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## THE HUMAN AND SOCIAL FACTOR IN HALAKHA

Any comprehensive overview of the concern for the human and social factor within halakha needs to relate, perhaps both substantively and historically, to several planes. We need to consider, first, the primal halakhic core. What is its presumed, and possibly avowed, telos? And how “friendly” is its codex—how rigorous its demand and how permissive its latitude? Secondly, we must examine the halakhic process, from a historical (albeit not from a historicistic) perspective. In part, this is simply a complementary extension of the initial phase. Pursuant to an analysis of the scope and nature of the concern for man implicit in the *de-oraita* bedrock of Torah, we could similarly probe the character and content of its *de-rabbanan* accretions. In part, however, it presents us with an independent challenge—examination of whether and how sensitivity to the human and social factor has impacted, legitimately, upon the formulation and implementation of halakha.

The first question itself bears a dual aspect, relating to both intent and content. With respect to the former, the Torah itself describes its regimen as destined to enhance human good:

And now, Israel, what doth the Lord thy God require of thee, but to fear the Lord thy God, to walk in all His ways, and to love Him, and to serve the Lord thy God with all thy heart and with all thy soul; to keep for thy good the commandments of the Lord, and His statutes, which I command thee this day?<sup>1</sup>

A similar chord is struck in familiar texts in *Hazal*. In a general vein, we are told:

The Holy One, blessed be He, desired to give Israel merit, therefore

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This article, to appear in a collection of Rav Lichtenstein’s essays to be published by KTAV, originally was presented to the Orthodox Forum, convened by the Rabbi Isaac Elchanan Theological Seminary, Yeshiva University, in March, 1999.

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He gave them much Torah and many *mitsvot*, as it is said, “The Lord was pleased, for the sake of His righteousness, to make the Torah great and glorious.”<sup>2</sup>

And, at the pragmatic and utilitarian level, several *halakhot* are explicated in light of the assumption, “The Torah was concerned with [unnecessary expenditure of] Israel's money.”<sup>3</sup>

At bottom, however, such prooftexts are inconclusive, as they leave open the critical issue of the definition of key terms. “To give merit” could range from material bounty to spiritual purgation. To which sphere does “for thy good” refer, the mundane arena of psychosocial benefit or the posthumous *olam she-kulo tov*?<sup>4</sup> We are therefore driven to move from teleology to substance, to encounter the fabric of halakha proper. We would need to examine, on the one hand, whether, and to what extent, its corpus promotes and/or mandates affirmation or denial; its consonance with the realization of natural desire or aspiration; where its norms, taken collectively, stand on a scale of asceticism. On the other hand, we would have to analyze the extent to which there is allowance for deviation, on human and social grounds, in particularly trying circumstances; to test, in effect, the scope of the Rambam's assertion with respect to the dispensation of *pikuah nefesh*:

Hence you learn that the ordinances of the Law were meant to bring upon the world not vengeance, but mercy, lovingkindness and peace. It is of heretics—who assert that this is nevertheless a violation of the Sabbath and therefore prohibited—that Scripture says, “Wherefore I gave them also statutes that were not good, and ordinances whereby they should not live.”<sup>5</sup>

Such an examination, even if exhaustive, would hardly produce a definitive response. So much depends on the eye of the beholder and upon the standards employed. Moreover, the elements of the halakhic order are, in this respect, widely divergent, exacting rigor seemingly reflected in some and general acceptance in others, so that an observer can focus upon components highlighting his own emphases while apologetically parrying others, apparently inconsonant with them. And, of course, one's conclusions might be subtly multifaceted, postulating dialectical interplay, the concept of intermediate constriction as leading to ultimate human efflorescence, or both.

The last, broadly speaking, was the position of the Rav *z.t.l.* He

repeatedly—alternately and, at times, even concurrently—developed twin themes. On the one hand, at both the ethical and the religious planes, he celebrated inhibition and restraint. At times, he almost identified *yahadut* with denial and sacrifice, through which the Jew both heroically attains spiritual catharsis and submissively bonds with the *Ribbono Shel Olam*.<sup>6</sup> On the other hand, he consistently rejected asceticism and emphasized that halakha neither accepted nor rejected the world but affirmatively mandated its sanctification through disciplined channeling of physical and passionate experience.<sup>7</sup> His emphasis fluctuated, and the relation between the respective elements underwent changes. But the basic adherence to this dual motif remained fairly constant, and it served as one of the linchpins of his thought.

