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**Toward Critical Halakhic Studies**

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# TOWARD CRITICAL HALAKHIC STUDIES

By Adiel Schremer\*

## Abstract:

Current scholarly study of Jewish law concentrates either on a description and analysis of halakhic doctrines, or on the jurisprudential theories underlying the thought of halakhic thinkers. Questions such as: “how halakhic decisions are actually produced?”, and “what are the various constraints operating in halakhic decision-making?”, usually receive very limited attention in the study of *Halakha*. This paper calls for a shift of focus, from the “theoretical” (whether doctrinal or philosophical) to the “practical”, so that the halakhic process will occupy a central role in the study of Jewish law.

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\* Bar Ilan University, Ramat Gan; Shalom Hartman Institute, Jerusalem. I would like to thank Rabbi Saul Berman, Professor David Kretzmer, Professor Gianluigi Palombella, Professor Jeffrey Rubenstein, Dr. Haim Shapira, Professor Aharon Shemesh, Professor Suzanne Stone, and Professor Joseph Weiler, for sharing with me their thoughts and erudition on the topics discussed in this article, which contributed much to its formation. The responsibility for the following ideas, however, is mine alone.

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## I. Introduction

“If a matter arises which is too hard for you to judge”, says the Hebrew biblical book of Deuteronomy (17:8-11), “then you shall arise and go up to the place which the Lord your God chooses” and ask “the levitical priests and the judge who is in office in those days” for legal instruction. But, how precisely should the levitical priest or the judge figure out the law? To this question Scripture offers no answer, and surprisingly it is neither discussed by later classical Jewish tradition, nor addressed by modern students of Jewish law. The paucity of attention the judicial process usually receives in the study of Jewish Law has been lamented by Hanina Ben-Menahem, right at the beginning of his study of judicial deviation in Talmudic tradition: “Notwithstanding a few partial historical descriptions”, Ben-Menahem writes, “little attempt has been made thus far to analyze the judicial process within the context of Talmudic law”.<sup>1</sup> This observation is still correct, unfortunately, and not only with respect to Talmudic law but with respect to Jewish law more broadly: since the publication of Ben-Menahem’s book very little has changed in this respect in the study of *Halakha*.<sup>2</sup> Questions such as, “How does the halakhic process actually take place?”, or: “How does a *Posek* arrive at a halakhic ruling when asked for?”, and “What are the considerations (conscious and unconscious) governing the manner by which he approaches an issue that requires a halakhic ruling?” – in short: the sort of questions that stand at the forefront of the critical study of the judicial process, whether in sociology, in political science, or in legal studies<sup>3</sup> – appear to lie beyond the scope of interest of students of Jewish law.<sup>4</sup>

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<sup>1</sup> Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur: Harwood Academic Press, 1991), 5.

<sup>2</sup> In light of this general neglect in scholarly literature, the important contributions to this topic in some of the writings of Modern Orthodox feminists should be noted. See, most notably: Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, MA: Brandeis University Press, 2004), and her most recent article, “The Feminist Contribution to Halakhic Discourse: ‘Kol be-Isha Erva’ as a Test Case”, *Emor* 1 (2010): 37-70.

<sup>3</sup> See, for example: Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997); Nancy Maveety (ed.), *The Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003); Roy L. Brooks, *Structures of Judicial Decision Making From Legal Formalism to Critical Theory*, Second Edition (Durham, NC: Carolina Academic Press, 2005); E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005).

<sup>4</sup> The lack of interest in the halakhic process can be seen most clearly in the broad discussions of Kirschenbaum, England and Elon, concerning modern research in Jewish law, from which the issue of the halakhic process is entirely absent. See: Aaron Kirschenbaum, “Toward a Restatement of Jewish Law: The State of Scholarly Research

To be sure, recent years have witnessed a growing awareness, among students of Jewish law, of the benefit the field may gain from opening itself to various aspects of legal studies, especially to legal theory. Informed by contemporary theories of law, several important contributions to the theoretical study of the *Halakha* have been recently published.<sup>5</sup> These studies draw the reader's attention to the "jurisprudential theory" underlying the thought of a given halakhic thinker, and by so doing they significantly expand the scholarly treatment of Jewish law, as they provide us with sophisticated conceptual tools to think of the *Halakha* as a legal system. Other studies have drawn attention to the centrality of the interpretive dimension in halakhic discourse, and to the role moral values play in the shaping of *Halakha*.<sup>6</sup> These studies enable us a better appreciation of the manners by which *Halakha* is actually shaped, as they demonstrate that *Halakha* is not a simple product of a formalistic style of legal thinking, but rather its production involves different considerations, halakhic and moral alike. Yet, the

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in Jewish Law Today (Aug. 1978)", in: Bernard S. Jackson (ed.), *Jewish Law in Legal History and the Modern World* (Leiden: Brill, 1980), 97-123; Izhak Englard, "Research in Jewish Law – Its Nature and Function", in: Bernard S. Jackson (ed.), *Modern Research in Jewish Law* (Leiden: Brill, 1980), 21-65; Menachem Elon, "More about Research into Jewish Law", *ibid.*, 66-111. This lack of interest has not changed very much since the publication of these studies.

<sup>5</sup> Such is, for example, Yair Lorberbaum and Haim Shapira's excellent analysis of the debate between Haym Soloveitchik and David Hartman concerning Maimonides's *Iggeret Ha-shmad*. See: Yair Lorberbaum and Haim Shapira, "Maimonides' *Epistle on Martyrdom* in the Light of Legal Philosophy", *Dine Israel* 25 (2008): 123\*-169\* (for an earlier, Hebrew version see the authors' paper in: *Renewing Jewish Commitment: The Work and Thought of David Hartman*, eds. Avi Sagi and Zvi Zohar [Tel-Aviv: Ha-Kibbutz Ha-Meuchad, 2001], 345-373; here I shall refer to the later, English version only). For other examples see: Moshe Halbertal, "*Sefer Ha-Mizvot* of Maimonides – His Architecture of *Halakha* and Theory of Interpretation", *Tarbiz* 59 (1990): 457-490 (Hebrew); David Henshke, "The Basis of Maimonides' Concept of Halacha", *Shenaton Ha-Mishpat Ha-Ivri*, 20 (1995-1997): 103-149 (Hebrew); Shai A. Wozner, *Legal Thinking in the Lithuanian Talmudic Academies as Reflected by the Works of R. Simeon Shkop*, LL.D. Dissertation (Hebrew University, Jerusalem), 2006 (Hebrew); Harel Gordin, "The Source of Halakhic Authority: Analysis of the Halakhic Thought of Rabbi Moshe Feinstein", *Dine Israel* 25 (2008): 1-39 (Hebrew); Yair Lorberbaum, "Maimonides on Aggadah, Halakhah, and Divine Law", *Dine Israel* 26 (2010): 253-297 (Hebrew). See also: Christine Hayes, "Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis", *Dine Israel* 25 (2008): 73\*-121\*.

<sup>6</sup> The most important contribution in this direction is that of Moshe Halbertal, *Interpretive Revolutions in the Making* (Jerusalem: Magnes Press, 1994), on which see the important comments of Avi Sagi in his review of Halbertal's book in: *Daat* 42 (1999): 171-2. The reader will obviously notice Dworkin's influence on Halbertal's thought, just as it can be seen in Yair Lorberbaum's discussion of the role of *Aggadah* in halakhic discourse. See: idem, "Reflections on the Halakhic Status of the *Aggadah*", *Dine Israel* 24 (2007): 29-63 (Hebrew).

*realities* of the halakhic process appear to be of little interest for students of Jewish law, and thus they still remain an “unexplored land”.<sup>7</sup>

The lack of interest in the realities of the halakhic process is rooted, probably, in the intellectual inclination of those interested in the study of *Halakha* as a legal system. However, it is also the result of an extremely widespread view that seems to many to deem the question, “How is the *Halakha* actually shaped?”, as of no serious need to be elaborated, as the answer, so it is frequently believed, is simply “self-evident”. According to that view, halakhic decision-making is a cognitive enterprise determined first and foremost by a process of learning and interpretation. When asked a halakhic question the *Posek* approaches the halakhic sources and studies them in order to find an answer to the question. The hidden assumption behind this tacit view is that the *Halakha* “exists” out there, that is, in the halakhic sources, and it needs only to be “found”. Once the *Posek* “finds”, as it were, the *Halakha* in the halakhic texts he “declares” it, and this is the heart of the halakhic process. This is a tacit view, to be sure, that is only rarely formulated in a straightforward manner, either by halakhic authorities or by students of Jewish law.<sup>8</sup> Nonetheless, it is implied by much of the scholarly writing on the *Halakha*,<sup>9</sup> and it is widely espoused without critical evaluation.

Yet, one who does not hold a membership card in the “Rabbinic Club”, and who is neither entirely naïve nor completely pious cannot utterly escape thinking about the realities of the halakhic process from the perspectives suggested by students of the judicial process. As noted by Eileen Braman, “[m]ore than a half century of empirical research tells us that judges tend to decide cases in ways that are consistent with their policy predispositions. Indeed, the main thrust of much empirical research on decision making has been to demonstrate the

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<sup>7</sup> Aviad Ha-Cohen has begun exploring the realities of the halakhic process, in a spirit similar to the one of the present paper, in his very recent article, “שיקולים מטא הלכתיים בפסיקת ההלכה: מתווה ראשוני” (“Meta-Halakhic Considerations in Halakhic Decision-Making: A Preliminary Outline”), in: *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 279-310. Some of the issues which will be raised here are discussed in his study too, but, as its title indeed indicates, in a very preliminary manner.

<sup>8</sup> In Section II of this paper I shall cite a rare text, in which that view is stated explicitly, although not penned by a dominant figure in the academic circle of students of Jewish law.

<sup>9</sup> Although, to be sure, not by all. See below.

substantial disconnect between what judges do (represented by case votes) and the objective criteria that judges say guides their decisional behavior.”<sup>10</sup> Although no parallel empirical research exists with respect to halakhic decision makers, one cannot ignore this vast body of research on the judicial process and its possible relevance for the study of Jewish law. Building on the achievements of this school of legal studies I wish to question the very fundamental assumption that views halakhic decision-making simply as a process of cognition and learning. It is my goal to unearth and problematize that view, in order to pave the way for the creation of a framework for a different, critical approach to the halakhic process.

True, analysis and interpretation of previous halakhic texts are significant components of halakhic reasoning, and I do not wish to be understood as denying the centrality of this aspect of halakhic discourse.<sup>11</sup> Nonetheless, the halakhic process is much more than halakhic reasoning, and its description cannot concentrate only on the manners by which earlier authoritative texts are interpreted by halakhic authorities in the course of justifying their halakhic decisions. Rather, a critical description and analysis of the development of the *Halakha* needs to approach the halakhic process from its different dimensions and to see it in its complexity.

I am not the first, of course, to make such a claim. Ephraim E. Urbach has long ago written that: “Since Max Weber gave us his large tomes on the sociology of religion, no one doubts the importance of elucidating the relationship between socio-economic data and religious teaching, and undoubtedly there is need for an exposition of this kind in the sphere of the history of the Jewish religion [because of] the centrality of the *Halakha*, which deals expressly with civil law, torts and the like”.<sup>12</sup> Indeed, great scholars, such as Jacob Katz, Haym Soloveitchik, as well

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<sup>10</sup> See: Eileen Braman, *Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning* (Charlottesville and London: University of Virginia Press, 2009), 13. I am grateful to Prof. David Kretzmer for bringing this book to my attention.

<sup>11</sup> It should be noted, however, that there are important examples in Jewish legal tradition for a mode of halakhic ruling, in which there is virtually no textual reasoning at all (and this is of some significance for the argument of this paper, as will become apparent below). Maimonides’ *responsa* are frequently of this type, and so too are many of the halakhic *responsa* of the Babylonian Geonim. For the very early layers of Jewish law see: Daniel R. Schwartz, “Hillel and Scripture: From Authority to Exegesis”, *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders*, eds. James H. Charlesworth and L.L. Johns (Minneapolis: Fortress Press, 1997), 335-362.

