkic decisions on the basis of the *Shulhan Arukh*, but do not know the reason underlying every point, if they do not previously examine the matter on the basis of the Talmud …, errors will occur in their decisions and they are among the destroyers of the world. Therefore, one should reprimand them.

At a much later date, the author of *Pithei Teshuvah, Yoreh De'ah* 242:8, modified Maharsha's comments with the observation that "perhaps" those remarks were cogent only

> in the time of Maharsha when there was as yet no commentary on the *Shulhan Arukh*. But now that the *Taz*, the *Shakh*, the *Magen Avraham* and other latter-day works have been authored and the reason for every ruling is explained in its place, it is proper to render decisions on the basis of the *Shulhan Arukh* and the latter-day authorities.

It is questionable whether *Pithei Teshuvah*'s assessment was correct when it was enunciated. Perhaps a question of a spoon and a pot can be decided on the basis of information available in a compendium, perhaps not. Experience teaches that quite frequently the serious questions presented to rabbinic decisors in this generation do not involve matters that are straightforward and clear-cut in nature. Those matters cannot possibly be addressed by persons lacking analytic skills.[8]

American law schools teach students "to think like a lawyer" by forcing the student to analyze actual cases. The cases serve as examples of legal reasoning. I know of no way to illustrate the relationship of *lomdut* to *pesak* other than by concrete example. The illustrations may appear to be but a string of anecdotes designed to demonstrate what to many is self-evident.[9]

"Brisk" has come to be synonymous with the analytic method. Yet, as reflected in the following anecdote, R. Hayyim pointed to the "issue-spotting" aspect of *lomdut* when pressed to justify his insistence upon *lomdut* as a *sine qua non* of *pesak*. I heard the nar-

rative as a youth during the course of a *shi'ur* on *Pesahim* delivered by a *rosh yeshivah* who was a *talmid* of the *Brisker Rav* during the war years. To my regret, I did not commit the material to writing at the time and since I am unaware of any published version I must rely upon my memory which is all too fallible.[10]

As related by R. Velvel, apparently R. Hayyim and a prominent non-Lithuanian rabbinic personage met at a wedding. Not surprisingly, the rabbi inveighed against the Lithuanian mode of study and decried the lack of emphasis upon *pesak halakhah* in Lithuanian *yeshivot*. R. Hayyim countered with the assertion that, in order to arrive at a correct *pesak, lomdut* is essential. The response was met with derision. Thereupon, R. Hayyim offered to prove his point by presenting a question to the rabbi which R. Hayyim was fully confident that, not being trained in the Lithuanian methodology, the rabbi would answer incorrectly.

The hypothetical involved two women, one Jewish, the other a gentile, each cooking meat outdoors in separate pots over adjacent fires. The question: The gentile woman shakes her pot causing a piece of non-kosher meat of indeterminate size to fly through the air and land in the pot belonging to the Jewish woman. Is the food in the Jewish woman's pot permissible or is it impermissible because of the admixture of non-kosher meat? The rabbi responded by observing that the answer hinges upon whether or not the quantity of kosher food is sixty times as great as the quantity of non-kosher food that fell into the pot. When the non-kosher food is of a variety different from the kosher food, the requirement for a quantity sixty times as great for nullification to be effective is biblical; if both foods are of the same variety, biblical law regards the non-kosher food to be nullified even if the kosher food is only slightly greater in quantity. In order to prevent confusion, rabbinic law established a uniform principle for nullification and requires that the quantity of kosher food always be at least sixty times as great as the quantity of non-kosher food. In the case under discussion, the kosher food was greater in quantity than the piece of non-kosher meat but it was doubtful whether or not the quantity of kosher food was sixty times as great as that of the non-kosher food. Accordingly, the rabbi responded

that since the kosher food and the non-kosher foodstuffs were meat having the same taste, the requirement of a quantity of kosher food sixty times the quantity of the non-kosher food is rabbinic in nature. Hence, he concluded, the principle that matters of doubt with regard to rabbinic matters are adjudicated permissively applies.

To that R. Hayyim responded that the rabbi had forgotten to take into account the fact that the gentile woman had no reason to soak and salt her meat and therefore the non-kosher food consisted not only of meat but of blood as well. Blood is distinct from meat and differs also in taste. The rabbi immediately reversed himself and conceded that since the doubt was with regard to nullification of a foodstuff in an entirely different type of food, the doubt is with regard to a matter of biblical law and must be adjudicated on the side of stringency.

R. Hayyim countered by informing the rabbi that he was again in error because he had overlooked the fact that the meat had already been cooked in the pot for some time and hence the blood within the meat had been cooked as well. Most early-day decisors rule that blood that has been cooked is prohibited by virtue of rabbinic decree rather than by biblical law. Hence, the matter still involved only a possible rabbinic violation. The rabbi was forced to concede error for the second time.

Thereupon, R. Hayyim told him that he was in error yet again. Blood of a properly slaughtered animal is prohibited as blood and is biblically prohibited only in an uncooked state; blood of carrion, in addition to being prohibited as blood, is prohibited as carrion as well. However, cooked and uncooked carrion are equally proscribed by biblical law. Therefore, contended R. Hayyim, the matter involves a possible biblical violation of the prohibition against carrion. The rabbi confessed that the point had not occurred to him. R. Hayyim then countered once again by pointing to *Tosafot, Pesahim* 22a, s.v. *ve-harei dam*, that establishes that blood is not included in the biblical usage of the term "animal" and hence is not to be equated with meat for purposes of the prohibition against carrion.[11]

Even a consummate *lamdan* such as R. Hayyim did not always immediately recognize all aspects of a problem. R. Yehiel Michel

Rabinowitz, *Afikei Yam*, II, no. 32, reports an incident in which R. Hayyim expressed regret for not having adequately analyzed the issues in a question brought before him. In a situation in which a patient afflicted with a serious illness requires meat on *Shabbat* and there is a choice between feeding him already available non-kosher meat or slaughtering kosher meat on *Shabbat*, the accepted rule is to slaughter the animal in order to obtain kosher meat. Such is the accepted rule despite the fact that violation of *Shabbat* restrictions is a much more severe transgression than consumption of non-kosher meat. Various rationales have been advanced for the rule by early-day authorities.[12]