Even barring definitive conclusions, then, an analysis of the degree of halakhic concern with human and social reality and aspiration would bear valuable fruit. On balance, it would sharpen our insight into the substance and spirit of *devar Hashem*. At the very least, it would delineate attitudinal parameters framing possible conceptions of the place of human and social concerns within halakha. And it would reinforce our sense of the role, within *yahadut*, of halakha, as a ballast countering possible hashkafic excesses of either ascetic rigor or affirmative exuberance. Whatever instinctive or ideological reservations a purist may have about sexuality, these cannot exceed a certain point in light of the simple normative dictum—particularly as applied to a spiritual elite:

Sexual relations are considered a form of Sabbath pleasure. Therefore, scholars who are healthy set aside Friday night as the night when they fulfill their [weekly] conjugal duties.<sup>8</sup>

Valuable as such a discussion might be, it is not, if I understand my mandate correctly, the focus of this paper. My primary concern shall not be the bedrock halakha, quintessential *devar Hashem*, but *ba'alei halakha*, *hakhmei ha-mesora* in whom it is embedded and through whom it is developed, implemented, and transmitted. And I shall narrow the discussion still further by largely ignoring the basic phases of halakhic discourse—exegesis, hermeneutics, and analysis—and instead concentrating, with particular emphasis upon the post-*Hazal* era, on its latter stages of decision and *hora'a*.

*Hora'a* is comprised of two elements: *pesak* and *pesika*, respectively. The former refers to codification, the formulation of the law pertinent to a given area; and it is most characteristically manifested in the adoption,

on textual or logical grounds, of one position in preference to others. As such, it is, essentially, the concluding phase of the learning process proper, whether on a grand or a narrow scale, and its locus is the *bet midrash*. *Pesika*, by contrast, denominates implementation. It bespeaks the application of what has already been forged in the crucible of the learning experience to a particular situation. It does not entail the definitive postulation of the law governing a delimited area or its detail, but, rather, the concurrent and coordinate meshing of all aspects, possibly drawn from widely divergent spheres, obtaining in a concrete situation. Its venue is, publicly, the *bet din* or, privately, the meeting of inquirer and respondent. It does not necessarily demand of the *posek* that he take a stand or break fresh ground. Its challenge lies in the need to harness knowledge and responsibility at the interface of reality and halakha.

The human and social factor is relevant to halakha at its various levels; and the point can be briefly illustrated by the example of *shalom*—perceived not only in moral and hortatory terms, with primary reference to the aggadic sphere, but as a halakhic element. At the teleological plane, it is described in one context as the impulse for the entire Torah. In the wake of Abaye's query to Rav Yosef, as to why the *mishna* in *Gittin* ascribes the sequence of *aliyot* to the quest for synagogal harmony, and hence of *de-rabbanan* origin, when it could presumably be accorded *de-oraita* status, as a fulfillment of the commandment of "*ve-kiddashto*," that we sanctify and entitle *kohanim* and *leviyim*, the *gemara* cites a brief discussion:

He answered: [This law] does derive from the Torah, but its object is to promote peace. [He objected:] But the whole of the Torah is also for the purpose of promoting peace, as it is written, "Her ways are ways of pleasantness and all her paths are peace!"<sup>9</sup>

It then goes on to present an alternate explanation, clearly implying that the basis of the rejoinder had been accepted.

What in the *gemara* is advanced, *en passant*, in the course of discursive debate, was posited by the Rambam in definitive terms; and furthermore, was linked to specific *halakhot*. As the coda to *Sefer Zemanim*, he elaborates upon a *din* cited from a *gemara* in *Shabbat*:

If [a poor man] needs oil for both a Sabbath lamp and a Hanukka lamp, or oil for a Sabbath lamp and wine for *Kiddush*, the Sabbath lamp should have priority, for the sake of peace in the household, seeing that even a Divine Name may be erased to make peace between husband and

wife. Great indeed is peace, forasmuch as the purpose for which the whole of the Law was given is to bring peace upon the world, as it is said, "Her ways are ways of pleasantness, and all her paths are peace."<sup>10</sup>

The stark contrast between the situation at issue—concern lest domestic tranquility be perturbed should a member of the household bump himself in the dark—and the grandiloquent generalization only serves to sharpen awareness of harmony as a value.