<sup>12</sup> See: Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs*, trans. Israel Abrahams (Cambridge Mass. and London: Harvard University Press, 1987), 14.

as Urbach himself, and many others, have expressed in different ways the understanding, that historical circumstances play an important role in the halakhic process. However, that understanding is virtually never systematically articulated, argued, or justified; rather, it is usually only stated. Furthermore, these scholars have never attempted to describe and analyze the process of halakhic decision-making, *per se*,<sup>13</sup> and a careful reading shows, in fact, that both Katz and Soloveitchik strive to *belittle* the role social and economic reality plays in the shaping of *Halakha*.<sup>14</sup>

This paper calls, then, for a shift of focus in the study of Jewish law. From “the ideological” and “the normative” to “the actual”; from the dogmatic (that is, legal-conceptual) and jurisprudential aspects of the *Halakha* to the *realities* of the halakhic process.<sup>15</sup> I am not about to make a final statement on the subject, nor do I pretend to exhaust the relevant questions that need to be asked. Rather I would like to begin drawing the map of the shoreline of an unexplored land (although I know well that I am not its first discoverer). I approach the subject with the spirit of Legal Realism,<sup>16</sup> as I share with Realism a discomfort with the “Platonic search

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<sup>13</sup> Thus, neither in Urbach’s book, *The Halakha: Its Sources and Development* (Ramat Gan: Massada and Yad Latalmud, 1986), nor in Joel Roth’s, *The Halakhic Process: A Systematic Analysis* (New York: The Jewish Theological Seminary of America, 1986), nor, for that matter, in Jacob Katz’s *Halakha and Kabbalah* (Jerusalem: Magnes Press, 1984 [Hebrew]), will one find any discussion of the process of halakhic decision-making, or of the constraints operating on the *Posek* in that process. In fact, I am unaware of any systematic discussion of these issues in any other place in scholarly literature devoted to Jewish law.

<sup>14</sup> See: Katz, *Halakha and Kabbalah*, 2-3; idem, *The Shabbes Goy: A Study in Halakhic Flexibility*, trans. Yoel Lerner (Philadelphia: The Jewish Publication Society, 1989), 5-6; Haym Soloveitchik, “Halakhah, Hermeneutics, and Martyrdom in Medieval Ashkenaz (Part I of II),” *Jewish Quarterly Review* 94 (2004): 77-78.

<sup>15</sup> Hanina Ben-Menahem distinguishes between a descriptive approach to the judicial process, that is, an attempt to describe how judges actually decide matters, and a normative approach, which seeks to describe the legal system’s normative view of how a judge *should* decide a case. See: idem, *Selected Topics in Jewish Law* (Raanana: The Open University, 2006), 1.45-49 (Hebrew). He openly admits that his interest is in the latter aspect (ibid., 49), whereas my interest is more phenomenological and therefore I shall focus on the former.

<sup>16</sup> I am well aware of the fact that Hart’s famous criticism of Realism in the seventh chapter of *The Concept of Law* (Oxford: Clarendon, 1961) caused many to reject Realism as “deeply implausible”, or even worse as a “jurisprudential joke”. See: Brian Leiter, “Legal Realism and Legal Positivism Reconsidered”, *Ethics* 111 (2002): 278 (= idem, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* [Oxford: Oxford University Press, 2007], 59). However, as noted by Leiter, all this has to do primarily with the view of Realism as a theory of law, not with its claims about adjudication. In fact, even with respect to the former it can be defended. See, for some recent examples: Michael Steven Green, “Legal Realism as Theory of Law”, *William and Mary Law Review* 46 (2005): 1915-2000; Hanoch Dagan, “The Realist Conception of Law”, *University of Toronto Law Journal* 57 (2007): 607-660 (I would like to thank Avital Margalit for bringing this paper to my

for pure and static principle behind the disorderliness of everyday adjudication”, so characteristic of the classical view of law<sup>17</sup> and so prominent in the study of *Halakha*. In my opinion, in contrast to a “Platonic” search for pure concepts a critical study of the development of *Halakha* should emphasize concrete historical circumstances and social context as determinative in its shaping.

History, as it is well known, is a central focal point of Critical Legal Studies too.<sup>18</sup> As noted by Mark Kelman, “much of the Critical writing has been historical”,<sup>19</sup> and as Robert Gordon noted: “Critical legal writers pay a lot of attention to history. In fact, they have probably devoted more pages to historical description ... than to anything else”.<sup>20</sup> Because Critical scholars believe that “there is nothing natural and necessary about the rules we adopt to regulate social life”,<sup>21</sup> a historical analysis enables them to “expose the contingency of the legal system”,<sup>22</sup> and thus to facilitate their call for social and political change.<sup>23</sup> Such claims are “critical” in the Marxist sense of the word, and as such they lay beyond the scope of my project. I am not interested in passing any judgment on the political aspect of the activity of halakhic authorities, nor on the political function of the *Halakha* as a stabilizing force in Jewish society, a force that

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attention); Wouter de Been, *Legal Realism Regained: Saving Realism from Critical Acclaim* (Stanford: Stanford University Press, 2008).

<sup>17</sup> See: de Been, *Legal Realism Regained*, 6.

<sup>18</sup> Much has been written on Critical Legal Studies, and there is no need to survey the literature here. For a useful recent discussion see: Mark V. Tushnet, “Critical Legal Theory”, in: *The Blackwell Guide to the Philosophy of Law and Legal Theory*, eds. Martin P. Golding and William A. Edmundson (Malden Mass.: Blackell, 2005), 80-89, and the bibliography cited therein.

<sup>19</sup> Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge MA and London: Harvard University Press, 1987), 213.

<sup>20</sup> Robert W. Gordon, “Critical Legal Histories”, *Stanford Law Review* 36 (1984): 57.

<sup>21</sup> De Been, *Legal Realism Regained* (above, n. 16), 17. As de Been goes on to show, the Critics were following the Realists in this claim (just as Critical Legal Theory shares with Legal Realism various other views, the most obvious of which is “rule skepticism”; see: Richard Nunan, “Critical Legal Parricide, or: What’s So Bad About Warned-Over Legal Realism?”, in: *Radical Critiques of the Law*, eds. Stephen M. Griffin and Robert C.L. Moffat [Lawrence, Kansas: University of Kansas Press, 1997], 21-43), yet their view of history and its place in shaping the law is totally different. See: de Been, *ibid.*, 31-65.

<sup>22</sup> De Been, *ibid.*, 17.

<sup>23</sup> To the same end Critical Legal Theorists claim that the legal system functions to legitimize the existing social order. See: Dale A. Herbeck, “Critical Legal Studies and Argumentation Theory”, *Argumentation* 9 (1995): 726-727.

very frequently stands against social change.<sup>24</sup> Instead, drawing on insights and findings of studies of judicial behavior I attempt a phenomenology of the halakhic process that is not dictated by the self-perception of halakhic authorities themselves, or to the ideological descriptions of the *Halakha* espoused by its adherents.<sup>25</sup>

This is not to be understood, of course, as a strong claim about the applicability of all of the theoretical claims of Realism, or those of Critical Legal Studies, to the study of Jewish law, let alone as an attempt to equate the role of the *Posek* to that of a judge in an American court.<sup>26</sup> After all, the *Halakha* is a religious law, seen both by observant Jews and by its students as the carrying out of the will of God, and this fundamental aspect makes halakhic decision-making different from secular adjudication. For example, a judicial mistake is an “error” at most (which can be corrected by a higher instance), whereas a halakhic misruling is, to a certain extent, a “sin”, which cannot be corrected, only forgiven (by God), and even this is never secured, as it depends on Divine grace.<sup>27</sup> In the realm of interpretation, too, there may be important differences

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<sup>24</sup> Such as in the case of feminism, to relate to but one obvious example. See, for an excellent recent example, the analysis of Adam A. Ferziger, “Feminism and Heresy: The Construction of a Jewish Metanarrative”, *Journal of the American Academy of Religion*, 77 (2009): 494-546.

<sup>25</sup> I share with Hanina Ben-Menahem the claim that “we should not content ourselves with declarations made by judges, thinkers and scholars ... [for] legal rhetoric is distinct from legal practice, and often serves political objectives”. See: Hanina Ben-Menahem, “Is Talmudic Law a Religious Legal System? A Provisional Analysis”, *Journal of Law and Religion* 24 (2008-2009): 382. Avi Sagi too sharply criticized the approach of “[contemporary] philosophers of Halakha”, who “accept, virtually without any qualification, the self-perception of halakhic authorities”. See: Avi Sagi, “הרהורים על המכשלות ועל האתגרים בפילוסופיה של ההלכה” (“Some Thoughts Concerning the Obstacles and Challenges of the Philosophy of *Halakha*”), in: *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 32-34. In the present project I indeed aspire to follow a different path.

<sup>26</sup> Cf.: Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory”, *Harvard Law Review* 106 (1993): 813-894.

<sup>27</sup> The religious character of halakhic decision-making is reflected in the anxiety, expressed by various halakhic authorities, about giving publicity to their halakhic opinions. Rabbi Moshe Feinstein can be quoted for an excellent example. See his introduction to his *Iggrot Moshe*, Volume 1 (New York: Noble Book Press, 1959 [Hebrew]), an English translation of which can be found in: Moshe Dovid[!] Tendler, *Responsa of Rav Moshe Feinstein, Volume 1: Care of the Critically Ill* (Hoboken, NJ: Ktav, 1996), 27-32. J. David Bleich expresses a similar fear when he writes that: “Halakhic pronouncements should bear a Surgeon General’s warning that they may be dangerous to spiritual health and well-being. The onus of error is entirely analogous to that which in the realm of the physical accompanies the granting of a seal of approval or the issuance of a public warning of impending danger. An erroneous endorsement can easily lead to serious danger; an unwarranted interdiction can wreak havoc with human lives”. See: J. David Bleich, *Contemporary Halakhic Problems, Volume 4* (New York: Ktav and Yeshiva University Press, 1995), xi. For older materials see: Haim Shapira, ובמסורת, “כי המשפט לאלהים הוא – על הזיקה בין האל להליך השיפוטי במקרא ובמסורת

between secular law and the *Halakha*: for a religious community, a divinely inspired text might not be necessarily subject to the same rules of interpretation as those applying to documents composed by human beings.<sup>28</sup> One could justifiably argue, then, that a simplistic application of the claims of students of judicial behavior to the study of the halakhic process is problematic, and indeed I do not wish this project to be understood as following such a path. Notwithstanding this caveat, approaching the halakhic process equipped with the insights of that branch of legal and political studies is fruitful, as it shifts our focus from the conceptual aspect of the *Halakha* to the realities of its shaping by halakhic authorities.

In what follows I shall take first steps toward that shift by problematizing an existing, widespread view, so as to enable a re-thinking of some fundamental aspects of halakhic decision-making. As such a criticism has never been systematically articulated in scholarly literature devoted to Jewish law, I devote the present paper to this task, with the hope to offer an alternative on another occasion.

## II. Figuring Out the *Halakha*: A Widespread View

How is a halakhic ruling actually produced? In a paper published a few years ago, Aryeh A. Frimer has articulated a widespread view, which can be used as a point of departure for our discussion. My aim, in presenting and analyzing Frimer's text, is not to refute it, as such, and a critique of Frimer is not my goal. Rather, I will be using his text as it encapsulates many of the

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"ההלכתית" ("For Judgment is the Lord's: On the Connection Between God and the Judicial Process in the Bible and Halakhic Tradition"), *Bar Ilan Law Review* 26 (2010): 51-89 (esp. 67 ff.). Notwithstanding these examples, in the vast majority of halakhic writings one can hardly sense any kind of "fear" of the theological consequences of potential error, for "[t]he image of God evoked in these writings is that of a distant or absent God, Whose importance rests primarily on the fact that He was the original grantor of the system" (Last Stone, "In Pursuit of the Counter-Text" [above, n. 26], 847 [commenting on Robert Cover's and Robert A. Burt's approach, which I think is correct]).

<sup>28</sup> See: Steven D. Smith, "Law as Religious Enterprise: Legal Interpretation and Scriptural Interpretation", in: *Law and Religion (Current Legal Issues 2001, Volume 4)*, eds. Richard O'dair and Andrew Lewis (Oxford: Oxford University Press, 2001), 83-99; Edward M. Andries, "Post-Modernism, Hermeneutics, and Authenticity: Interpreting Legal and Theological Texts in the Twenty-First Century", *idem*, 131-144; Paul Cliteur, "Hard Cases in Scripture: A Reflection on Legal and Religious Interpretation", in: *Holy Writ: Interpretation in Law and Religion*, ed. Arie-Jan Kwak (Farnham and Burlington VT.: Ashgate, 2009), 67-111.

features of that widespread view, which can be found in the writing of other students of Jewish law (even if obliquely and in a much less crystallized form), as I shall demonstrate below.