Such a case arose in Brisk and, to no one's surprise, R. Hayyim directed the *shohet* to slaughter on *Shabbat*. Subsequently, the *Dayyan* of Brisk, R. Simhah Zelig Reguer, recalled an item that he had earlier come upon in *Giv'at Olam* authored by R. Tevel of Minsk. *Giv'at Olam* cites Ran who explains that, although slaughtering an animal on *Shabbat* constitutes a capital transgression, it involves but a single act, whereas eating a quantity of carrion, although involving only violation of a negative commandment, involves multiple infractions since consumption of each piece of meat equal to the size of an olive constitutes a separate violation. That rationale, contends *Giv'at Olam*, is cogent only if the patient is to be fed meat. If, however, the patient is to be given soup prepared from the meat, rules *Giv'at Olam*, non-kosher soup is to be preferred since consuming non-kosher soup involves only partaking of the "taste" of meat rather than of the meat itself. The prohibition of *ta'am ke-ikkar*, asserts *Giv'at Olam*, is rabbinic in nature and hence far less severe.

When informed of that ruling, R. Hayyim reportedly responded that had that consideration been brought to his attention he would not have directed that an animal be slaughtered but would have ordered soup to be obtained from a non-Jewish restaurant. R. Hayyim added the comment that the ruling of *Shulhan Arukh* to the effect that the principle of *ta'am ke-ikkar* is biblical in nature is intended only as a stringency.

Both anecdotes involve not simply analysis of a situation in which all salient factual elements are expressly stated but contextual

analysis in the sense of an ability to draw upon general *savoir faire* in order to identify unexpressed factors relevant to a halakhic analysis, i.e., awareness that soup rather than meat is the fare of the ill and more obviously, that gentiles do not draw blood from meat.

Perhaps a better example is the well-known story of the person who came to R. Joseph Ber Soloveitchik of Brisk to ask if milk could be used for *arba kossot*. Instead of answering the question, R. Joseph Ber took a sum of money from his pocket and gave it to the person with instructions to use it to purchase wine. His wife pointed out to him that the sum proffered was far in excess of the money necessary to purchase wine. R. Joseph Ber responded with the observation that no Jew would contemplate drinking milk after eating meat. Therefore, if the person sought advice regarding use of milk for all four of the *arba kossot* he obviously did not have the wherewithal to buy meat for *Yom Tov*. A person so obviously needy requires more than the price of four cups of wine.

Such analyses require greater or lesser degrees of insight but hardly require singular intellectual prowess and hardly warrant the appellation *lomdut*. Of far greater intellectual significance is not identification of issues which, when pointed out, are immediately grasped by all, but delineation and proof of the nature of halakhic provisions. The nature and categorization of a halakhic provision may have a profound impact upon specific *pesak*.

This is true not only of Halakhah but of any system of law. Numerous examples can be found in any legal system. For purposes of illustration it may be useful to take as an example a recent U.S. Supreme Court case that has received media attention. The case involved a fairly simple issue of this nature. Pursuant to provisions of law, an Independent Counsel was appointed to investigate whether crimes had been committed by members of the Executive Branch during the course of prior investigations into the 1993 dismissal of employees of the White House Travel Office. During the course of those investigations, Deputy White House Counsel Vincent Foster, Jr. met with an attorney for the purpose of obtaining legal representation. The attorney took notes during the course of the meeting. Foster committed suicide some days later. Subsequently, a Federal Grand

Jury, at the request of the Independent Counsel, issued subpoenas for those notes. The attorney sought to quash the subpoenas on the grounds that the notes were protected by attorney-client privilege.

The issue before the Supreme Court in *Swidler & Berlin and James Hamilton v. United States*[13] was whether the attorney-client privilege survives the death of a client. Resolution of the question depends upon the nature of the attorney-client relationship: Is the privilege rooted in, and is it an expression of, the right against self-incrimination? If so, it should not survive the death of the client since the deceased is now beyond the reach of the law. Or is the privilege designed to encourage full and frank communication between attorneys and their clients for much broader purposes that do not necessarily involve criminal liability, e.g., personal and family matters, financial matters and problems arising in the course of operating a business? Knowledge that such communications might be revealed after the client's death would have a chilling effect upon a person desirous of such advice.

The Court of Appeals ruled that posthumous revelation may be compelled in situations in which the relative importance of the communication to a particular criminal litigation is substantial. The Supreme Court found such a holding to be consistent with the notion that the attorney-client privilege is but another aspect of the privilege against self-incrimination but, upon determining that the attorney-client privilege is designed to promote an entirely different goal, reversed the Court of Appeals. The issue in *Swidler* could readily be formulated in Brisker terminology, i.e., as a *hakirah* concerning the nature of the attorney-client privilege.

Brisker *hakirot* of this genre are legend. A sampling of such incisive analyses is included by R. Shelomoh Yosef Zevin in the pointed vignettes of R. Hayyim he presents in his characteristically keen portrayal of the scholarly personality of R. Hayyim in *Ishim ve-Shitot*.[14] One, actually definitively resolved much earlier by R. Akiva Eiger in the latter's novellae on *Orah Hayyim* 294, involves the following question: A person, for whatever reason, does not recite the *shemoneh esreh* for *moza'ei Shabbat*. The following morning he is required to recite the prayer twice, the first for *shaharit* and the

second as *tashlumin* or a "make-up" for the missed evening prayer. In which of the two *shemoneh esreh* prayers should he include *attah honantanu* which he did not recite the previous evening? The intuitive reaction is that *attah honantanu* should be included in the second *shemoneh esreh*, i.e., the substitute for the prayer omitted the previous evening. Apparently, as reported by R. Zevin, such was the about-to-be rendered opinion of a rabbinic colleague, who lacked R. Hayyim's acumen.[15]

The correct answer, however, hinges upon an analysis of the nature of the ordination of *attah honantanu*: Was it ordained for inclusion in the *ma'ariv shemoneh esreh* of *moza'ei Shabbat* or for inclusion in the first *shemoneh esreh* of the new week? If the latter is the case, then were, through some vagary of the calendar, Sunday morning to occur before Saturday evening, *attah honantanu* would properly be included in the Sunday morning prayer. To formulate the *hakirah* is to recognize the answer. As R. Hayyim and R. Akiva Eiger before him[16] realized, there is no reason to associate *attah honantanu* with the *ma'ariv* prayer; there is every reason to associate it with the first *shemoneh esreh* recited after the conclusion of *Shabbat*. Accordingly, a person who did not recite *shemoneh esreh* on *moza'ei Shabbat* should include *attah honantanu* in the very first *shemoneh esreh* of the new week that he does recite, *viz*., the first *shemoneh esreh* of *shaharit* on Sunday morning. In this instance at least, the question of the *hakham* is more than half an answer; it is the entire answer.