At the plane of substantive content, we may regard the quest for harmony as the underpinning of a number of *halakhot*, if not of whole halakhic areas, *mi-de-oraita*. From a certain perspective, the mandate of *bet din* is not only juristic but social, and its primary function in that connection is the preservation of comity.<sup>11</sup> Or, to take an individual example, the laws of *harhakat shekhenim* are intended not only to avert inflicting damage, but positively, to promote interpersonal civility.<sup>12</sup> And, of course, the point is fully explicit as regards *takkanot de-rabbanan*, with respect to which the link is variously formulated. It may be viewed, as in the *Yerushalmi*'s<sup>13</sup> explanation of *eruvei hatserot*, as an impetus to promote camaraderie, in positive terms. It may be the source of ordinances, instituted *mi-penei darkhei shalom*, intended to forestall possible friction.<sup>14</sup> And, more sharply, it may underlie *halakhot* legislated *mishum eva*, with an eye to averting potential enmity, not only between Jew and Gentile but within the Jewish community proper, whether the resentment of a mate<sup>15</sup> or the vindictiveness of a parent.<sup>16</sup> The primary chord, the need to preserve and enhance interpersonal and communal harmony, is uniformly clear, however.

The element of *shalom* is likewise in force as an overriding factor, preempting the "normal" halakha. In *Hazal*, this aspect, at the level of particular implementation rather than general legislation, only appears explicitly vis-à-vis *de-rabbanan* ordinances. However, the Rama extended it to the *de-oraita* level as well. Invoking an aggadic account of Ahitophel's extension of the license presumably implicit in the erasure of the divine name in order to establish marital reconciliation, he daringly elevates this to the status of general procedural principle:

We have learned from here that it is permissible to modify [the truth] for the sake of peace, and it is permissible to violate the injunction, "Thou shalt distance thyself from falsehood." [The consideration of peace] also overrides the biblical prohibition of "Thou shalt not do thus to the Lord thy God," which bans the erasure of God's Name, as is explained in the *Sifri* to *Parashat Re'eh* and counted by the Rambam

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and the Semag in their respective enumerations of the *mitsvot*. Since this is so, I say that it is also the case that [peace] overrides the prohibition of defamation; in other words, it is permissible to defame another if one's intention is for the sake of Heaven and for a good cause, [namely,] to promote peace.<sup>17</sup>

In certain respects, the application is ironic, inasmuch as the overridden *issur* is that of slander, presumably itself predicated, *inter alia*, by the concern for preserving peace and reducing acrimony. Moreover, as a routine operative principle, the use of so amorphous and highly subjective a criterion to dispense with any *lo ta'aseh* is potentially subversive. However, these reflections only reinforce awareness of the weight the Rama assigned to *shalom* as a halakhic category.

That weight is, finally, relevant, although not always manifestly so, at the plane of decision. In a sense, this point is manifested in Rava's resolution of the question as to how one who can only afford either a candle for his home or wine for *kiddush* should choose, with the statement, "a candle for his home is preferable because of the peace of his household."<sup>18</sup> Strictly speaking, however, this is not quite decision, as Rava confronts options but not opinions. However, the same theme is indeed encountered in *hora'a*, narrowly defined, as exemplified by the Rosh's determination that educated judicial opinion could substitute for hard evidence,

For by means of judgment there is peace in the world; therefore they empowered the judge to adjudicate and to do as he pleases, even without offering a reason or a proof, in order to foster peace in the world.<sup>19</sup>

Illustrations apart, however, the cogency and legitimacy of a "human" approach to *pesak*, appears, to many, problematic. They would have us believe that the ideal *posek* is a faceless and heartless supercomputer into whom all of the relevant data is fed and who then produces *the* right answer. Should this standard not be met, the shortfall is to be regarded as a failing, the lamentable result of human frailty—in Bacon's terms, a manifestation of the besetting "idols" which hamper and hinder the capacity for reasoned judgment. On this reading, the process of *pesika*, properly conceived and executed, bears no semblance to an existential encounter between seeker and respondent. It entails, rather, the application of text to problem, the coupling of code and situation. This conception does not necessarily preclude reckoning with the specific circumstances of the question and questioner, as these may very well be

part of the relevant objective data. The prevailing tendency, however, would be to dwarf this factor; and as to the human aspect of the *meshiv*, that would be obviated entirely. He, for his part, is to be animated by the precept that “we do not have mercy in judgment,” and hence, to pass on the merits of the issue with imperviously stony objectivity.