In the absence of prophecy, we have no direct way of knowing what God's will is. Classical Orthodoxy maintains, however, that the Divine Law-Giver gave us the tools to indirectly discover His will via the *halakhic* process. The latter is a person's attempt at discovering the Divine will—the *retzon haBoreh*. The greater the scholar, the more adept at utilizing the process, the closer he or she will come to accurately revealing what God wants of us in a particular situation ... The *halakhic* system and process yields the *pesak Halakha* (*halakhic* decision) which is considered by tradition to be the closest human beings can come to approximating the Divine will. The utilization of the rules of *pesak*, as well as their application to a particular case, is based upon intellectual analysis. In addition, relevant precedent needs to be scrutinized. Admittedly, since we are dealing with human beings, what one considers to be “the proper” understanding of the rules and precedent is often a matter of discretion and subjective preference. One cannot always prove that one's analysis or interpretation is the absolutely correct *peshat* (meaning of the text). Nonetheless, the analysis and understanding is always subject to peer review by other *talmidei hakhamim* and can be either confirmed or rejected— as with any academic discipline. In this context, the consensus view of the *poskim* (*rov poskim*) is often invoked as an indication that a certain approach or result is the more compelling view—even though majority is not always an absolute arbiter or guarantor for absolute truth. But the most important element of *pesak* is intellectual honesty. As noted above, this process focuses on the rules and analysis. The *pesak* is the result of this analysis—wherever the chips may fall ... Within such a framework there should be few, if any, conscious and deliberately predetermined goals. The goals should not precede the *pesak*, but rather should become evident after the fact ... All agree that there is nothing improper about difficult life experiences motivating one to ask tough questions. The objection is to having these factors predetermine the answer.<sup>29</sup>

From the introductory sentence we understand that the aim of observing *Halakha* is to fulfill the will of God.<sup>30</sup> In order to fulfill God's will properly one needs, obviously, to know it, and

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<sup>29</sup> Aryeh Frimer, “Feminist Innovations in Orthodoxy Today: Is Everything in *Halakha—Halakhic?*”, *JOFA* 5:2 (2004): 3-5, at 4. As Frimer quotes Rabbi Aharon Lichtenstein, and leaves the reader with the impression that the latter's view supports his own, I find it necessary to draw the reader's attention to the fact that the spirit of Lichtenstein's paper runs in complete opposite to that of Frimer! See: Aharon Lichtenstein, “The Human and Social Factor in *Halakha*”, *Tradition* 36 (2002): 1-25.

<sup>30</sup> As Frimer writes elsewhere: “When the interpretations affect law and practice, the readings must be careful and close, and correspond to halakhic tradition – for we are attempting to determine the divine will of how we should

according to Frimer the best way to obtain knowledge of God's will would have been simply to ask Him – that is, by means of some prophecy. Since, however, this way is blocked,<sup>31</sup> we need to uncover God's will through our reading of His law. How exactly does one discover God's will? According to Frimer, God Himself “gave us the tools to indirectly discover His will” – these are what he calls “the rules of *pesak*”. J. David Bleich too, one of the most eloquent exponents of this outlook, refers to “Canons of interpretation, which are themselves an integral part of the Torah itself”.<sup>32</sup> And, in Frimer's view, “The utilization of the rules of *pesak*, as well as their application to a particular case, is based upon intellectual analysis”. This is stated time and again: the halakhic process “focuses on the rules and *analysis*. The *pesak* is the result of this *analysis*”. According to this view, the halakhic process is deductive in its nature. Or, as Bleich puts it: “In order to understand the manner in which halakhic rulings are formulated, it is necessary to focus attention upon the *deductive* process by means of which definitive rulings are derived from fundamental principles”.<sup>33</sup>

If the halakhic process is the “*discovering* [of] the Divine will”, that is, it is an attempt to dig out something that already exists “out there”, one can fully understand the claim that the result of the halakhic process should be “wherever the chips may fall”. That is, contemporary human needs can never determine the *Halakha*, for the *Halakha* is an already existing “given” – which, admittedly, might be unknown at a certain point in time, and needs therefore to be found and discovered, but nevertheless it already exists “out there” – and hence the changing needs of individuals or communities cannot affect it. As Frimer concludes: “Within such a framework

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act”. See: idem, “Guarding the Treasure: A Review of Tamar Ross, *Expanding the Palace of the King – Orthodoxy and Feminism*”, *BDD - Journal of Torah and Scholarship* 18 (2007), 67-106, at 84.

<sup>31</sup> Aharon Shemesh has recently suggested that in Second Temple times, among the Qumran sectarians, prophecy was the accepted method of getting knowledge of the Divine will. See: Aharon Shemesh, *Halakhah in the Making: The Development of Jewish Law from Qumran to the Rabbis* (Berkeley and London: University of California Press, 2009), pp. 55-69. Rabbinic tradition, however, rejected prophecy as a means for deciding legal questions, and it is precisely for that reason that the question of how halakhic rulings are reached calls for a detailed clarification.

<sup>32</sup> See: J. David Bleich, *Contemporary Halakhic Problems*, Volume I (New York and Hoboken: Ktav and Yeshiva University, 1977), xv.

<sup>33</sup> Bleich, *ibid.*, xvii. Michael Broyde too refers to “serious analysis of the sources, their underlining principles and the need for consistency with Talmudic doctrines” as the main characteristics of faithful halakhic treatment. See: Michael Broyde, “Honesty and Analysis: A Reasoned Response to Passionate Letters”, *The Edah Journal* 5 (2005): 89.

there should be few, if any, conscious and deliberately predetermined goals. The goals should not precede the *pesak*, but rather should become evident after the fact”.

A similar view is expressed by Haym Soloveitchik, one of the most prominent scholars of *Halakha*: “If law is conceived of”, Soloveitchik writes, “as religious law must be, as a revelation of the divine will, then any attempt to align that will with human wants, any attempt to have reality control rather than to be itself controlled by the divine norm, is an act of blasphemy and is inconceivable to a God-fearing man”.<sup>34</sup> Or, as Soloveitchik has written elsewhere: “Nothing could be farther from the mind of any religious person, not to speak of a man of the Middle Ages, than an attempt of set purpose to align a divine norm with temporal needs”.<sup>35</sup> And the same voice can be heard in Michael Broyde’s argument against “result-oriented *halakhah*, where the will for change is enough, as if that alone can create the way”.<sup>36</sup>

The assumption underlying these views is that the *Halakah* is, to use Bleich’s words, a “closed, immutable system of law”,<sup>37</sup> operating according to its own rules and methods of analysis. Indeed, in Bleich’s opinion, “Halakhah is an autonomous discipline with its own sources, its own dialectic and its own values. The values and mores of other disciplines dare not be permitted to intrude”.<sup>38</sup> Rabbi Joseph B. Soloveitchik too, as noted by Walter S. Wurzbarger, “insists that *halakhah* operates with its own unique canons of interpretation”, and that “historic contingencies have no bearing upon the halakhic process. In his view, halakhah represented an a

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<sup>34</sup> See: Haym Soloveitchik, “Religious Law and Change: The Medieval Ashkenazic Example”, *AJS Review* 12 (1987), 205. Note, however, that despite the categorical tone of Soloveitchik’s statement, in the following page he concedes that in the sphere of actual judicial rulings “there has always been a strong interplay between circumstances and legal principles” (ibid., 206). For this reason he emphasizes that his analysis is confined to “theoretical writings of Halakhah” (ibid.), which is precisely the path I wish to avoid.

<sup>35</sup> Haym Soloveitchik, “Can Halakhic Texts Talk History”, *AJS Review* 2 (1978), 174.

<sup>36</sup> Broyde, “Honesty and Analysis” (above, n. 33), 89. Izhak England, writing of the question of the relations between moral considerations and Jewish law, expresses a similar concern. See his “The Interaction of Morality and Jewish Law”, *The Jewish Law Annual* 7 (1988): 124. Compare, however Julius Stone’s critical comments of England stance in his paper, “Leeways of Choice, Natural Law, and Justice in Jewish Legal Ordering”, *ibid.*, 219-230.

<sup>37</sup> J. David Bleich, *Contemporary Halakhic Problems, Volume 4* (New York: Ktav and Yeshiva University, 1995), xiii.

<sup>38</sup> *Ibid.*, xvii.

priori system of ideas and concepts to be applied to empirical realities”.<sup>39</sup> If, then, as Bleich writes, “Halakha is a science in the sense that, in its pristine form, there is no room for subjectivity”,<sup>40</sup> we can easily understand his claim that: “There is a clear need to distinguish between matter of Halakhah and matters of policy”,<sup>41</sup> and that *Halakha* “does not permit policy considerations to adjudicate between competing theories or precedents”.<sup>42</sup>

In order to assert that reality needs to be “controlled by the divine norm” (rather than shape it) of necessity one needs to view the “divine norm” as already existing “out there”, waiting to be discovered and declared. So the relation between that ideological stance and the hermeneutical theory underlying it is transparent. What halakhic authorities, *Poskim*, do, when they give a halakhic decision, is an attempt to uncover a pre-existing truth which lays in the authoritative texts. The halakhic process, thus, can be characterized as a “going to” authoritative halakhic texts, learning and analyzing them, and bringing to light the halakhic message that lays within them. The *Posek* never *shapes* the *Halakha*; he never *makes* it; he only *discovers* it, in order to implement it.

### III. Halakhic Formalism

If looked at from the perspective of legal theory, it is easy to see that the view of the halakhic process hitherto described displays many of the traits of Legal Formalism.<sup>43</sup> To be sure, Formalism has been defined in different ways by different scholars,<sup>44</sup> and lately the very concept

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<sup>39</sup> See: Walter S. Wurzbarger, “Rav Soloveitchik as a *Posek* of Postmodern Orthodoxy”, in: *Engaging Modernity: Rabbinic Leaders and the Challenge of the Twentieth Century*, ed. Moshe Z. Sokol (Northvale NJ and Jerusalem: Jason Aronson, 1997), 119-136, at 122.

<sup>40</sup> Bleich, *Contemporary Halakhic Problems, Volume 4* (above, n. 36), xv.

<sup>41</sup> *Ibid.*, xvii.

<sup>42</sup> *Ibid.*

<sup>43</sup> This has been shown, with respect to Haym Soloveitchik’s approach, by Lorberbaum and Shapira (above, n. 5). It should be noted that Soloveitchik’s view of the halakhic process is rooted in his father’s conceptualization of *Halakha*, as has been analyzed by Lawrence Kaplan, “Rabbi Joseph B. Soloveitchik’s Philosophy of *Halakhah*”, *Jewish Law Annual*, 7 (1988): 139-197. As Kaplan noted, “The most striking and central feature of R. Soloveitchik’s approach to the *Halakhah* is his adoption of a scientific model, specifically the model of mathematics and mathematical physics, rather than a juridical model for understanding the *Halakha*” (*ibid.*, 145-146). Approaching *Halakha* as if it were mathematics or physics is the clearest possible way of thinking of it in formalistic terms.

<sup>44</sup> See, among many others: Duncan Kennedy, *A Critique of Adjudication* (Cambridge Mass.: Harvard University Press, 1997), 105-107; Frederick Schauer, “Formalism”, *Yale Law Journal* 97 (1998): 509-548; Ernest J. Weinrib,

and its “realness” has been entirely challenged by Brian Z. Tamanaha.<sup>45</sup> However, at least as an “ideal type”, to use Weberian terminology, it represents an extremely widespread approach to describe the judicial process, that is, how judges actually make their decisions. As a theoretical model, at any rate, it is very helpful in illuminating the underlying jurisprudential assumptions guiding that widespread view of the halakhic process I have just presented.<sup>46</sup>

In his recently published book, *How Judges Think*, Richard Posner has given us a useful articulation of the major characteristics of Formalism (which, for the sake of avoiding criticism, Posner called “legalism”):

Legalism, considered as a positive theory of judicial behavior (it is more commonly a normative theory), hypothesizes that judicial decisions are determined by “the law”, conceived of as a body of preexisting rules found stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or higher court, or derivable from those materials by logical operations ... The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from the statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the “canons of construction”), so that interpretation too becomes a rule-bound activity, purging judicial discretion. The legalist slogan is “the rule of law” ... Legalism treats law as an autonomous discipline, a “limited domain”. Since the rules are given and have only to be applied, requiring only (besides fact-finding) reading legal materials and performing logical operations, the legalist judge is uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy

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“Legal Formalism: On the Immanent Rationality of Law”, *Yale Law Journal* 97 (1998): 949-1016; Brian Leiter, “Review Essay: Positivism, Formalism, Realism”, *Columbia Law Review* 99 (1999): 1138-1164, at 1144; Martin Stone, “Formalism”, in: *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules Coleman, Scott Shapiro, and Kenneth Hinar Himma (Oxford and New York: Oxford University Press, 2002), 166-204.