The crucial difference between the analytic approach of rabbinic scholars and the analyses of secular jurists operating within other legal systems is that the former disclaim any originality. The endeavor involves a pristine marshalling of sources and examination of text. Expediency, policy considerations and intellectual bias dare not be permitted to intrude. Widespread ascription of the appellation "*hiddush*" to the analysis must be understood in the sense of "discovery" rather than "novellum."[17] The purpose is not to read into the text but to make explicit that which is already inherent in the text. Such was the task of rabbinic scholars from time immemorial in all ages and in all lands. Some were simply more successful

in those endeavors than others. It has been said that all of Western philosophy is but a series of footnotes to Plato. In a very real sense, all of rabbinic scholarship is but a series of footnotes to the Talmudic texts, although sometimes the footnotes take the form of footnotes to footnotes authored by early-day authorities.

Examples illustrating this point are virtually inexhaustible. It may be relevant to point to an example or two of the analytic approach in earlier ages and of its effect in the formulation of Halakhah. The Sages sought to enhance the honor and dignity of *Yom Tov* by encouraging haircutting before the advent of the festival. To accomplish that end they employed a simple expedient. They prohibited cutting hair during the intermediate days of the festival thereby assuring that people would not put off a visit to the barber so that it would become a leisure time activity for *Hol ha-Mo'ed*. *Noda bi-Yehudah*[18] marshals evidence showing that their edict was not simply an exercise of general rabbinic legislative power but had the effect of delineating the type of "labor" prohibited on the intermediate days of the festival. The prohibition against haircutting, asserts *Noda bi-Yehudah*, is nothing more and nothing less than categorization of haircutting as a prohibited form of labor. The logical result is that hair may be cut on *Hol ha-Mo'ed* under precisely the same conditions under which other proscribed forms of labor may be performed on *Yom Tov*. The chief practical application is that a needy person lacking funds for celebration of *Yom Tov* who is permitted to engage in otherwise prohibited activities in order to earn sufficient funds for that purpose may also work as a barber and others may avail themselves of his services with impunity.

Analyses of such nature appear in the responsa of virtually all of the prominent *poskim* where seminal *teshuvot* have left an indelible imprint upon the halakhic process, although, to be sure, they seldom employed either the form or vocabulary later developed in Lithuanian circles. One example culled from *Teshuvot Hatam Sofer* will serve as illustration.

It is, of course, forbidden to eat non-kosher foodstuffs. There is also a second prohibition against consuming food that has acquired the taste of a non-kosher substance. An example would be a situation

in which a piece of non-kosher meat is placed in a pot of cooking vegetables and then removed. No meat remains in the pot of vegetables but the flavor of the non-kosher meat is clearly discernible. The vegetables are prohibited on the basis of *ta'am ke-ikkar,* i.e., the prohibition against eating food endowed with the "taste" of a non-kosher substance.

Hakirah: Are the vegetables prohibited because of a new prohibition against *ta'am*, i.e., a superimposed prohibition forbidding the taste or flavor of a non-kosher substance that is quite distinct from the antecedent prohibition proscribing the non-kosher food itself? Or is the prohibition against partaking of the *ta'am* of a prohibited substance simply a novel expression of the underlying prohibition against eating a non-kosher food? But, comes the objection, if *ta'am ke-ikkar* is really part and parcel of the original prohibition, why is it formulated as a separate and distinct prohibition? Answer: Were the basic prohibition not to have been supplemented by the principle of *ta'am ke-ikkar,* the vegetables would be entirely permissible. Biblical law provides for nullification of prohibited foods by adulteration of the forbidden food with kosher food of even a slightly more than equal quantity. The principle of *bittul be-rov,* in terms of its own canons, would apply to adulteration of any food product even if the flavor of the non-kosher food may be detected in the mixture. However, a new rule in the form of *ta'am ke-ikkar* renders the mixture impermissible so long as the taste of the non-kosher food is discernible (generally unless the kosher elements are sixty times as great). Accordingly, the principle of *ta'am ke-ikkar* may not constitute a novel prohibition at all but may merely be a limitation upon, or an exception to, the rule of *bittul be-rov* which has the effect of causing the underlying prohibition to reassert itself.

The conceptual distinction between the two formulations is clear, but is there any halakhic difference that flows therefrom? [The thrust of such a question I would term "halakhic positivism," i.e., the ultimate meaning of a *hakirah* is its verification in a concrete *nafka minah*, just as logical positivism insists that the meaning of a proposition is its mode of verification.]

The difference becomes manifest with regard to the prohibi-

tion against *ever min ha-hai* as it applies to Noahides and to Jews providing Noahides with food. Are food products containing the flavor of *ever min ha-hai* forbidden to Noahides? *Ever min ha-hai* is prohibited to gentiles but the principle of *ta'am ke-ikkar* is not incorporated in the Noahide Code. Accordingly, if *ta'am ke-ikkar* is a novel and distinct prohibition, vegetables in which *ever min ha-hai* has been steeped would be permitted to Noahides, although, to be sure, there can be no flavor of *ever min ha-hai* without the presence of at least a minute quantity of the prohibited substance. The quantity of the prohibited foodstuff is so infinitesimal as to be non-existent for purposes of Halakhah: *De minimis non curat lex* (the law does not concern itself with trifles). But, if it is understood that halakhically recognized particles of matter exist wherever flavor is detectable and if *ta'am ke-ikkar* is understood as merely the recession of what would otherwise be permitted by invocation of *bittul be-rov*, the vegetables remain prohibited to Noahides because the principle of *bittul be-rov* is not one of the canons of the Noahide Code.