Purist proponents of this approach often cry it up as the “frum” view of *pesika*. In reality, however, this portrait of a *posek* is mere caricature, limned by those who, at most, *kar’u ve-shanu*, but certainly *lo shimsbu*. As anyone who has been privileged to observe *gedolim* at close hand can readily attest, they approach *pesak* doubly animated by responsibility to halakha and sensitivity to human concerns. The balance between norm and need may be variously struck. There certainly are ideological differences among *posekim* over how much weight to assign the human factor—although, as Rav Avraham Schapira once noted, the classical *meshivim* are likely to be among the more lenient, inasmuch as inquirers are disinclined to turn to *mahamirim*. In principle, however, recognition of this factor is the rule rather than the exception; and responsa include frank acknowledgments of this theme. Writing to a colleague who had dissented from a lenient *pesak* he had rendered with regard to an *aguna*, Rav Hayyim Volozhiner asserts:

And I saw that in most matters, we were of like mind, except for [the fact that] his honor leans towards stringency, since the matter does not depend upon him. Likewise, before the yoke of practical decision was thrust upon me, I too did not incline toward the leniencies arising from [legal] analysis. In our great sins, however, the generation has been orphaned of sages, and now the yoke of practical halakhic decision-making has been thrust upon me, for in our entire region they do not free [*agunot*] in any manner without the concurrence of my meager opinion. Therefore I have taken counsel with my Maker, and feel obliged to gird all my strength and devote myself to remedying [the situation of] *agunot*. And may the blessed Lord save me from error.<sup>20</sup>

And does not the whole history of coping with *agunot* reflect this concern?<sup>21</sup> To anyone familiar with that history, the point is self-evident; but no less an authority than the *Mas’et Binyamin* provides express witness:

In truth, I have written too expansively on this matter, when I should have been brief. [I did so] because I know that the way of some of the sages of our generation, may the Lord preserve them, is to follow the shining path and to avoid any doubt in the world, [refusing to rule on

halakhic matters] unless they can determine a clear and unequivocal ruling, untinged by any contradictory considerations. They do this for the sake of Heaven, out of a fear of rendering halakhic decisions. This is a good and a straight path in all other areas of halakhic decision-making; but regarding *agunot*, such is not my position. Rather, I follow the well-trodden path of the earlier and later shepherds, who sought with all their strength all manner of considerations, primary and secondary, to be lenient in matters pertaining to *agunot*, as I have cited above.<sup>22</sup>

Or, to take a far more limited issue, we are privy to the pained determination of the same *meshiv* who, upon losing his vision, found himself grappling with the Bet Yosef's conclusion that a blind person could not qualify for an *aliya*:

For now, in my old age, my eyes have become dim, and according to [the Bet Yosef's] opinion I should be banished from sharing in the Lord's inheritance (for the Torah of truth is eternal life), and I should not be counted among those suitable for an *aliya*; therefore I said and determined to myself, "Heaven forbid that I depart from the path of the Tree of Life and cease grasping its branches! I have loved this law from earliest youth; it has always enjoyed primacy [in my life]. Even in my old age I shall not discard it, and I shall walk in it[s path]." [Thus,] I commenced halakhic research, to determine why the [Bet Yosef] has done this to me.<sup>23</sup>

It is, here, the *posek's* own anguish, and with reference to a religious, as opposed to a mundane, need. But it is nonetheless profoundly human and bears ample witness to the rightful place of sensitivity within the process of halakhic decision. And would we have it otherwise? Does anyone truly yearn for a *dayan* who approaches an *aguna* and a *blitztrop* with the same degree of equanimity?