<sup>45</sup> See: Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010).

<sup>46</sup> In this respect I find myself in the same position as that of Hanoach Dagan, who needed to present Formalism for the sake of his analysis of Realism and therefore wrote that: “for the purpose of reconstructing the realist conception of law, it is sufficient that the by now canonical account of classical formalism summarized here is the view against which legal realists revolt, even if it is – as some claim – a mere caricature”. See: Dagan, “The Realist Conception of Law” (above, n. 16), 611, n. 26.

judgments, because he is not engaged, or at least he thinks he is not engaged, in making such judgments.<sup>47</sup>

The applicability of this description to the above described view of the halakhic process is self-evident. As in Formalism, that view maintains that halakhic decisions are determined by “the Halakha”, conceived of as a body of preexisting rules found in the authoritative texts of the halakhic tradition, or derivable from these texts by logical inference. As halakhic rules have to be “discovered” (in order to be applied), the main requirement of the *Posek* is to study the halakhic texts in a precise and cautious manner. However, since the desired halakhic rule cannot always be explicitly found in the existing halakhic materials, and it needs to be derived from another existing one, the *Halakha* sets its own “rules of interpretation”, so that halakhic interpretation too is a matter determined by the halakhic tradition itself. Hence, just as “[t]o the formalist law has a content that is not imported from without but elaborated from within”,<sup>48</sup> so too is the *Halakha*. Thus, the “Halakha” becomes a closed, autonomous system, precisely as the law is according to Legal Formalism.

As has been recently noted by Benjamin Brown: “Many of the thinkers and scholars who discussed the nature of the *Halakha* in the past and in the present share the intuition concerning Halakha’s formalism, whether they mentioned it negatively or positively”.<sup>49</sup> Why is this so? Why is a formalistic view of the role of the decisor in the halakhic process so popular? In his

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<sup>47</sup> Richard A. Posner, *How Judges Think* (Cambridge, Mass. and London: Harvard University Press, 2008), 41-42. One can find many other similar assessments of Formalism, primarily in the huge literature of its opponents. See, among many others: Leiter, “Positivism, Formalism, Realism” (above, n. 44), 1144-1147; Brooks, *Structures of Judicial Decision Making*, 31-59; Dagan, “The Realist Conception of Law” (above, n. 16), 611-619; Tamanaha, *Beyond the Formalist-Realist Divide* (above, n. 45) 1-3, and the references cited by these authors.

<sup>48</sup> E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005), 57.

<sup>49</sup> See: Benjamin Brown, “פורמליזם וערכים: שלושה דגמים” (“Formalism and Values: Three Models”), in *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 244. Brown openly admits that he is one of those who hold this view: “Our fundamental point of departure should be that the Halakha is a system with a strong formalistic character ... our basic intuition is that the Halakha is a considerably formalistic system” (ibid.). Ben-Menahem’s characterization of the “notion that Jewish law is formalistic” as “pervasive misconception”, notwithstanding its critical tone, confirms Brown’s assertion that many scholars (and lay people alike), to this very day, see the *Halakha* and the halakhic process in formalistic terms. See: Ben-Menahem, “Is Talmudic Law a Religious Legal System” (above, n. 25), 380.

severe attack on Formalism, E.W. Thomas has offered various explanations for its popularity among judges, lawyers and lay people alike:

The institutional pressure that leads judges to remain committed to the outdated declaratory theory or, if not committed to it, to continue to act as if were a valid theory, is readily evident. It assists to absolve judges from personal responsibility for their decisions. Responsibility can be transferred to that amorphous corpus, ‘the law’, which they are merely interpreting. It also militates against the criticism that the judges are setting themselves above the law. The charge of arbitrariness is avoided when judges purport to propound, or make the pretence of propounding, a pre-existing law. Finally, the theory also deflects the charge that judicial decisions are retrospective and undemocratic ... In addition, the declaratory view, or any less absolute derivative of that view, makes it appear that the outcome of a case is unrelated to the identity of the particular judge. The decision can be presented as a decision that is neither personal to the judge nor an arbitrary exercise of the law-making power. Even if it must be accepted that the judge has made the law, the judge can profess that the pre-existing law moulded or dictated his or her modest law-making accretion. In other words, his or her accretion was inherent in the established law and, therefore, could be ‘declared’ in this looser sense.<sup>50</sup>

The reasons for the popularity of a formalistic view of the *Halakha* are the same. This approach helps maintain the view of the *Posek* as a “holy man”, as it were, who decides matters only in accordance with the Divine will. Such a view is of prime importance in sustaining the “pure” image of the *Halakha* as a whole, for if the *Halakha* is a declaration of God’s will, rather than a product of human activity, than its Divine status is re-affirmed. Put differently, a formalist view enables the *Posek* to confer Divine authority on his decision. It is not “his” decision; it is not what he, the *Posek*, says, but rather it is “the Torah”, or “the *Halakha*”, who speaks (through him). By presenting *Halakha* as a pre-existing ruling, which the *Posek* merely “discovers”, the halakhic decision of the *Posek* is endowed with divine authority, and its status is thus elevated.

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<sup>50</sup> Thomas, *The Judicial Process* (above, n. 3) pp. 25-26. Dagan too writes of Formalism that it “falsely present[s] (often intuitive) value judgments made by judges as inevitable entailments of predetermined rules and concepts”, and that “The formalist fallacy ... serves as a cover-up for ‘considerations of social advantage’ that are ‘the very ground and foundation of judgments’ and must not be left unconscious”. See: Dagan, “The Realist Conception of Law” (above, n. 16), 617 (quoting Oliver W. Holmes, “The Path of the Law”, *Collected Legal Papers* [New York: Harcourt, Brace & Co., 1920], 184).

Furthermore: just as Formalism “treats [legal] concepts not as legal artifacts but as a non-modifiable part of our natural or ethical environment and, thus, misleadingly presents existing legal concepts as explanations and justifications for subsequent legal results”,<sup>51</sup> so too a declaratory theory of the halakhic process is intimately related to an extremely widespread *ontological conception of the commandments*. As Moshe Halbertal pointed out: “According to such a conception, halakhic categories such as pure and impure do not reflect mere legal concepts. They are, rather, causally connected to the very nature of reality ... Something is truly impure if it affects reality in a negative manner and vice versa. Therefore, such a view of the causal impact of halakhic categories makes those categories completely independent from human decision. Just as a physician’s pronouncement that a poison is curative is devoid of sense so the sages’ ruling that something truly impure is pure has no meaning”.<sup>52</sup> There is a deep connection, then, between a declaratory theory of *Halakha* and an ontological conception of the commandments. If one considers halakhic categories as a reflection of actual reality, then the interpreter’s task is only to grasp that reality and understand it, so as to be able to instruct us on how to behave with respect to it. And as such an understanding of the *Halakha* is indeed widely held by halakhic experts and lay people alike – although, to be sure, most of those who espouse it are not entirely reflective about its nature – the popularity of a declaratory theory of the halakhic process is perfectly understood.<sup>53</sup>

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<sup>51</sup> Dagan, “The Realist Conception of Law” (above, n. 16), 617-618 (quoting Felix S. Cohen, “Transcendental Nonsense and the Functional Approach”, *Columbia Law Review* 35 [1935], 811-812; 820).

<sup>52</sup> See: Moshe Halbertal, “The History of *Halakhah*, Views from Within: Three Medieval Approaches to Tradition and Controversy”, <http://www.law.harvard.edu/programs/Gruss/halbert.html>; idem, *People of the Book: Canon, Meaning, and Authority* (Cambridge Mass. and London: Harvard University Press, 1997), 54-72.

<sup>53</sup> According to Daniel R. Schwartz, an ontological conception of the *Halakha* (which Schwartz, following Yochanan Silman, called “realistic”), was characteristic specifically of *sectarian*, non-rabbinic attitudes to the Torah. See: Daniel R. Schwartz, “Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law”, in: *The Dead Sea Scrolls: Forty Years of Research*, eds. Devora Dimant and Uriel Rappaport (Leiden: Brill, 1992), 229-240. However, an ontological conception of the commandments never disappeared from Jewish tradition, and it can be well documented even within Talmudic literature itself, as has been stressed by various scholars. See: Jeffrey L. Rubenstein, “Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment”, *Dead Sea Discoveries* 6 (1999): 157-183; Shai Wozner, “Ontological and Naturalistic Thinking in Talmudic Law”, *Dine Israel* 25 (2008): 41-97 (Hebrew); Vered Noam, “Is the Dead Really Not Defiling? The Character of Impurity in Tannaitic Literature”, *Tarbiz* 78 (2009): 157-188 (Hebrew). Indeed, as noted by Jonathan Haidt and Selin Kesebir, the notion that “moral statements ... refer to plain facts: objective, unchangeable, unquestionable truths”, and that moral law is

Needless to say, not all students of Jewish law embrace these views. Many scholars have long recognized that *Halakha* develops in much more complicated ways, and that historical reality plays a significant role in shaping halakhic decision-making.<sup>54</sup> Indeed, as Jacob Katz noted, “historians have always made such claims”.<sup>55</sup> Noam Zohar went even a step further and claimed that: “The formalistic image of deductive-technical interpretation is an image that is completely outdated, both concerning legal systems in general and with respect to the halakhic system in particular”.<sup>56</sup> As we have seen, however, recent scholarship indicates that this is not the case: Formalism, as a theory of judicial decision-making, and especially as an *intellectual disposition*, comprised of a strong conservative inclination toward obedience, compliance, and conformity, has never died; certainly not among students of *Halakha*.<sup>57</sup> It is my aim, therefore, to explain why it is erroneous, from a hermeneutical point of view, to accept the formalistic image of the halakhic process.

#### IV. Problematization

Of course, according to their own self-perception, halakhic authorities (*Poskim*) do nothing but to “implement” the *Halakha*, and the principles by which they choose and interpret authoritative texts are themselves laid down in these halakhic texts. Judges, too, frequently present their

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“a kind of physical law, as pervasive and inescapable as the law of gravity”, is extremely common in many societies. See: Jonathan Haidt and Selin Kesebir, “In the Forest of Value: Why Moral Intuitions are Different From Other Kinds”, in: *Intuition in Judgment and Decision Making*, eds. Henning Plessner, Cornelia Betsch, and Tilmann Betsch, (New York and London: Lawrence Erlbaum Associates, 2008), 215.

<sup>54</sup> See, for example: Ephraim E. Urbach, “The Rabbinical Laws of Idolatry in the Second and Third Centuries in the Light of Archaeological and Historical Facts”, *Israel Exploration Journal* 9 (1959): 149-165, 229-245; idem, *The Tosaphists: Their History, Writings and Methods* (Jerusalem: Bialik Institute, 5<sup>th</sup> enlarged edition, 1986), 1.91-92; 1.177; 1.351. It is not surprising, however, that Urbach was criticized for that stance by some of the reviewers of his book, who apparently did not like his “non-halakhic” approach. See: Yaacov Sussmann, “The Scholarly Oeuvre of Professor Ephraim Elimelech Urbach”, in: *Ephraim Elimelech Urbach: A Bio-Bibliography* (Supplement to Jewish Studies, 1 [1993]), 44-47 (Hebrew).

<sup>55</sup> See: Katz, *Halakha and Kabbalah* (above, n. 13), 345.