Teshuvot Hatam Sofer, Yoreh De'ah 19, s.v. *ve-adayin*, citing a comment of Rashi, *Hullin* 98b, adopts the latter position in cryptically ruling that "taste" of *ever min ha-hai* is forbidden to Noahides because the principle of *bittul* is not applicable to them.[19]

Another much earlier example having a novel modern-day ramification is found in a responsum of an early eighteenth-century authority, R. Ezekiel Katzenellenbogen, who served as the immediate predecessor of R. Yonatan Eybeschutz as chief rabbi of Altona.

A young Jew who lived in the city of Apt was accused of having frequented a Moslem prostitute. The man was imprisoned and faced death or forced apostasy. There was, however, a possibility of securing his release upon payment of an exorbitant sum of money. The leaders of the community turned to Maharam of Lublin with a query concerning whether, given the totality of the circumstances, they were obligated to secure his release by virtue of the mitzvah of "ransoming captives" and if so, whether they were obligated to expend even an exorbitant sum in order to rescue him. Maharam of Lublin, *Teshuvot Maharam Lublin* no. 15, responded that the young man had the status of a "captive" whom it is a mitzvah to ransom

but that, despite the danger to his life, "it appears obvious to me that there is no obligation to pay a ransom greater than his value; nor do I know from whence it would enter one's mind that there is an obligation to ransom him by paying more than his value."[20]

Maharam's ruling became the object of severe criticism. The Mishnah, *Gittin* 45a, does indeed declare that captives should not be redeemed for more than their value. However, *Tosafot, Gittin* 58a, indicate that the Mishnah refers only to captives who are held solely for ransom. If, however, the captives are threatened with death they must be ransomed even if the sum required to secure their release is greater than their value. Maharam of Lublin was accused of having ruled as he did because he had overlooked the comments of *Tosafot*.

R. Ezekiel Katzenellenbogen, *Teshuvot Kenesset Yehezkel* no. 38, focuses attention upon the discussion of the Gemara, *Gittin* 45a. The Gemara elucidates the rationale underlying the limitation placed by the Mishnah upon the sum that may be expended for the ransom of a captive. The Gemara posits two alternative explanations: (1) payment of a larger sum would constitute an undue burden upon the community; (2) payment of excessive ransom would encourage future kidnapping of Jews in order that exorbitant sums might be demanded for their release.

Kenesset Yehezkel notes that *Tosafot, Gittin* 58a, in addition to their comment concerning captives whose lives are endangered, offer an alternative solution to the problem addressed in that comment. *Tosafot* advance the position that even an exorbitant sum may be paid to secure the release of a renowned scholar. The latter distinction, argues *Kenesset Yehezkel*, is not at all cogent if a maximum limit was established because of the burden the ransom represents to the community; all individuals are equal insofar as obligations of charity are concerned. Hence, contends *Kenesset Yehezkel*, there is no reason why a community should assume an excessive burden for the ransom of a scholar. If, however, the limit was set in order not to encourage the kidnapping of Jews and holding them for excessive ransom, the exception made for a scholar of renown is readily perceived: Persons of such stature are few and far between. Rarely will gentiles have the

opportunity to kidnap such a personage. The captor, knowing full well that the huge sum they received was forthcoming only because of the scholarly attainments of their captive, will not be encouraged to engage in a similar enterprise in the future.[21]

By the same token, argues *Kenesset Yehezkel*, the alternative resolution offered by *Tosafot* in positing an exclusion in instances of a threat to the life of a captive is not at all cogent if the concern is not to encourage future acts of a like nature. Once kidnappers become aware of the fact that unlimited sums are available for the ransom of Jews threatened with death, they will quickly realize that they can extort vast sums simply by threatening to execute their captives. That position, contends *Kenesset Yehezkel*, can be understood only if it is predicated upon the consideration that a limit was placed upon the ransom to be paid because of consideration of communal burden. A limitation based upon fear of creating onerous financial difficulties for a community is cogent with regard to establishing a limitation upon obligations of charity. However, such considerations are not germane with regard to the rescue of a human life. Thus, each of the two resolutions offered is designed to satisfy only one of the respective rationales advanced by the Gemara.[22]

Shulhan Arukh, Yoreh De'ah 252:4, rules that a prominent scholar may be ransomed even for an extravagant sum but makes no mention of a similar exception in instances in which the life of the captive is in jeopardy. According to *Kenesset Yehezkel*'s analysis, *Shulhan Arukh*'s position flows directly from his categorization of the limit placed upon the ransom to be paid as designed to discourage future kidnapping. It may be further noted that Rambam, *Hilkhot Matnot Aniyyim* 8:12, codifies the same explanation in limiting the ransom to be paid to the value of the captive, despite the fact that earlier, in *Hilkhot Matnot Aniyyim* 8:15, he speaks of such captives as being in danger of losing their lives.

Kenesset Yehezkel's keen analysis of *Tosafot*'s comment not only illustrates the role of analytic prowess in halakhic decision-making but also reflects a facet of *piku'ah nefesh* having far-reaching implications.

Kenesset Yehezkel takes it for granted that there is no obligation

to rescue a captive from certain death if the result will be seizure and ultimate execution of others. This is his position despite the fact that the danger to the present captive is imminent whereas the danger to others lies sometime in the future. The clear implication is that future danger, at least when it is a matter of certainty, is to be equated with present danger. Hence, rescue of a person presently endangered should not to be undertaken if it will result in the loss of a greater number of lives at some future time.

It is precisely that issue that is involved in the controversy concerning divulging a diagnosis of AIDS to the victim's spouse or sexual partner. Failure to divulge such information results in an ongoing danger to an innocent sexual partner. Breach of confidentiality, it is argued, will have a chilling effect upon others who, fearing that a positive diagnosis will be divulged to their spouses, will refuse to be tested for the presence of the disease. If that does indeed prove to be the case, the result will be the loss of an even greater number of lives. Assuming that such a fear would inhibit a significant number of AIDS victims from availing themselves of testing and treatment -- a matter which I believe has yet to be empirically demonstrated -- the argument for non-disclosure finds significant support in *Kenesset Yehezkel*'s discussion of *Tosafot*'s comments.[23] Although evidence that disclosure of a diagnosis of AIDS would result in the loss of a greater number of lives is lacking, the underlying principle, i.e., that prevention of present loss of life should not be undertaken if the result will be greater loss of life in the future, is applicable in a host of other situations.[24]