*Hazal* certainly did not. The operative rule, "Rabbi So-and-so is worthy of being relied on under exigent circumstances,"<sup>24</sup> is clearly predicated upon the assumption that a *posek* can recognize an hour of need and may strive to respond to it. Implicit in this formulation is the concept of differential *pesak*, the principle that divergent answers may be given to the identical halakhic question, depending upon attendant human and social circumstances; and it is this concept which holds the key to the advocacy of sensitivity in halakhic decision.

And yet, whatever its precedents, the question of the moral and religious validity of this approach persists. Presumably, it cannot be ground-



ed in the preempting of halakha by alternate normative or pragmatic considerations. One recalls, by analogy, Newman's striking declaration: "The Catholic Church holds it better for the sun and moon to drop from heaven, for the earth to fail, and for all the many millions who are upon it to die of starvation in extremest agony, as far as temporal affliction goes, than that one soul, I will not say, should be lost, but should commit one venial sin, should tell one wilful untruth, though it harmed no one, or should steal one poor farthing without excuse."<sup>25</sup> Contemporaries may find it difficult to believe this sentence was not written by a virulent critic of Roman Catholicism but by one of its leading nineteenth-century spokesmen—indeed, by one of its most *liberal* spokesmen, and, *mirabile dictu*, in a work addressed to Anglicans, at that. The statement rings harsh if not cruel, and it aroused Kingsley's strident ire. And yet, the very harshness of the dictum serves to point up the dimensions of the problem to which, in context, it addresses itself.

The difference between temporal and eternal bliss is one of kind rather than duration. As the metaphysician holds that timeless eternity is not to be confused with infinite time, so the moralist contends that no amount of mundane joy can equal a single grain of transcendental bliss. Since he "regards this world, and all that is in it, as a mere shade, as dust and ashes, compared with the value of one single soul," he "considers the action of this world and the action of the soul simply incommensurate, viewed in their respective spheres." The difference between them being qualitative rather than quantitative, no measure of physical or emotional good can compensate for even the minutest spiritual evil. Hence, once a normative duty has been established, it becomes inviolate. Moral and religious law defines principles of right and wrong, and henceforth—except insofar as that law itself provides for dispensations—these can be sacrificed to nothing.

Given its premises, Newman's position, paradoxically harsh as it may seem, is grounded upon an inexorable logic. The Church is right in insisting that it "would rather save the soul of one wild bandit of Calabria, or whining beggar of Palermo, than draw a hundred lines of railroad through the length of Italy or carry out a sanitary reform, in its fullest details, in every city of Sicily, except so far as these great national works tended to some spiritual good beyond them."<sup>26</sup> Even in a moment of crisis, can one sacrifice bliss of *hayyei olam* upon the altar of *hayyei sha'a*? How, then, can the same halakhist issue varied responses to an identical question?

The clear answer is that while, of course, for the committed Jew, halakha, as a normative order, can never be superseded by external pressures, a specific halakha may be flexibly applied—and, in a sense, superseded—by the internal dynamics of the halakhic system proper. And this, in two distinct, albeit related, ways. The first entails recourse to a phalanx of factors, of human and social import, which affect decision as acknowledged halakhic elements. At the apex stands, of course, *pikuah nefesh*, but other factors, local or general, of lesser gravity, also abound. These include physical and psychological pain, financial hardship, social harmony, and human dignity, sensitivity to any or all of which can affect *pesak* measurably.

Yet, while the *modus operandi* concerning these factors—the measure of a *posek*'s awareness, how they are defined, and how liberally they are applied—may be of crucial practical significance, they do not constitute, philosophically, the heart of our problem. For their inclusion in the halakhic equation means that, even at the formal and technical level, two supposedly identical situations are, in effect, not identical at all. Our primary concern is therefore the second route—the latitude allowed a *posek* for differential decision even when all things are indeed, formally and technically, even.