<sup>56</sup> See: Noam Zohar, “פיתוח תאוריה הלכתית כבסיס חיוני לפילוסופיה של ההלכה” (“Developing a Halakhic Theory as a Necessary Basis for a Philosophy of the Halakha”), in: *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 48

<sup>57</sup> See above, n. 49.

decisions as nothing but the implementation of the law.<sup>58</sup> However, as Lawrence Baum emphasized, “The study of judicial behavior in political science is rooted in skepticism about the theory of judging reflected” in such a presentation of the judicial process.<sup>59</sup> “For several decades”, Baum reminds us, “political scientists have agreed on the proposition that judges do more than apply the law, that their conceptions of good policy influence their choices”.<sup>60</sup> Indeed, very few critical students of judicial behavior today would accept a judge’s own self-presentation of her job, merely because it is a judge who asserts so.<sup>61</sup>

Along similar lines, yet due to a deeper methodological consideration, Jacob Katz has emphatically written that a critical analysis of the *Halakha* requires its interpretation in terms different than its own.<sup>62</sup> An anthropologist, who is willing “to go beyond the words,”<sup>63</sup> would not stop by recording his, or her, informant’s description. Consequently, one needs to consider the possibility of explaining halakhic decision-making on terms other than those claimed by halakhic thinkers themselves.

### 1. Choice in Halakhic Decision-Making

There are good reasons for considering this possibility. For, as noted by Thomas, “*Formalism obscures the reality of the judicial process*. In particular, the inherent uncertainty of the law, the pervasiveness of choice in judicial decision-making, and the full scope of judicial autonomy and the extent judges make law and formulate policy in doing so, are skirted rather than confronted. The choices that must be made in judicial decision-making are seemingly ignored or denied or, if acknowledged, the reason for the choice that is made is never fully explained”.<sup>64</sup> Or, as Thomas

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<sup>58</sup> See: Lawrence Baum, *The Puzzle of Judicial Behavior* (above, n. 3), 57.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Even Eileen Braman, who strongly insists on the importance of judges’ self-perception and sincere conviction that they “judge by the law”, in explaining their judicial decisions, does not deny, after all, the findings of studies of judicial behavior, which indicate, in an undisputable manner, that judges are influenced by their policy and social preferences. See: Braman, *Law, Politics, and Perception* (above, n. 10)

<sup>62</sup> See: Katz, *Halakha and Kabbalah* (above, n. 13), 3.

<sup>63</sup> See: Gilbert Lewis, *Day of Shining Red: An Essay on Understanding Ritual* (Cambridge Studies in Social Anthropology; Cambridge: Cambridge University Press, 1988), 6-8; 24-25.

<sup>64</sup> See: Thomas, *The Judicial Process* (above, n. 3), 73 (emphasis added).

writes elsewhere: “Essentially, a formalistic approach masks the manifold choices facing the judge in the course of reaching a decision. Judicial reasoning is then diverted into a more or less artificial process in which the reality of choice is ignored or denied”.<sup>65</sup>

The “pervasiveness of choice in judicial decision-making” is the result of the fact that “doctrinal multiplicity is endemic to law”.<sup>66</sup> This is true with respect to the *Halakha* as well: Jewish legal tradition comprises of an immense literature, spanning over two thousand years of Jewish learning and legal thinking, and despite important historical attempts at domesticating this immense literature by means of canonization (Maimonides’ *Mishne Torah* and Caro’s *Shulchan Aruch* are perhaps the most known examples), the number of halakhic works is countless, and the growth of halakhic material has never stopped. In fact, as has been suggested by the great sixteenth century halakhist, Rabbi Shlomo Luria, in the introduction to his book, *Yam Shel Shlomo*, canonization may in fact be one of the contributors to that literary expansion.<sup>67</sup> As a result, the *Posek* has numerous possibilities for choosing halakhic materials that would be relevant for his decision-making. Most frequently, the *Posek* chooses – whether consciously or not – which halakhic rule is the most fitting one to the case at hand, based on his understanding of the nature of the problem. Yet, other *Poskim* may think that a different rule is more applicable, without any possibility for us to decide which of the options is more valid.

This is true not only with respect to substantive halakhic rules and halakhic materials, which are numerous and very frequently divergent indeed, but also with respect to rules of interpretation, found within the halakhic system itself. The existence of different (at times contradictory) “rules” of *Pesak* within the halakhic tradition itself renders any attempt to “regulate” the *Posek*’s choice unattainable. Moreover: very often *Poskim* do not actually abide by these regulatory rules of interpretation, and chose which opinion to follow even when their choice stands in contrast to such a rule.

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<sup>65</sup> Thomas, *The Judicial Process*, 55.

<sup>66</sup> See: Dagan, “Realist Conception of Law” (above, n. 16), 615. As Dagan noted, this is the main basis for the Realists’ claim concerning the indeterminacy of law: “The main source of doctrinal indeterminacy is the multiplicity of doctrinal material potentially applicable at each juncture in any given case” (ibid., 613).

<sup>67</sup> See: Shlomo Luria, *Yam Shel Shlomo on Tractate Hullin* (Offenbach: Seligman Ruiz, 1718), First Introduction, 1a.

Take, for example, the rule that in any case in the Talmud, where there is a controversy between two or more halakhic opinions, the *Halakha* follows the last stated opinion (הלכתא כלישנא בתרא). This is a well-established rule, that directs the *Posek* which of the opinions to follow. There exists, however, a dissenting view on precisely that matter, that is, on whether the *Halakha* follows the last stated opinion, or the first stated one. According to several important Ashkenazic authorities in the Middle Ages, the accepted rule is that *Halakha* follows the first, rather than the last, stated opinion!<sup>68</sup> Can one claim, then, that a *Posek* who follows these authorities, and as a result follows the first stated opinion in a given halakhic debate, should be considered as deviating from the *Halakha*?! Obviously not.

To be sure, different *Poskim* embrace different attitudes to the halakhic process, and some of them may espouse formalistic views of halakhic decision-making.<sup>69</sup> Nonetheless, although the *Posek*'s self-perception might indeed be that in a given case he “simply followed the *Halakha*”, the truth of the matter is that he was choosing legal materials from a variety of relevant sources, and he was reading them in a specific manner that ultimately produced his legal opinion. Another *Posek* could have reached a different conclusion, as a result of different choices

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<sup>68</sup> See: Tosafot ad b. Avoda Zara 7a, s.v. בשל, and the many sources cited by Eliezer S. Rosenthal, “The Rendings[!] of TB Tractate *Temura*”, *Tarbiz* 58 (1989): 344-349 (Hebrew).

<sup>69</sup> One may argue that there are many cases in which a *Posek* is asked for a halakhic opinion, and the answer is given by reliance on existing halakhic text[s] in a formalistic manner. One might even wish to claim that such cases are in fact the vast majority of halakhic questions answered by halakhic authorities. This is the opinion, for example, of Benjamin Brown (see above, n. 49, 244-245). Yet, even if such an empirical observation were correct, these “simple” cases usually do not find their way into *responsa* literature, for the halakhic questions addressed in that literature are nearly always “complicated”, and are never answerable by means of a simple quotation of any given “rule of *Halakha*”. It is not a coincidence, therefore, that Brown bases his claim on halakhic works such as the *Shulhan Aruch*, and not on the *responsa* literature, which presents the *Halakha* in its making, not in a theoretical form. Moreover, “simple” halakhic questions (and the “formalistic” answers they are frequently given) do not contribute by any means to the formation and development of the *Halakha*, as they pose no new problem to the halakhic system. It is precisely for this reason that these routine questions are of much less interest for my discussion. Rather, my argument refers primarily to halakhic discussions that are to be found in the *responsa* literature. These discussions cannot be regarded as peripheral to the halakhic tradition (that is, they do not resemble what Dworkin calls “hard cases”, which are indeed very rare), even if one would insist that quantitatively the significance of “simple” and “routine” questions is greater.

he would have made, whether consciously or unconsciously.<sup>70</sup> These choices are the heart of the halakhic process

## 2. Interpretation

*Halakha's* indeterminacy is deepened even more once we take seriously *and internalize* the impact that the study of hermeneutics has had on questions of legal interpretation.<sup>71</sup> A widespread view maintains that, the aim of interpretation is to discover the original intent of the author. Such an understanding characterizes, for example, the modern philological study of ancient texts, and it was indeed one of the prominent views in hermeneutical studies in the past. However, that understanding has been discredited by many scholars with respect to the realm of law, and it has been argued that it is simply naïve, as the process of reading, interpreting, conferring meaning, is much more complex than that understanding allows for.<sup>72</sup>

For, as has been long recognized by students of hermeneutics, the reader never approaches the text free of values, interests, and pre-dispositions. As a result, her reading cannot

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<sup>70</sup> For that reason the frequently heard claim that in reality there are many cases in which a halakhic decision is given in a formalistic manner, as the *Posek* “simply” refers to the appropriate passage in *Shulhan Aruch*, must be rejected. Nothing compels the *Posek* to rely specifically on the *Shulhan Aruch*, except for his own policy to follow that halakhic source. That policy is frequently justified on the basis of a claim that the *Shulhan Aruch* has been recognized as the standard normative canon of *Halakha*. However, that very claim is ideological, as it attempts to domesticate and minimize halakhic discretion of individual halakhic authorities. In reality such attempts never succeeded, as most *Poskim* do not follow the *Shulhan Aruch* in a blind and simplistic manner, but rather treat it as one among many other authoritative sources for their halakhic decisions. See: Daniel Sperber, *The Path of Halacha: Women Reading the Torah: A Case of Pesika Policy*, ed. Yoav Sorek (Jerusalem: Mass, 2007), 106-107.

<sup>71</sup> Much has been written on legal interpretation in general, and in the context of Jewish law in particular, in the last two decades. See, *inter alia*: Halbertal, *Interpretive Revolutions in the Making* (above, n. 6), Chap. 8 (Hebrew); Mark Washofsky, “Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision”, in: *Pursuing the Text: Studies in Honor of Ben Zion Wacholder on the Occasion of his Seventieth Birthday*, eds. John C. Reeves and John Kampen (*Journal for the Study of the Old Testament, Supplement Series*, 184; Sheffield: Sheffield University Press, 1994), 368-373, and the bibliography cited therein; Robert Stecker, *Interpretation and Construction: Art, Speech, and the Law* (Malden Mass. and Oxford: Blackwell, 2003), 153-183; Ólafur Páll Jónsson, “Vagueness, Interpretation, and the Law”, *Legal Theory* 15 (2009): 193-214; Christopher Hutton, *Language, Meaning, and the Law* (Edinburgh: Edinburgh University Press, 2009); Arie-Jan Kwak (ed.), *Holy Writ: Interpretation in Law and Religion* (Farnham and Burlington VT.: Ashgate, 2009); and most recently: Itamar Brenner, *A Hermeneutic Study of the Interpretive Aspect in the Babylonian Talmud*, Ph.D. Dissertation, Bar Ilan University (Ramat Gan, 2010 [Hebrew]). I do not pretend to make any claim for novelty with respect to legal interpretation. However, as I wish to problematize views such as the one discussed above some well-known points need to be re-stated.

<sup>72</sup> See: Arthur Miller and Ronald Howell, “The Myth of Neutrality in Constitutional Adjudication”, *University of Chicago Law Review* 27 (1960): 661-695.

be described in any simple manner as a passive “listening” to the message that “exists down there in the text”, as it were. For what one hears is the product of the inevitable and unconscious merging and fusion of the text, on the one hand, with one’s values, pre-dispositions, and expectations, on the other hand. The meaning of the text is thus *produced*, or comes-into-being, in the very process of its reading and interpretation. In other words: there is no text in any meaningful sense prior to its reading, for reading is the process by which the text receives its meaning. As Bernard Jackson has written: “the reading of ancient texts by legal historians cannot be ‘innocent’. All meaning is constructed: texts do not ‘make sense’; we attribute sense to them. And the sense we attribute is in part a function of the resources we bring to that process”.<sup>73</sup> Drucilla Cornell is therefore entirely correct in claiming that: “The very idea of a rule as a force that pulls us down the track through each new fact situation, determining the outcome of a particular case, is false ... It is interpretation that give us the rule, not the other way around”.<sup>74</sup>

The significance of this crucial insight for understanding legal interpretation cannot be underestimated, as the debate between Hart and Fuller, concerning the proper way of treating a rule prohibiting vehicles in a park, clearly demonstrates.<sup>75</sup> Hart, as it is well known, maintained that such a rule, “No vehicle in the park”, has a “core meaning”, which is expressed by the rule’s terms (that is, “no *automobiles* in the park”). In a case of a car, there would be, therefore, no doubt about the law; a car may not enter the park, because a car falls under the rule’s core meaning. Only marginal meanings (what Hart called “penumbra”) – such as bicycles, or roller skates – are uncertain, and therefore the judge will need to decide such cases by considering the rule’s purposes. Fuller disagreed with this distinction, because in his opinion the consideration of the purposes is always involved in interpreting a legal rule, not only when it comes to marginal meanings. He challenged Hart by asking: Does the rule proscribe the placement of a World War

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<sup>73</sup> See: Bernard S. Jackson, “Models in Legal History: The Case of Biblical Law”, *Journal of Law and Religion* 18 (2002-2003): 1-30, at 1.