In our own day, resolution of one vexing religio-social problem hinges upon analytic categorization of a particular *hazakah*. Do people who have entered into a civil marriage or who have been married under Reform or Conservative auspices without benefit of halakhically qualified witnesses require a religious divorce for dissolution of their relationship? In principle, Jewish law recognizes the equivalent of common law marriage on the basis of *hazakah ein adam oseh be'ilato be'ilat zenut*, i.e., a halakhic presumption that people do not wish to engage in fornication and therefore, when the option is available, cohabit with intent to establish a marital relation-

ship. The facile understanding of that statement is that the *hazakah* is but an example or instantiation of a general *hezkat kashrut*, i.e., people are, and desire to be, law-abiding. Therefore they seek marriage rather than an illicit relationship. But what of a person whose lifestyle and general comportment betray a total lack of fidelity to Halakhah? It would stand to reason that, for them, no such presumption exists with regard to marriage any more so than with regard to other aspects of their behavior. So concluded R. Moshe Feinstein.[25]

R. Yosef Eliyahu Henkin, however, reached a totally different conclusion on the basis of his analysis of the same *hazakah*. For R. Henkin, the *hazakah* was not at all an instance of *hezkat kashrut* but a *hezkat hanhagah*, a matter of comportment rooted in human psychology and reflective of the essence of marriage. The essence of marriage, argued R. Henkin, is a woman's entry into an exclusive conjugal relationship. The human male, by operation of his psyche, seeks exclusivity in his sexual partner and will go to great lengths to prevent others from seeking the sexual favors of his partner. Whenever a male and female enter into that type of relationship the effect is matrimony whether or not such a formal institution is either sought or acknowledged. Accordingly, R. Henkin ruled that parties to any such relationship require a *get* for its termination,[26] while R. Moshe Feinstein ruled that in such circumstances a *get* was not needed. The controversy in this grave area of family law hinges entirely upon the *lomdut* underlying the *hazakah ein adam oseh be'ilato be'ilat zenut*.

These examples are taken more or less at random as illustrations of the effect of *lomdut* upon *pesak* over a period of several centuries. It should be quite evident that *lomdut* did not originate in late nineteenth-century Lithuania. To be sure, the *lomdut* of Brisk was not the *lomdut* of Telshe; the responsa of R. Akiva Eiger are markedly different in style from those of *Hatam Sofer*. Assuredly, among those engaged in the analytic dialectic of Halakhah there are differences of style, language, vocabulary, expression and even of insights and thought processes.[27] However, when all is said and done, halakhic analysis is either cogent or it is not. Cogency is immanent in the analysis, regardless of variations of language, style and flavor.[28]

Of course, some scholars will experience and give voice to insightful observations that elude others. Given the nature of the human intellect, there may be, and indeed there often is, disagreement with regard to the accuracy of such observations and the cogency of analytic formulations. Conflicting analyses of *gedolei hora'ah* are well within the parameters of *elu va-elu divrei Elokim hayyim*.[29] Not so with the patent errors of a *talmid she-lo higi'a le-hora'ah*. Just as correct analysis is necessary for correct *pesak*, faulty analysis necessarily results in faulty *pesak*. Failure to appreciate the *lomdut* or conceptual subtlety of a Talmudic aphorism can lead to serious confusion. In yeshiva circles the caricature of *lomdut* gone haywire is the application of the principle *kelutah ke-mi she-hunehah damya* in ruling that a pot of milk over which a chicken has flown is thereby rendered non-kosher. Even a school child would have no difficulty in recognizing that *kelutah ke-mi she-hunehah damya* is a "meta"-physical construct or, as some would prefer, a legal fiction, whereas an admixture of milk and meat depends upon the quite physical and indeed sensual, attribute of taste, or in the Gemara's own formulation, "*derekh bishul asrah Torah*."

In other instances, incongruous analysis is much less obvious. Elsewhere,[30] I have had occasion to point out that the gross distortion of Halakhah that has been committed in some quarters in groundlessly declaring a state of *kiddushei ta'ut* and issuing annulments is based upon a misunderstanding of the principle *tav le-meitav tan du mi-le-meitav armelu* (better to dwell as two than to dwell alone). The proposition that women prefer marriage to persons suffering from certain physical defects over spinsterhood is cited by the Gemara, *Bava Kamma* 110b, in explaining why levirate obligations exist even when the brother-in-law suffers from such a condition.

In recent decades the argument has been made that in the modern era, in light of changed economic conditions making it possible for women to earn their own livelihood, different social attitudes toward single women, the higher regard and dignity in which women are held, as well as women's own heightened sense of esteem and self-worth, the Talmudic vision of women has been rendered obsolete and continues the argument, halakhic provisions

based upon the presumption of *tav le-meitav* must be regarded as nugatory. Years ago, R. Joseph B. Soloveitchik declared that rejection of *Hazal*'s application of *tav le-meitav* "borders…on the heretical."[31] To my mind, the more fundamental point is that such rejection does not border upon, but is squarely within, the boundaries of *am ha'aratzut*. Nonsense is nonsense; theological analysis of nonsense can only create an aura of cogency where non exists.

The notion that sociological, psychological, economic and attitudinal effects and/or values of the Talmudic period were different from those of our day is not at all supported by the aphorism. Writing in a different context, R. Moshe Feinstein marshals comments of the Gemara as well as observations of *Tosafot* indicating that women of the Talmudic period relish the prospect of marriage to a *mukeh shehin* no more so than do their progeny in our day.[32] *Beit ha-Levi* demonstrates that the Gemara, in context, is seeking grounds for positing an implied condition upon which the marriage may be presumed to be predicated, *viz.* that if the result would be a levirate relationship with a *mukeh shehin*, the marriage is to be nullified retroactively.[33] For such an unstated condition to rise to the level of an implied condition it must be a universally recognized presumption (*anan sahadi*). Since some women do consent to give themselves in marriage to *mukei shehin* because *tav le-meitav tan du*, i.e., *those* women prefer a *mukeh shehin* to spinsterhood, such a presumption is clearly not universal. Hence, the suggestion that the original marriage was conditional in nature is firmly rebutted.