That latitude is grounded in the pluralistic aspect of halakha. The halakhic order comprises three distinct tiers. There is, first, an ideal, and presumably monistic, plane, the Torah which is *ba-shamayyim*. It is to this that the *gemara* in *Bava Metsia* alludes when it ascribes to the *Ribbono Shel Olam* a position with respect to an issue in *taharot*.<sup>27</sup> There is, as the final stage, the definitive corpus, the genre of the *Shulhan Arukh*, which, having decided among various views, posits—again, monistically—what is demanded of the Jew. Intermediately, however, there is the vibrant and entrancing world within which exegetical debate and analytic controversy are the order of the day, and within which divergent and even contradictory views are equally accredited. The operative assumption is that, inherently and immanently, the raw material of Torah is open to diverse interpretations; that *gedolei yisrael*, all fully committed and conscientiously and responsibly applying their talents and their knowledge to the elucidation of texts and problems, may arrive at different conclusions. License having been given to them all to engage in the quest, the results all attain the status of Torah, as a tenable variant reading of *devar Hashem*: “Both these and those are words of the living God.”<sup>28</sup>

In one sense, this pluralistic conception is most immediately rele-

vant to the *gadol* himself, possibly authorizing him to act in accordance with his own dissenting lights, even in the face of a prevalent consensus.<sup>29</sup> However, it has ramifications for others as well. Were pure monism the order of the day, no degree of trauma—unless it constituted an acknowledged halakhic basis for dispensation—could justify deviating from standard norms. Against our grain, we would have to bow to Newman’s trenchant logic. However, the introduction of the principle of “Both these and those are words of the living God” alters the situation radically. Positions espoused by one *talmid hakham* are not only defined as a parcel of Torah with regard to himself. Within certain limits, they attain that status for adversaries as well. Time spent by Bet Hillel analyzing a view of Bet Shammai would be credited as a fulfillment of the *mitsva* of *talmud Torah*; *a fortiori* so, with respect to later *posekim* who had confronted both views before accepting one.

It is this concept which undergirds the legitimacy of recourse to minority opinions *bi-sh’at ha-dehak*. Inasmuch as these opinions are not simply dismissed as erroneous but procedurally rejected—in practice, we can’t have it both ways—they are very much alive, held in reserve where they can be culled from the shelf in a crisis.<sup>30</sup> In effect, the principle of “Rabbi So-and-so is worthy of being relied on in exigent circumstances,” states, that while a given view has been accepted *le-halakha*, as part of our third tier, in an emergency we envision ourselves back at our middle tier, *sans* decisive resolution, and hence as authorized to heed another view. Moreover—and this is no less remarkable—under the pressure of circumstance, we are not bound by the general directive of *sefeka de-oraita le-humra*, but are entitled to follow a lenient minority.<sup>31</sup>

This license raises obvious questions. How liberally and by whom can it be exercised? From how far back can discarded *shitot* be extracted—from the *mishna*, the *gemara*, *rishonim*, early *aharonim*? Which views, if any, might indeed be treated as error, and on what basis? At the practical plane, these issues need to be clarified, but that task lies beyond my present scope. Here, I content myself with an account of the principle and its rationale, as a manifestation of concern for the human and social element within *pesika*.

It is sometimes thought that the Rav was opposed to this approach. To the best of my knowledge, this assumption is primarily based upon a page drawn from *Ma Dodekh Midod* in which he emphatically rejects the notion that psychosocial elements are factored into the halakhic process and affect its course. Several sentences in this vein are admittedly sharp and sweeping. And yet, careful examination of this tenuously balanced

passage reveals that its primary thrust is not denial of human considerations but insistence upon the autonomy of halakha. Commiseration is acknowledged as a legitimate factor stimulating the *posek's* quest for a solution but is barred as a component of the halakhic process proper, once that has been set in motion:

However, the mutual connection between law and event does not take place within the realm of pure halakhic thought, but rather within the depths of the halakhic man's soul. The event is a psychological impetus, prodding pure thought into its track. However, once pure thought begins to move in its specific track, it performs its movement not in surrender to the event, but rather in obedience to the normative-ideal lawfulness particular to it.<sup>32</sup>

It is a nice distinction, and I confess that I am not certain it can be readily sustained in practice. In any event, it leaves the fundamental perspective I have outlined previously intact.