<sup>74</sup> See: Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge and Kegan Paul, 1992), 12.

<sup>75</sup> See: H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review* 71 (1958): 606-615; Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart”, *Harvard Law Review* 71 (1958): 661-669. For a recent review of this debate see: Frederick Schauer, “A Critical Guide to Vehicles in the Park”, *NYU Law Review* 83 (2008): 1109-1134.

Is a truck as a war memorial in the park? Does not a truck fall under the core meaning of “vehicle”? Yet, we all understand that the rule does not proscribe the placement of such a “vehicle” in the park!

Why not, really? As “vehicle” is usually defined as “means in or by which someone travels or something is carried or conveyed”, or as “a conveyance moving on wheels, runners, tracks, or the like, as a cart sled, automobile, or tractor”, why not, then, include bicycles, for example, in the core meaning of the rule? Or, as has been recently formulated by Brian Z. Tamanaha: “What in the literal meaning of ‘No vehicles in the park’ says that automobiles are in the obviously prohibited core, while (as Hart contended) application to bicycles and roller skates is ambiguous? A limitless number of possible conveyances come with the definition of ‘vehicle’ – wheelchair, skateboard, child’s wagon – none distinguished by the literal terms of the rule. Hart thought it obvious that an automobile is a paradigm example of a vehicle, which is correct, but no more so than a bicycle – used by many people as their primary means of transportation”.<sup>76</sup>

Tamanaha correctly answers this question when he says that: “Only by knowing what parks are for and by having in mind what this rule aims at achieving would one say that it prohibits automobiles from the park but not baby strollers, which easily fall within the definition of ‘vehicle’ ... Assumptions about underlying purposes restrict, constrain, shape, and rank the possible meanings that occur to interpreters of a rule, even when not consciously considered. It is within the ‘core meaning’ of this rule that automobiles are prohibited but baby strollers and wheelchairs are not because the implicitly understood purpose, not literal meaning alone, makes it so”.<sup>77</sup>

This is the crucial point that needs to be emphasized: our assumptions, whether conscious or unconscious, as to what the rule’s purpose is are not derived from the rule’s own words! Nothing in the rule “No vehicles in the park” tells us what is the rationale behind it, and what its purpose is. It is rather our assumptions about the nature of public parks and how they should function that causes us to understand the rule as aiming at protecting the safety and tranquility of

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<sup>76</sup> Tamanaha, *Beyond the Formalist-Realist Divide* (above, n. 45), 169

<sup>77</sup> *Ibid.*

the people who enter these parks, and as a result to conclude that the rule should not be understood as prohibiting a World War II truck in the park as a war memorial. These assumptions about the nature of parks and the proper ways to run them stem from our values and our cultural world-view, that is, from our communal preferences concerning our public lives, not from the words of the law. We *may* tend to ascribe, consciously or unconsciously, these values to the legislator, and therefore to be confident that our interpretation is not alien to the law.<sup>78</sup> Nonetheless, it is the assumptions that we bring with us to our reading of the text that dictate the precise meaning it will be given, not the text's own words.<sup>79</sup>

The claim, then, is not that the law is entirely indeterminate because there are limitless interpretive possibilities to any given text. Rather, the argument is that a legal text is very often open to different understandings, because words may have different meanings, and, moreover, because legal texts are frequently interpreted not only according to the words but also according to the interpreter's presumptions concerning the purpose of the law, which of themselves are founded on the interpreter's values and world-views. It is these values that ultimately produce differing interpretations and legal judicial decisions.

The following example will illustrate this insight. In a famous baraita, found in the Tannaitic midrash on Leviticus, the *Sifra*, and in both Talmudim, the Babylonian Talmud and the Palestinian Talmud, Rabbi Aqiva rejects the traditional accepted and authoritative interpretation of Lev. 15:33, according to which the words *והדהה בנדתה* are understood to mean that during her menstrual period a woman must actively take measures to be filthy and repulsive in her husband's eyes. That accepted interpretation was held by "The Early Sages" (זקנים הראשונים), a technical term in classical rabbinic texts which indicates the antiquity of the tradition. In contrast to the opinion of these Early Sages Rabbi Aqiva reasoned that, "If so, she will be considered

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<sup>78</sup> This has to do with the manners by which the interpretation of the law is *justified*, especially when it does not appear to fit the intuitive literal meaning of the law's words. However, the problem of justification cannot obscure the possible radical nature of interpretation itself. Cf. Halbertal, *Interpretive Revolutions in the Making* (above, n. 6), 168-203.

<sup>79</sup> As was correctly emphasized, time and again, by Stanley Fish, "There Is No Textualist Position", *San Diego Law Review* 42 (2005): 629-650. Fish has made this point already in *Is There a Text in This Class* (Cambridge MA. and London: Harvard University Press, 1980), 279-280. Compare: Dennis Patterson, "Interpretation in Law", *San Diego Law Review* 42 (2005): 688-689.

unfitting by her husband, and he might be inclined to divorce her”. As such a result was considered undesirable by Rabbi Aqiva, he re-interpreted the words of the Torah so as to mean that a woman must adorn herself during her menstrual period.<sup>80</sup>

Now, consider Rabbi Aqiva’s argument. He does not base himself on any Scriptural text. Neither does he claim that the manner by which the Early Sages understood the words of the Torah is simply wrong. Rather, he claims that such an understanding as held by the Early Sages, that is, accepted by the tradition up to his own days, might yield undesirable results. He is then putting forward a new understanding of the Torah, which is based on, and motivated by, his understanding of the institution of marriage and his value judgment concerning divorce. By no means are these considerations presented by the midrash as stemming from the Torah! Rather, they reflect Rabbi Aqiva’s perceptions of that which is good and right, and these perceptions shape, in turn, his halakhic stance.<sup>81</sup>

As Richard Posner has written, judges “start by making the legislative judgment, that is, by asking themselves what *outcome* – not just who wins and who loses, but what rule or standard or principle enunciated in their judicial opinion – would have the best consequences”.<sup>82</sup> What Gadamer has shown is that this consideration shapes the very understanding of the legal text! As Itamar Brenner has recently written of the Talmudic Sages, they “approach the object of interpretation with a clear understanding (and a desire) that their interpretation will bear a sheer

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<sup>80</sup> Cf. Halbertal, *Interpretive Revolutions in the Making* (above, n. 6), 16-17.

<sup>81</sup> Hanina Ben-Menahem claimed that: “Despite th[eir] commitment to the law, one finds that when officiating as judges, or when commenting on court decision, Rabbis would sometimes openly declare that the decision reached was not derived from the law as understood by them but was based on extra-legal considerations. Cases falling under this category are crucial for an analysis of the judicial process and are the core of this study. They reveal without requiring any resort to external evidence, the judges’ own perception of their role”. See: Ben-Menahem, *Judicial Deviation* (above, n. 1), 10. I find this claim extremely important, and I therefore concur with Ben-Menahem’s further claim that: “Judicial expressions which concede that the decision reached is not derived from the law reveal judges’ self-awareness of a role in the judicial process which allows them to depart from precedent ... These judicial expressions *destroy the myth that judicial process falls completely within the domain of legal reasoning*. It is only if one approaches these pronouncements with preconceptions of how judicial decision ought to be reached and expounded that one is likely to distort their significance by reading into them fictitious legal argumentation contrary to the judges’ own explicit statement” (ibid., 11 [emphasis added]).

<sup>82</sup> Posner, *How Judges Think* (above, n. 47), 84.

practical value in the lives of observant Jews, and this practical value shapes, without any doubt, the interpretation from its very beginning”.<sup>83</sup>

The representation of the halakhic process as a journey, in which the *Posek* sets himself to “study” – and then to “accept” and “declare” – the halakhic “truth” that is “hiding”, as it were, in the halakhic texts, distorts the unique nature of halakhic interpretation as a legal enterprise. For, in contrast to the philological approach, which aims at a historical reconstruction of the past, and therefore its main interest is the text – as the text is seen as the window through which one can gaze at that past – legal interpretation, as has been emphasized by Gadamer, is oriented toward the present. What needs to come-out-good is not the text, as such, but rather our lives. For this reason, the legal interpreter does not restrict herself to that reading of the text that would be most compatible with our knowledge of the text in its historical setting. Neither does she restrict herself to that reading which best corresponds to the literal meaning of the words, nor to that reading which would make the text seem most coherent as a whole. Rather the legal interpreter attempts to offer a meaning that will result in a successful realization of the law in the current social state of affairs.<sup>84</sup>

One cannot speak, then, of “the law” as something that exists apart from our choices and understandings, because it is only through our choices and understandings that the law receives its status as “the law”. Only after that process, of choosing the relevant rules and of their interpretation, legal materials becomes “the law” by which we abide. It is only an illusion, therefore, to view the judge, or the *Posek* for that matter, as “searching for the law” in order to declare it. They rather *engender* the law, by conceptualizing the issue at hand, by deciding (most

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<sup>83</sup> Brenner, *Hermeneutic Study* (above, n. 71) 56.

<sup>84</sup> Compare Stanley Fish’s view of interpretation as the explication of the intent of the author. See: Stanley Fish, “Intention is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law”, *Cardozo Law Review* 29 (2008): 1109-1146. In contrast, I think Gadamer’s understanding of legal interpretation better describes the manner by which halakhists treat the *Halakha*. For Gadamer’s concept of legal interpretation as “applied interpretation” see his *Truth and Method*, trans. J. Weinsheimer and D. Marshall (London & New-York Continuum, 2004), 306-310. As has been shown recently by Itamar Brenner, Gadamer’s conception best explains the rabbinic approach to interpretation as seen in midrashic and Talmudic literature. See: Brenner, *Hermeneutic Study* (above, n. 71), 52-57.

frequently unconsciously) which legal materials would be governing the case, and by interpreting these materials in a specific way that gives the law its actual life.

A “formalist” view of halakhic decision-making is wrong, therefore, because it is based on a misapprehension of the concept of legal interpretation. The latter is characterized by its orientation toward the application of the law, not toward a better understanding of the text as such. Interpretation in the legal sphere – and *Halakha* is a legal sphere – is not aimed at uncovering the intent of the author, but rather is aimed at giving the text the best meaning for its implementation in the “here and now”.<sup>85</sup> What needs to come-out-good is not the text and its author (for example, that his text would seem to us coherent and thus we will consider him a coherent person), but rather the lives of the people who would follow that law.

It is erroneous, then, to claim that the *Halakha* is “discovered and implemented”, for it is rather made by the *Posek*.<sup>86</sup> This claim is based on the pervasiveness of choice in halakhic decision-making, which indicates that the *Posek* is never “compelled”, as it were, by the *Halakha*, but rather it is he who shapes it through his selections and decisions which texts to rely upon. There are many halakhic texts, inscribing different halakhic opinions, and there are no fixed “rules of Pesak” in halakhic tradition guiding the *Posek* which of these opinions to follow. Quite to the contrary, there exist different (at times contradictory) interpretive rules in halakhic tradition, without any governing principle telling the *Posek* which of them to apply in any specific case. The very decision, which interpretive rule to apply, is a matter of judicial discretion, and therefore the claim that the *Halakha* itself guides the *Posek* on how to rend a halakhic decision is nothing but a delusion.

The fact that the *Posek* makes choices (unconsciously, to be sure) – in conceptualizing the problem at hand; in selecting the relevant material; in interpreting the texts – raises the question: What controls these choices? What are the governing considerations – conscious and

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<sup>85</sup> This is one of the criticism directed at the interpretive approach espoused by Justice Antonin Scalia. See most recently: Herman Philipse, “Antonin Scalia’s Textualism in Philosophy, Theology and Judicial Interpretation of the Constitution”, in: *Holy Writ* (above, n. 71), 15-45, esp. at 20-21.