"*Lomdut*" is required in order to recognize that (1) a theory for negating the levirate obligation is absolutely necessary even if *tav le-meitav* is not accepted as cogent; (2) that the only available theory is conditional marriage; and finally, (3) that, in order to defeat the argument, *tav le-meitav* need not be posited as a universal principle. Ockham's razor applies to Talmudic dialectic no less than to metaphysics. The Gemara does not posit theorems, postulate hypotheses or advance theories unless necessary for a halakhic contingency and when it does, the theorem, postulate or hypothesis is crafted narrowly to fit the purpose.

The role and place of *lomdut* in our educational system is not

my assigned topic. But it is from our educational system that rabbis emerge and the relationship of *lomdut* and *pesak* is my topic.

A student recently informed me that when he had interviewed for a rabbinic position he was asked, "And who will be your *posek*?" He was quite perturbed and told me that when he had answered, "I will," he felt that the committee members viewed him as an arrogant whippersnapper. What he had meant was: I shall *pasken* and if there is a complicated matter, I will decide who is the expert in that particular area with whom I wish to consult. That is as it should be. A *rav* should be a *moreh hora'ah* and *ba'alei battim* should expect no less.

Failure to develop a milieu in which a rabbi is expected to be a competent *posek* breeds an atmosphere in which the *talmid she-lo higi'a le-hora'ah* seizes the mantle of *hora'ah*. The result, as *Hazal* predicted, is nothing short of a disaster.

Informed laymen are much wiser than unknowledgeable rabbis; *le-da'avoneinu*, they no longer expect a rabbi to be a *posek*. If we do not produce *lomdim*, we – and *ba'alei battim* – have no right to expect our graduates to be *poskim*. *Elef benei adam nikhnasin…ve-ehad [yotzei] le-hora'ah*.[34] Of a thousand entrants we cannot anticipate more than one competent *moreh hora'ah*. But we will not produce the single *moreh hora'ah* unless a thousand are accorded the opportunity to develop the requisite skills. To be sure, the needs of the other nine hundred and ninety-nine must be recognized and accommodated, but not at the cost of destroying the only system from which competent *rabbanim* can emerge.

Warmth, tact, dignity, vision, oratorical talent, administrative skills and many other qualities are necessary to assure a rabbi's effectiveness. But a rabbi who is not qualified to be a *moreh hora'ah* cannot be, and should not claim to be, a *rav*. And without the analytic skills of a *lamdan* it is not possible to function as a *moreh hora'ah*. *Ergo*, a *rav*, to merit the appellation, must be a *lamdan*.

NOTES

1. *Contemporary Halakhic Problems*, vol. 4 (New York: 1995), xiv. See also this

writer's "Is There an Ethic Beyond Halakhah?" *Studies in Jewish Philosophy,* ed. Norbert M. Samuelson (Lanham, Md.: 1987), 543.

2. See, for example, R. Yonatan Eybeschutz, *Urim ve-Tumim*, *Kitzur Tokpo Kohen*, sec. 124, who states that a defendant cannot claim to rely upon an opinion ignored by *Shulhan Arukh* and Rema because their rulings were guided by the Divine Spirit.
3. See, for example, *Hovot ha-Levavot, Sha'ar Avodat ha-Elokim*, ch. 4.
4. See *Contemporary Halakhic Problems*, vol. 4, xiii–xv.
5. Although the matter is not quoted by any of the poskim, it seems to me that a person intellectually convinced of the correctness of his own position may not himself inform an interlocutor that another more highly regarded authority is of an opposite view, but must refer the individual to that authority directly. There is a Talmudic controversy with regard to whether the taste of the *gid ha-nasheh* is sufficiently pungent so that, if cooked with other food, it renders such food non-kosher. R. Ami regarded such food to be prohibited. Nevertheless, the Gemara, *Hullin* 99b, reports that when a person brought such a matter before R. Ami he would refer the person to R. Yitzhak ben Halov who would rule permissively. Quite obviously, R. Ami regarded R. Yitzhak ben Halov as at least his equal and as a person whose opinion might be relied upon. Why did he not simply inform the interlocutor that, although in his own opinion the food is not permissible, the interlocutor might in good conscience rely upon the lenient view of R. Yitzhak ben Halov?

   The Talmudic narrative seems to reflect two distinct canons of *pesak*: (1) One decisor may refer with equanimity to a person whose antithetical view is within the parameters of *elu va-elu divrei Elokim hayyim*. (2) The same decisor dare not himself utter the word "*muttar*" in the name of another unless he believes that to be true. Perhaps it is the phrase "*zekenekha ve-yomru lakh*"(Deut. 32:7) that requires the *zaken* to announce his own opinion rather than the opinion of another. Cf., however, R Shelomoh Zalman Auerbach, *Minhat Shelomoh*, I, 44, who, while not directly contradicting the foregoing, opines that in cases of controversy regarding a matter of rabbinic prohibition, the *posek* must inform the interlocutor of the dispute and of the principle that the permissive view may be relied upon. If that is correct, why then, according to the authorities who maintain that the prohibition of *ta'am ke-ikkar* is rabbinic in nature, did R. Ami not himself inform the people in question of the opinion of R. Yitzhak ben Halov and advise them that *safek de-rabbanan le-kula*?

   The same point seems to be reflected in the narrative recorded in *Hullin* 48a regarding the *kashrut* of an animal whose lungs had areas filled with pus. The Gemara relates that when a case of that nature came before R. Yohanan, he would send it to R. Judah ben Simeon who would rule that it was permitted. Rashi comments that R. Yohanan himself maintained that the animal was not kosher but declined to forbid its use because he was not in possession of a received tradition to that effect. But, if R. Judah ben Simeon's opinion could be relied upon, why did R. Yohanan himself not make that information available?

   More cryptic but equally germane is the narrative recorded by the Gemara, *Hullin*

44b. An animal with a severed trachea was brought before Rav. Rav proceeded to examine the outer circumference of the trachea with a view to pronouncing the animal non-kosher if the greater part of the outer circumference had not remained intact. R. Kahana and R. Asi objected: "But have you not taught us, Master, to examine it on the basis of the greater part of the hollow [i.e., the inner circumference]?" Thereupon, Rav sent the matter to Rabbah the son of Bar Hana who examined the inner part of the circumference and, finding the greater portion to be intact, ruled the animal to be kosher. In this case, Rav was apparently prepared to rule in accordance with the stricter view but, when reminded by his students of his own earlier held permissive view, refused to state that the lenient view might be relied upon and instead put the person consulting him to the trouble of himself seeking out the scholar who would rule permissively.