Moreover, the Rav's own experience as a *posek*—admittedly, not his primary task—over the years reflected this outlook. And I might add a salient recollection. During the mid-sixties, Yeshiva University launched the Rogosin Institute for Jewish Ethics. One of its primary projects, under the direction of my late brother-in-law, Rav Professor Yitzhak Twersky *z.t.l.*, was a group enterprise which entailed ferreting out and analyzing *teshuvot* in which the ethical moment figured significantly, either by dint of the topic or by the impetus of the response. I recall vividly how the Rav appeared at one of the opening sessions, warmly endorsed the project, and enthusiastically recounted how Reb Lippa Mirrer had gone to great lengths in order to overcome *prima facie* considerations which had seemed to portend an almost certain *issur* for the wife of a *kohen*.<sup>33</sup>

The autonomy so dearly and rightly cherished by the Rav is of course vital; but insofar as we deal with human and social elements which are related to the internal dynamics of the halakhic process proper, it remains largely intact. In this respect, one factor is, however, critical: the degree of self-conscious awareness which a *posek* brings to his encounter with extraneous considerations. Where that level is low, the danger of distortion is great. A *talmid hakham* needs to examine himself and his situation candidly, to ascertain that whatever cultural forces, possibly unknown to predecessors, he confronts and perhaps absorbs, are filtered through the prism of his Torah personality and do not simply seep through the pores of his semi-conscious being. To be sure,

intellectual historians revel in emphasizing that it is precisely with respect to unquestioned assumptions that the most significant change, subtle and incremental, takes place; and, within certain proportions, some shift in the parameters of thought cannot be denied. Hopefully, however, here, too, there is a filter, more relevant to attitudes than to perception. As the body rejects certain grafts, so the soul; and the nobler the soul, the more selective its system. Be this as it may, however, the counsel regarding a *posek's* active inclusion of human and social factors within his deliberations is that of controlled and critical sensibility.

Recognition of the possibility of differential *pesak* leaves open the question of the circumstances under which recourse to it is valid, advisable, and perhaps even mandatory. Clearly, on so delicate an issue we can hardly expect unanimity, possibly not even a clear consensus. A number of variables are involved, and each is susceptible of a broad spectrum of definition. Inasmuch as the issue turns on the balance between the halakhic order and human need, any resolution hinges on the degree of flexibility—in light of hermeneutic and/or analytic canons and the *modus operandi* of the system—assumed with respect to halakha, on the one hand, and the importance ascribed to personal or communal travail, on the other. Even the most caring and sensitive *posek*, confronted with genuine tragedy, may rule *le-humra* because, despite his most profound commiseration, he cannot traverse what are, on his conception, the bounds of the halakhic universe; because he cannot make a travesty of a *din* in order to relieve a personal crisis.

The issue is most keenly perceived at the individual level, but, to the extent that it involves the formulation of standards, may be general as well. How is *pikuah nefesh* to be defined? How great and how immediate must danger be? And how is *nefesh* itself, in this context, to be understood? What of *sakkanat ever*, of derangement, of apostasy? Can endangered public safety, even where no loss of life is in prospect, be viewed as its equivalent? What degree of pain invokes the license of *tsa'ar* and how great a loss justifies the license of *hefsed merubeh*?

These are immanent questions, to be honestly and conscientiously confronted; and surely we have no right to demand of a *posek*, almost as a matter of moral and personal right, the most comforting answer. The notion that “where there is a rabbinic will there is a halakhic way” both insults *gedolei Torah*, collectively, and, in its insouciant view of the totality of halakha, verges on the blasphemous. What we do expect of a *posek* is that he walk the extra mile—wherever, for him, it may be—harnessing knowledge and imagination, in an attempt to abide by his responsibility

to both the Torah with which he has been entrusted and to his anguished fellow, whose pangs he has internalized. For insensitive *pesika* is not only lamentable apathy or poor public policy. It is bad halakha. To the extent that *kevod ha-beriot*, for instance, permits a “violation,” be it of a *de-rab-banan* injunction, actively, or of a *de-oraita*, passively, failure to act on that principle undercuts a spiritual ideal. The Rav was fond of quoting the *Hafets Hayyim* to the effect that interruption of *keriat shema*, where enabled, *mi-penei ha-kavod*, was not permissible but mandatory.<sup>34</sup> Human dignity—the Rav would have preferred the term, “human sanctity”—is hardly a neutral matter.