<sup>86</sup> And see, in this context, Thomas’s important comment that: “The declaratory theory of law for one collapses once it is accepted that judges make law. Simply stated, judges cannot exercise the choice or choices that make law and at the same time be declaring a pre-existing law”. See: Thomas, *The Judicial Process* (above, n. 3), 25.

unconscious – that operate in that process? My argument is that it is this question, more than any other, that needs to stand at the focus of a critical study of the halakhic process.<sup>87</sup>

### 3. God's Will

To confer authority on their halakhic assertions halakhic thinkers and authorities frequently present halakhic decisions as expressions of the human attempt to fulfill the will of God. However, several early rabbinic texts indicate that the Sages rejected this claim as a basis for the *Halakha*, for, according to these texts, God's will is an indeterminate concept, which cannot be established with certainty. One of these texts is the following story from the Babylonian Talmud:

This question was put by Turnus Rufus to Rabbi Aqiva: If your God loves the poor, why does He not support them? He replied: So that we may be saved through them from the punishment of Gehinnom. He [Turnus Rufus] said to him: On the contrary, it is this which condemns you to Gehinnom! I will illustrate by a parable: Suppose a king of flesh-and-blood was angry with his servant and put him in prison, and ordered that he should be given no food or drink, and a man went and gave him food and drink. If the king heard, would he not be angry with him? And you [the Jews] are called "servants", as it is written: "For unto me the children of Israel are servants" (Lev. 25:55)! Said Rabbi Aqiva to him: I will illustrate by another parable: Suppose a king of flesh-and-blood was angry with his son, and put him in prison and ordered that no food or drink should be given to him, and someone went and gave him food and drink. If the king heard of it, would he not send him a present? And we are called "sons", as it is written: "Sons are you to the Lord your God" (Deut. 14:1)! He [Turnus Rufus] said to him: You are called both sons and servants. When you carry out the desires of the Omnipresent you are called "sons", but when you do not carry out the desires of the Omnipresent, you are called "servants", and at the present time you are not carrying out the desires of the Omnipresent. Said Rabbi Aqiva to him: Scripture says: "Is it not to deal your bread to the hungry and bring the poor that are cast out to thy house" (Isa.

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<sup>87</sup> There is another question (of religious character), arising from the above analysis, that is: If the *Posek*, rather than submitting himself to the *Halakha* actually makes it, in what sense can we speak of him as "observing" it? A structurally similar argument is frequently raised against the Realists' claim, that judges make the law. If, as the Realists maintain, judges make the law, what is the source of their authority? Even Dworkin refuses, for that reason, to accept the notion of a judge-made law. In his opinion, this is both non-Democratic and immoral. See: Ronald Dworkin, "The Model of Rules", *University of Chicago Law Review* 35 (1967): 14-46 (= idem, *Taking Rights Seriously* [Cambridge Mass.: Harvard University Press, 1977], 14-45), on which see: Lorberbaum and Shapira (above, n. 4), 154\*, n. 51. As noted by Thomas, "Dworkin's theory ultimately becomes a sophisticated version of the declaratory theory of law". See: Thomas, *The Judicial Process* (above, n. 3), 189.

58:7)? When do you bring the poor who are cast out to your house? Now; and it says: “Is it not to deal thy bread to the hungry?”<sup>88</sup>

This story problematizes the notion of God’s will as the basis of *Halakha*, by pointing at the existence of two opposing possibilities for reconstructing God’s will, between which one cannot decide. Turnus Rufus challenges Rabbi Aqiva by claiming that Israel’s relationship with God are those resembling the relationship of a master and a servant. Consequently, when they give charity to the poor they act against God’s will, for which they will be punished. His claim is backed with a biblical proof-text (Lev. 25:55), in which it is stated explicitly that Israel are God’s servants. Rabbi Aqiva offers a different perspective: basing himself on another biblical verse (Deut. 14:1) he claims that Israel’s relationship with God should be seen as those of a father and his child, and therefore giving charity to a (Jewish) poor is not an act violating God’s will.

This obviously raises the question, which of these two competing perspectives is the correct one? What is God’s true will? Surprisingly, the story does not answer this question. Rather, it rejects it altogether! It claims that as Israel are referred to by Scripture both as “servants” and as “sons”, one cannot know with certainty the true relationship they have with God, and therefore one cannot reconstruct with certainty God’s will, whether or not to support the needy. What is the basis, then, for the halakhic obligation to give charity to the poor? The story’s answer is that there is an explicit biblical verse commanding one to give charity to the poor (Isa. 58:7), and it is the law as prescribed by the biblical text which is to be followed.<sup>89</sup>

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<sup>88</sup> B. Bava Batra, 10a. I followed the Soncino translation with some modifications.

<sup>89</sup> The rabbinic stance expressed by this story might appear, then, to resemble “legal textualism”, that is the believe that “The text is the law, and it is the text that must be observed”, and therefore “We do not inquire what the legislature meant; we ask only what the statute means” (Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* [Princeton: Princeton University Press, 1997], 22-23, on which see in further detail: Brooks, *Structures of Judicial Decision Making* (above, n. 3), 61-84, and most recently: Jonathan R. Siegal, “The Inexorable Radicalization of Textualism”, *University of Pennsylvania Law Review* 158 [2010]: 117-178). However, the manners by which early rabbinic discourse interprets earlier authoritative texts indicate that one cannot claim in any simple manner that the rabbis’ approach resemble “legal textualism”. For, rabbinic interpretations are so removed from the plain meaning of the interpreted texts that viewing the rabbis as “Scalian Textualists” (or any other type of Textualists) would obviously be ridiculous. In fact, the rabbis themselves seem to be aware of the problematic nature of their interpretations, in that they frequently ignore the context of the interpreted words. See: Christine E. Hayes’s excellent analysis of the sugya in b.Sanhedrin 90b-91a in her article, “Displaced Self-Perceptions: The Deployment of *Minim* and Romans in B. *Sanhedrin* 90b-91a”, in: *Religious and Ethnic Communities in Later Roman Palestine*

In the famous Talmudic story, known to students of the Talmud as the story of “the Oven of Achnai”,<sup>90</sup> the rejection of the notion of God’s will as the *telos* of observing *Halakha* is expressed in an even stronger manner. In that story, let us recall, the Sages refused to accept Rabbi Eliezer’s halakhic stance, even though Rabbi Eliezer raised every possible legal argument to prove that his stance is the correct one and that the stance held by the Sages was wrong (אותרו (היום השיב רבי אליעזר כל תשובות שבעולם). In his despair he turns to miracles with the hope to convince his opponents that his view is the correct one, but they still refuse to accept it. Although the story is frequently read as a rejection of the validity and legal value of miracles and supra-natural proofs in halakhic discourse, there is another point in that story, which is rarely acknowledged, but is of great importance to my theoretical claim: As he was unsuccessful in changing the Rabbis’ opinion through miracles, at last Rabbi Eliezer says: “If *Halakha* is in accordance to my opinion, let Heaven prove it”, whereupon a heavenly voice was heard in the academy saying: “For what reason do you continue to argue with Rabbi Eliezer, since the *Halakha* follows his opinion in any matter!” Surprisingly, however, Rabbi Yehoshua, who serves as a metonym for the Sages as a group, stands on his legs and declares: “It is not in heaven” (לא (בשמים היא). That is, Rabbi Yehoshua – who represents in the story the opinion of the majority, which, in turn, is the opinion of the author, which became the “official” opinion, so to speak, of “Rabbinic Judaism” as a whole – denies any role to God in the halakhic deliberation. What is so striking, in my opinion, is that we have here a clear case where the will of God on how to decide the halakhic question under discussion *is* known, yet the Sages refuse to consider it as a criterion for their halakhic decision making.<sup>91</sup>

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(*Studies and Texts in Jewish History and Culture*, V), ed. Haym Lapin (Bethesda: University Press of Maryland, 1998), 249-289.

<sup>90</sup> b.Bava Metzia 59b, on which much has been written. See the references cited by Izhak England, “Majority Decision vs. Individual Truth: The Interpretations of the ‘Oven of Achnai’ Aggadah”, *Tradition* 15 (1975): 143-146.

<sup>91</sup> The emphasis of my reading is thus slightly different from that of Halbertal, who views the story as claiming that “God’s intent is irrelevant for *deciding* the *Halakha* between the disputing sages... as the Torah itself prescribes a different method for decision making”. See: Halbertal, *Halakhic Revolutions in the Making* (above, n. 6), 200 (emphasis added). In Halbertal’s view, this and similar rabbinic texts indicate that “the intent of the legislature does not constitute the criterion for the truthfulness, or untruthfulness, of an interpretation”. On my reading God’s will is irrelevant not only for deciding whether or not any given interpretation of an authoritative text is correct, but far beyond: it is irrelevant as a guide for the very shaping of the *Halakhah*.

The rabbis of the Talmud knew very well what they were claiming. Think about it for a moment: Can we really speak of the will of God, as something that exists-out-there of its own, ready to be “heard”, if only we had the capability of hearing? After all, even if God’s voice could be heard, still our understanding of that voice would be *mediated* by our perceptions, values, pre-dispositions, that is our entire mental and cognitive machinery. So, there is never “God’s will” as something that stands out there, intact, ready to be discovered by us. There is always, and only, God’s will as we understand it; as we perceive it!<sup>92</sup> And since different people approach God’s words with different pre-dispositions, with different values and world-views, it is of necessity that God’s will will be understood in different manners. As the great sixteenth century Ashkenazic halakhist Rabbi Shlomo Luria wrote:

ושלא לתמוה על מחלוקותם בריחוק הדעות, שזה מטמ'א] וזה מטהר זה אוסר וזה מחמיר (! – צ"ל מתיר), זה פוסל וזה מכשיר, זה פוטר וזה מחייב, זה מרחק וזה מקרב אם דעתם לש"ש [לשם שמים]. והראשונים אפי' [לן] בב"ק [בבת קול] לא היו משגיחים וכולם דברי אלהים חיים כאלו קבל כל א' [חד] מפי הגבורה מפי משה אף שלא יצא הדבר מפי משה מעולם להיותו שני הפכים בנושא אחד ... והמקובלים כת' [בן] טעם לדבר לפי שכל הנשמות היו בהר סיני וקבלו דרך מ"ט צינורות ז"פ [שבע פעמים] ז' [שבע] מזוקק שבעתים, והם הקולות אשר שמעו וגם ראו "וכל ישראל ראו את הקולות" – הן הדיעות המתחלקות בצינור כל א' [חד] ראה דרך צינור שלו לפי השגתו וקבל כפי כח נשמתו העליונ' [ה] לרוב עילויה או פחיתות, זה רחוק מזה, עד שא' [חד] יגיע לטהור והב' [השני] יגיע לקצה האחרון וטהר, והג' [השלישי] לאמצעי רחוק מן הקצוות, והכל אמת. והבן זה.

Do not be amazed [puzzled?] by the existence of [halakhic] disagreements, in which we see a distance of opinions, one deeming impure while the other deems pure ... All are the words of the living God, as if each one of them received [directly] from the Mighty, through Moses, even though the issue has never been issued forth from Moses’s mouth, as it is impossible, since they are contradictory opinions on a single matter... And the Kabbalists have written the following explanation for this: Because all the souls were present at [the giving of the Torah at] Mount Sinai, and they all received [the Divine precept] through forty nine channels ... *Each one saw through his own channel, in*

<sup>92</sup> Compare, for this matter, Yoel Finkelman’s formulation of Tamar Ross’s view, according to which “texts themselves do not have absolute or objective meaning. Their meaning and their authority is grounded in the interpretive community, which is the final arbiter of normativity. Interpretation of Torah is not an attempt to comprehend an objective “will of God” which exists outside of the community’s voice. Rather, the will of God is articulated through the community’s discourse”. See: Yoel Finkelman, “Review Essay: A Critique of *Expanding the Palace of Torah: Orthodoxy and Feminism* by Tamar Ross”, *The Edah Journal* 4 (2004): 2-3.