6. *Berakhot* 7b.
7. See Maharal of Prague, *Derekh Hayyim*, *Avot* 6:6.
8. See R. Abraham Elimelech Kornfein, *Shimmushah shel Hora'ah* (Jerusalem: 5754), xii.
9. Indeed, Rabbi Kornfein's *Shimmushah shel Hora'ah*, cited *supra*, note 8, is designed to serve as a pedagogic tool to train the student in issue-spotting. Actual questions and hypothetical fact patterns are presented and analyzed in terms of the salient issues that might be addressed in order to arrive at a determinant *pesak*. For purposes of illustration one simple example will suffice: A non-kosher chicken leg was cooked in a cauldron of soup together with other kosher chicken legs. The total quantity of soup and chicken was only fifty-five times greater than the non-kosher chicken leg. The intuitive response of a neophyte student is that, since the permitted foodstuffs are less than sixty times greater than the non-kosher piece of chicken, the contents of the pot are non-kosher. However, upon proper analysis, the opposite is the case. Hard, inedible bones of a non-kosher animal, when cooked with kosher food, do not render the kosher food impermissible. However, since bones are absorbent, the bones of a kosher animal (and, for some authorities, even of the non-kosher animal) may be included as part of the aggregate necessary to nullify non-kosher food. Accordingly, since only the meat of the non-kosher chicken need be considered, a quantity of food fifty-five times greater than the entire chicken leg is ultimately more than sixty times greater than the non-kosher meat alone. See *Shimmushah shel Hora'ah*, no.13.
10. A similar anecdote, but minus any confrontation or discussion of analytic method, is presented by R. Shimon Yosef Miller in his recently published *Uvdot ve-Hanhagot le-Beit Brisk*, vol. 1 (Jerusalem: 5759), 217–218. The source of that anecdote is apparently a report of R. Menachem Mendel Chen published in *Moriah* 4:3–4 (*Sivan-Tammuz* 5732): 9.
11. In the version recorded in *Moriah* and in *Uvdot ve-Hanhagot, supra*, note 10, R. Hayyim carried the "issue-spotting" one step further. In that report, the non-kosher meat was not carrion but a kosher-slaughtered animal found to be a *tereifah*. R. Hayyim incisively distinguished between *neveilah* and *tereifah* and declared the

blood of a *tereifah* (and presumably also of a member of a non-kosher "unclean" species) to be biblically prohibited. Although, as *Tosafot*, *Pesahim* 22a, rule, the blood of an animal is not encompassed in biblical references to an animal, the blood is nevertheless the *yotzei* of the animal, i.e., it is produced by the animal. Biblical law posits a specific prohibition banning the *yotzei* or product emitted by a forbidden substance. Accordingly, since the blood of an animal is a product of the animal, the blood produced by an animal that has already become a *tereifah* is biblically prohibited as *yotzei* and hence any doubt with regard to nullification of the blood of a *tereifah* is a doubt with regard to a biblical infraction. The same is not true with regard to blood of carrion since the blood, having been produced while the animal was still alive, is not the *yotzei* of a *neveilah*. Accordingly, in the case of the meat of a *tereifah* that became mixed with kosher meat, R. Hayyim concluded that, because of the presence of blood biblically prohibited as *yotzei*, the matter involved a doubt with regard to a possible biblical infraction and hence he ruled that the meat was forbidden.

12. See, *inter alia*, Rosh, *Yoma* 9:14; *Teshuvot ha-Rashba*, no. 689; and *Beit Yosef*, *Orah Hayyim* 328.
13. 3. 118 S.Ct. 2081 (1998).
14. Second ed. (Jerusalem, 5718), 61. See *infra*, note 29. See also *Hiddushei ha-Grah al ha-Shas* (Jerusalem: 5729), 1 and *Hiddushei ha- Grah ve-ha-Griz al ha-Shas* (n.d.), 1.
15. Indeed, *Mishnah Berurah* 294:2 rules *contra* the position of R. Hayyim. It is surprising that *Mishnah Berurah* either overlooked or ignored the comment of R. Akiva Eiger, particularly since there is no other authority who unequivocally rules to the contrary. For the rule in the case of a person who in the interim has recited *havdalah* over wine, see the conflicting sources cited by *Bi'ur Halakhah, ad loc.*, and *Mishnah Berurah* 108:33.

    Members of the Soloveitchik family recount a slightly different version of this incident. According to that version, R. Hayyim himself instinctively responded that *attah honantanu* should be recited in the second *shemoneh esreh* but immediately reversed himself. They also report that both R. Naphtali Zevi Judah Berlin and R. Raphael Shapiro, although impressed by R. Hayyim's novel insight in this matter, disagreed with his ruling.
16. This is but one instance in which a "Brisker" ruling can be traced to earlier scholars. The analytic method was not invented in Lithuania but oft-times a much sharper presentation was formulated in those circles, as in this case the quixotic hypothetical of Sunday morning occurring before Saturday evening. Once, in the course of a *yahrtzeit shi'ur*, Rabbi J.B. Soloveitchik presented R. Hayyim's analysis of the nature of a *shetar* and then pointed out that the analysis had actually been formulated much earlier by the *Ketzot ha-Hoshen*. Rabbi Soloveitchik concluded the citation with the pithy observation: "*Nor der Ketzos hot es gezokt ohn hendt und ohn fiss*."
17. Elsewhere (*Contemporary Halakhic Problems*, vol. 4, xiii), I have commented that there is nothing innovative in Halakhah in the true sense of that term, just as there is nothing inherently innovative in physics. Both disciplines have as their subject

matter a closed, immutable system of law-physical in the case of the latter, regulative in the case of the former. To be sure, the theoretical physicist may propose a previously unexpounded thesis in an attempt to explain the operation of the laws of nature; so also may a *rosh yeshivah* develop conceptual novellae in the course of an endeavor to explicate the meaning of the revealed law. In physics, a newly developed hypothesis may have a predictive value with regard to empirical phenomena; likewise, Talmudic novellae may yield heretofore unarticulated halakhic propositions. But both in physics and in Halakhah the outgrowth is likely to be marginal to each of the systems viewed in its entirety. In each case the thesis must be tested against the totality of the system. Generally, contradiction by other aspects of the system is tantamount to demonstration of an inherent fallacy in the thesis.