*Posekim*, especially in the modern era, are often reluctant to invoke broad axiological *heterim* when they can construct more narrowly based decisions, in which local and possibly technical factors are more prominent. *Pesika* can congeal into *pesak*, and a decision issued, with trepidation, in light of special circumstances, may then enter the halakhic world as a precedent. The danger is particularly acute at a time when many, within and without the pale of commitment, seek to pounce upon every such *pesak* in order to promote an ideological agenda. We should realize, however, that such reserve may exact a practical and educational toll, as awareness of certain values and their place within halakha may become jaded. Be this as it may, we can recognize the position of the human and social factor within halakhic decision as firmly secure. And, were visible evidence necessary, surely, the two greatest *posekim* of our generation, Rav Moshe Feinstein and Rav Shelomo Zalman Auerbach *z.t.l.*, are prime exemplars.

Differential *pesika* requires the *raison d’etre* of a human or social desideratum. With an eye to Mill and Moore, in defining it, we obviously need to distinguish between the desired and the desirable. I would not, with reference to our context, rule out entirely assigning weight to the former. As there is a concept of subjective need, *asher yehezar lo*, with respect to *tsedaka*, so that the *mitsva* may encompass supplying a fallen aristocrat with a servant and conveyance,<sup>35</sup> so empathetic concern for one’s fellow may include taking into account matters which, for most, might entail mere comfort and convenience but, for him, constitute genuine present want. Clearly, however, our focus is the desirable—not just what a person or community wants but what they should want.

Movement from is to ought may raise, in the *posek*’s mind and heart, basic moral, *hashkafic*, and halakhic issues, possibly concerning his existential stance vis-à-vis certain *halakhot*; and these, in turn, greatly expand

the horizons of our discussion. Some cases, tragic as they may be, induce, in the *posek*, profound commiseration, but little tension. The situation of an *aguna* whose husband has disappeared in battle is palpably and uniformly perceived as pitifully bad. Trapped in a web of circumstance, she is bound by a norm whose inherent value a committed Jew readily comprehends but which, for her, has tragic ramifications. The situation might be somewhat different, however, in the case of a *kohen* who had fallen in love with a divorcee—or, worse still, who had become a *ba'al teshuva* after marrying her. In this case, a *posek* could find himself torn between empathy for the young couple and appreciation of the ideal of *kedusbat kehuna*, even in its devalued contemporary form.<sup>36</sup> He might lament the lack of an escape hatch which could provide dispensatory relief. But his appreciation of the norm *per se* and of the weight assigned it as a value is beyond question. However, in a third situation, that of *kiddushei ketana* on the part of a vindictive father, he, almost certainly, would not only regard the *mekaddesh* as a scoundrel but would regret that the institution exists. He would not, *has ve-shalom*, sit in judgment upon the license or question its morality. “Should the axe boast itself against him that heweth therewith? Should the saw magnify itself against him that moveth it?”<sup>32</sup> He would, however, candidly assume that what had been apt and perhaps even necessary in a given sociohistorical setting was no longer ideally suited to his own. The assumption would certainly not exempt him from mastering the relevant *halakhot* nor dim his enthusiasm for analyzing the nuances of *devar Hashem* as, in accordance with *Hazal*’s authoritative exegesis, initially formulated. It might, however, in his mind and in ours, raise certain pertinent questions.

With respect to the last example, this might be particularly so, inasmuch as our *posek* evidently does not stand alone. Rav Yehuda in the name of Rav (or possibly, Rav Elazar) possibly had similar reservations and, hence, issued a prohibition:

It is forbidden for one to give his daughter in betrothal when a minor; [rather, he must wait] until she grows up and states, “I desire so-and-so.”<sup>37</sup>

*Ba'alei ha-Tosafot*<sup>38</sup> state that, due to changed historical circumstances, the *issur* was not observed in their society; and the Rambam softened the impact of Rav’s injunction somewhat by substituting for *asur* the milder admonition, *en ra’uy la’asot ken*.<sup>39</sup> Be this as it may, the fundamental issue raised by Rav’s innovation is clear. What are we to assume, what did he assume, about the previous situation? In which respect and on what basis was the change justified, if not necessitated?