18. *Mahadurah Kammah, Orah Hayyim*, no.13.
19. Cf., however, *Noda bi-Yehudah, Mahadurah Tinyanah*, no. 45; *Melo ha-Ro'im, erekh ben Noah*, sec. 21; *Sefer ha-Makneh*, I, no. 8, sec. 1; *Minhat Hinnukh*, no. 5; and *Hiddushei Rabbeinu Hayyim ha-Levi al ha-Rambam, Hilkhot Ma'aseh ha-Korbanot* 10:12 and *Hilkhot Ma'akhalot Assurot* 9:9.
20. The statement of *Pithei Teshuvah, Yoreh De'ah* 262:4, to the effect that Maharam ruled that the townspeople should expend even an exorbitant sum because of the consideration of *hillul ha-Shem* is inaccurate.
21. As reported by R. Shelomoh Luria, *Yam shel Shelomoh, Gittin* 4:66, Maharam of Rothenburg did not permit himself to be ransomed for an exorbitant sum. It need not, however, be assumed that Maharam of Rothenburg disagreed with the position of *Kenesset Yehezkel*. If popular accounts of the imprisonment of Maharam of Rothenburg are accurate in their report of the commodious circumstances of his confinement, Maharam of Rothenburg may not have regarded himself as a "captive" to whom the *mitzvah* of *pidyon shevuyim* pertains. If so, it is probable that the reason why, when first imprisoned, Maharam of Rothenberg reportedly cooperated in a failed attempt to raise the necessary revenue was that, at that time, he had no way of knowing that he would not be oppressed in captivity.
22. *Kenesset Yehezkel* also notes that in their comments on *Gittin* 45a, s.v. *de-lo legeivu, Tosafot* fail to posit an exception in cases of danger to life because those comments are offered in explication of the discouragement rational as is clearly indicated in the caption preceding those comments. R. Jacob Emdens's derogatory remarks regarding R. Ezekiel Katzenellenbogen, *Megillat Sefer,* ed. David Kahane (Warsaw 5657), 121–140, and indeed much of the material in that work, should be taken with several grains of salt. In particular, R. Jacob Emden's comments regarding Rabbi Katzenellenbogen, *ibid*., 134–135, are clearly at variance with the intellectual acumen displayed in the responsum herein discussed.
23. For a fuller discussion of the halakhic issue involved see this writer's *Bioethical Dilemmas: A Jewish Perspective*, vol. 1 (Hoboken, N.J.: 1998), 152–159.
24. For some examples see *Bioethical Dilemmas*, vol. 1, 156–157.
25. *Iggerot Mosheh, Even ha-Ezer,* I, no. 74–76 and *Even ha-Ezer,* II, no. 19. See also, *Iggerot Mosheh, Even ha-Ezer,* III, no. 25.

26. *Perushei Ivra*, chaps. 3–5.
27. R. Shelomoh Yosef Zevin's *Ishim ve-Shitot* is a collection of stunning intellectual biographies of various foremost late nineteenth and early twentieth-century rabbinic scholars. Rabbi Zevin brilliantly employs representative vignettes of analytic thinking in an emblematic portrayal of the unique thought processes of each of those *lomdim*.
28. At the risk of flippancy, it may be noted that the purveyor of a popular brand of ice cream advertises that the company's product is available in twenty-eight flavors. Chocolate ice cream does not have the same taste as vanilla ice cream; the flavor of butterscotch is quite different from that of pistachio. But the product is essentially the same; any dissimilarity is only a matter of taste. Ice cream has the same nutritional value regardless of the flavor.
29. Nevertheless, even a consummate *posek* may prove to be less than infallible. At times, a theoretical analysis, no matter how cogent and enticing, may simply be contradicted by an overlooked source. The prowess of an *oker harim* can be validly employed only when accompanied by the knowledge of a *sinai*. One example will suffice.

    In the course of a now classic responsum discussing the permissibility of blended whiskey containing a small but significant quantity of wine, R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, I, no.62, in effect, formulates a *hakirah*: Is wine nullified in six parts of water (rather than sixty) because, although the taste of wine remains present, it serves to ruin rather than to enhance the water or because the taste that is perceived is no longer the taste of wine? *Iggerot Mosheh* seeks to demonstrate that it is the latter rationale that forms the basis of the relaxation governing nullification of wine. A necessary concomitant of that hypothesis is that wine can never have the status of a condiment that remains unnullified even in a mixture sixty times as great. A contradictory statement by Rambam in his *Commentary on the Mishnah, Orlah* 2:10, indicating that wine may be a pungent agent, is dismissed as a copyist's error. As a corollary, *Iggerot Mosheh* then formulates the theory that the residue of the grapes from which wine is pressed is prohibited, not because it absorbs non-kosher wine, but by virtue of an entirely independent prohibition. That analysis follows from *Iggerot Mosheh*'s premise that the "taste" of wine can never survive adulteration with a substance six times as great.

    Alas, *Darkei Mosheh, Yoreh De'ah* 114, citing an early-day authority, specifically refers to the pungency of the "wine" rather than the residue per se as responsible for rendering the food with which it is mixed non-kosher. *Be'er ha-Golah, ad loc.*, cites a comment of *Beit Yosef* to the same effect. That rationale is also reflected in the comment of *Shakh, Yoreh De'ah* 98:31. *Iggerot Mosheh*'s *lomdut* is appealing but, in this case, appears to be contradicted by the sources.

    Cf., R. Yitzhak Weisz, *Teshuvot Minhat Yitzhak*, II, no. 28, who cites these sources but does not refer to *Iggerot Mosheh*'s *hiddush*. *Minhat Yitzhak* nevertheless finds grounds tentatively to permit blended whiskey on the basis of an entirely different analytic consideration.

30. *Tradition*, 33:1 (Fall 1998): 102 ff.
31. See lecture transcribed by Dr. Isaac Hersch, *Light*, 17 Kislev 5736, p. 13, reprinted in the *Jewish Press*, October 16, 1998, p. 22.
32. *Iggerot Mosheh, Even ha-Ezer,* 1, no. 79, *anaf* 1.
33. *She'eilot u-Teshuvot Beit ha-Levi*, III, no.3.
34. *Va-Yikra Rabbah* 2:1.