*accordance with his intellectual abilities and the strength of his own soul, whether it was strong or weak, each one distanced from his fellow, so that one arrives at “pure”, while the other reaches the other edge and declares “impure”, and a third one would get to the middle, evenly distanced from both edges, yet all opinions are true! And you should understand this.*<sup>93</sup>

Have not our rabbis of blessed memory recognized precisely that, when they proclaimed: “These and these are all the words of the living God” (אלו ואלו דברי אלהים חיים)?! For, in truth, there are many manifestations of God, all depending on the hearer and the reader.<sup>94</sup>

#### 4. Motivated Reasoning

*Poskim* are virtually always insulted when confronted with the claim that their decisions are based on considerations other than the *Halakha*, and therefore they should openly be guided by recognition of contemporary social needs. They reject this view, claiming, instead, that they decide matters only according to their understanding of the demands of “the sources” (that is, the authoritative texts of Jewish law), not by any desired outcome. As Rabbi Aharon Lichtenstein has written, “[t]he notion that ‘where there is a rabbinic will there is a halakhic way’ both insults *gedolei Torah* [masters of Torah – A.S.] collectively, and, in its insouciant view of the totality of halakha, verges on the blasphemous”.<sup>95</sup> Judges too, as Eileen Braman repeatedly emphasizes, reject similar claims concerning judicial decision making. Wholeheartedly and sincerely they maintain that they make only “legal” considerations, and that their decisions are based on “the law”, not on policy or personal preferences. To decide matter in accordance with one’s personal

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<sup>93</sup> See: *Yam Shel Shelomo* (above, n. 67), *ibid.*. Cf. Avi Sagi, *Elu va-Elu: A Study on the Meaning of Halakhic Discourse* (Tel-Aviv: Ha-Kibbutz Ha-Meuchad, 1996), 96-97 (Hebrew); Shimshon Etinger, “Controversy and Truth – On Truth in the Halakhic Context”, *Shenaton Ha-Mishpat Ha-Ivri*, 21 (1998-2000): 37-69 (Hebrew).

<sup>94</sup> As Tamar Ross notes: “The deepest theological challenge of feminism lies in the fact that it problematizes the view of a sterile transmission of God’s word, clean of all human input, and forces us to develop a more sophisticated understanding of the relationship between the divine word and human interpretation”. See: Tamar Ross, “Guarding the Treasure and Guarding the Tongue (*Shmirat Halashon*)”, *BDD* 19 (2008): 93-123 (“Heretical Understanding of Revelation”). Or, as Finkelman puts it: “The feminist critique requires redefining the notions of divine revelation and *Halakhah* in light of recent feminist theory and post-modern philosophy of law. Orthodoxy must come to understand that all language is inherently bound to a particular time and cultural atmosphere”. See: Finkelman, “Review Essay” (above, n. 93), 2.

<sup>95</sup> Lichtenstein, “The Human and Social Factor in Halakha” (above, n. 29), 13.

values is to trash the integrity of the profession, so they insist.<sup>96</sup> And, like Braman, I see no reason why should we not accept the honesty of this self-perception.

However, numerous empirical studies on judicial behavior show that the decisions judges make are influenced – indeed shaped – by their attitudes and social values and beliefs.<sup>97</sup> How are we to reconcile the findings of these studies with the self-understanding of judges about their profession? As Braman puts it: “If we take seriously the idea that judges feel constrained by norms of judicial behavior, an alternative way of explaining findings of policy-oriented decision-making is that judges believe they are following the law, but somehow their preferences bias their reasoning processes”.<sup>98</sup> Following Jeffrey A. Segal and Harold J. Spaeth she suggests the concept of “motivated reasoning” as a tool for solving the enigma. According to that suggestion, “judges may engage in ‘motivated reasoning’, a biased decision process where decision makers are predisposed to find authority consistent with their attitudes more convincing than cited authority that goes against desired outcomes”.<sup>99</sup> This, to be sure, happens unconsciously, hence the judge’s sincere belief that he rules only according to “the law”.

The same happens in the halakhic process. Because the *Posek* is learned and knowledgeable in Jewish law a halakhic question rarely “falls upon him” in a state of “halakhic ignorance”. Right at the initial stage, therefore, a possible halakhic stance is constructed in his mind. When he then proceeds to “learn” the halakhic sources his learning is already guided by the initial stance intuitively constructed in his mind. That process of learning and reasoning, therefore, is, almost by definition, a process of justification and anchoring. True, it may happen that in the course of that second stage (of much learning) the *Posek* will retract from his initial, intuitive opinion, but such cases are not very frequent, for the simple psychological reason that the *Posek* has an understandable need to confirm for himself his competence, and therefore he

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<sup>96</sup> See: Braman, *Law, Politics, and Perception* (above, n. 10), 19-28.

<sup>97</sup> Braman, *ibid.*, 14-19.

<sup>98</sup> Braman, *ibid.*, 19.

<sup>99</sup> Braman, *ibid.*, 4-5 (referring to Jeffrey A. Segal and Harold J. Spaeth, “Norms, Dragons, and Stare Decisis: A Response”, *American Journal of Political Science* 40 [1996]: 1064-1082; *idem*, *The Supreme Court and the Attitudinal Model Revisited* [Cambridge and New York: Cambridge University Press, 2002]).

will be inclined to give more weight to those sources and considerations that support his initial stance rather than to those challenging it.

A *Posek's* initial halakhic stance is “doubly animated by responsibility to halakha and sensitivity to human concerns ... recognition of this factor is the rule rather than the exception; and responsa include frank acknowledgments of this theme”.<sup>100</sup> Indeed, reading in halakhic *responsa* reveals the pivotal role such considerations play in the halakhic process, without being presented by rabbinic authorities as “external” in any meaningful sense.<sup>101</sup> *Poskim* very frequently raise considerations relating to the welfare of individuals, or communities, but only rarely do they speak of these considerations as if they hold “extra”-halakhic status in the halakhic thinking of the *Posek*. Take, for example, the extremely widespread use of the halakhic concept of “great loss” (הפסד מרובה), or its more popular sibling, “the Torah shows care for Israel’s property” (התורה חסה על ממונם של ישראל). These halakhic concepts are tools of justification, applied in support of halakhic positions motivated by a concern to prevent the loss of a Jew’s property, in cases where that prevention stands in contrast to an existing halakhic norm. To be sure, once these concepts entered the halakhic discourse they became so popular, that one is entirely justified in seeing them as “halakhic”. However, we must not fall into the trap of assuming that they were present in halakhic discourse from its very beginnings, as if they were “given to Moses at Sinai”. The truth of the matter, of course, is that these concepts belonged, at the initial stage of their entrance into halakhic discourse, to the realm of “needs” and “wellbeing” of individuals. Yet, rabbinic authorities found no problem in seeing these needs as integral to halakhic reasoning and as legitimate components of halakhic thinking, and therefore such concepts could be integrated into halakhic thought without difficulty.<sup>102</sup>

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<sup>100</sup> See: Lichtenstein, “The Human and Social Factor in *Halakha*” (above, n. 29), 7.

<sup>101</sup> As Hayes correctly notes: “In the case of rabbinic law, the evaluative criteria are identified by the system’s practitioners as internal to the revealed law and are not understand [sic!] as external or foreign to it”. See: Hayes, “Legal Truth” (above, n. 5), 119\* n. 85.

<sup>102</sup> Many other similar halakhic concepts can be easily cited to demonstrate the prevalence of “extra halakhic” (according to the “formalistic” view of the *Halakah*) considerations in halakhic discourse. See the long list given by Norman Lamm and Aaron Kirschenbaum, “Freedom and Constraint in the Jewish Judicial Process”, *Cardozo Law Review* 1 (1979): 132-133. See also: Kaplan, “Rabbi Joseph B. Soloveitchik’s Philosophy of *Halakhah*” (above, n. 43), 174; Roth, *The Halakhic Process* (above, n. 13), 231-304; Sperber, *The Path of Halacha* (above, n. 70), 67-101.

To sum up: the claim I was hitherto making was that the view of the *Halakha* and the halakhic process discussed above is problematic from almost every respect, and therefore it cannot be used as a basis for a critical study of halakhic decision-making. First, a Formalist view of halakhic decision-making is based on a misapprehension of the concept of legal interpretation. In contrast to that view, interpretation in the legal sphere – and *Halakha* is a legal sphere – is not aimed at uncovering the intent of the author (as is the case with the philologist, or historian), but rather is aimed at giving the text the best meaning for its implementation in the “here and now”.<sup>103</sup> Of course, “the best meaning” is a term requiring serious discussion and elaboration – “best” from what perspective? Most utilitarian? Fits the existing social values and norms? Leads to social change? – but nonetheless legal interpretation is characterized by its orientation toward the application of the law, not toward a better understanding of the text as such. What needs to come-out-good is not the text and its author (for example, that his text would seem to us coherent and thus we will consider him a coherent person), but rather the lives of the people who would follow that law.

It is erroneous, then, to claim that the *Halakha* is “discovered and implemented”, for it is rather *made* by the *Posek*.<sup>104</sup> This claim is based on the pervasiveness of choice in halakhic decision-making, which indicates that the *Posek* is never “compelled”, as it were, by the *Halakha*, but rather it is he who shapes it through his selections and decisions which texts to rely upon. There are many halakhic texts, inscribing different halakhic opinions, and there are no fixed “rules of Pesak” in halakhic tradition guiding the *Posek* which of these opinions to follow. Quite to the contrary, there exist different (at times contradictory) interpretive rules in halakhic tradition, without any governing principle telling the *Posek* which of them to apply in any specific case. The very decision, which interpretive rule to apply, is a matter of judicial

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<sup>103</sup> Cf. n. 85, above.

<sup>104</sup> And see, in this context, Thomas’s important comment that: “The declaratory theory of law for one collapses once it is accepted that judges make law. Simply stated, judges cannot exercise the choice or choices that make law and at the same time be declaring a pre-existing law” (*The Judicial Process* [above, n. 3], 25).

discretion, and therefore the claim that the *Halakha* itself guides the *Posek* on how to rend a halakhic decision is nothing but a delusion.

The fact that the *Posek* makes choices (unconsciously, to be sure) – in conceptualizing the problem at hand; in selecting the relevant material; in interpreting the texts – raises the question: What controls these choices? What are the governing considerations – conscious and unconscious – that operate in that process? My argument is that it is this question, more than any other, that needs to stand at the focus of a critical study of the halakhic process.<sup>105</sup>

## V. Conclusion

Current scholarly study of *Halakha* devotes very little attention to the question, “how are halakhic decisions actually produced?”. In this paper I called for a shift of focus in the study of Jewish law, from the “theoretical” (whether doctrinal or philosophical) to the “practical”, so that the latter question will occupy a central role in the study of *Halakha*.<sup>106</sup> My argument was that the lack of interest in this question stems from a widespread view that sees the halakhic process in formalistic ways, and that its unpacking and problematization is necessary for making the case for a different, Realist approach to the halakhic process.<sup>107</sup>

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<sup>105</sup> There is another question (of religious character), arising from the above analysis, that is: If the *Posek*, rather than submitting himself to the *Halakha* actually makes it, in what sense can we speak of him as “observing” it? A structurally similar argument is frequently raised against the Realists’ claim, that judges make the law. If, as the Realists maintain, judges make the law, what is the source of their authority? Even Dworkin refuses, for that reason, to accept the notion of a judge-made law. In his opinion, this is both non-Democratic and immoral. See: Ronald Dworkin, “The Model of Rules”, *University of Chicago Law Review* 35 (1967): 14-46 (= idem, *Taking Rights Seriously* [Cambridge Mass.: Harvard University Press, 1977], 14-45), on which see: Lorberbaum and Shapira (above, n. 5), 154\*, n. 51. As noted by Thomas, “Dworkin’s theory ultimately becomes a sophisticated version of the declaratory theory of law” (*The Judicial Process* [above, n. 3], 189).

<sup>106</sup> The call of the present paper is programmatic in its nature. In a future study I hope to demonstrate the type of analysis I referred to, through an examination of concrete halakhic treatments of specific halakhic issues. For the time being I refer the reader to the fascinating examples analyzed by Zvi Zohar in his important paper, "עיון בדוגמאות ממשיות של פסיקה טלאולוגית ובמשתמע מהן" (“A Study in Concrete Examples of Teleological Halakhic Decisions and their Implication”) in: *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 387-414.

<sup>107</sup> Without any doubt, “views of judging are largely a product of prevailing views of law, and thus vary depending upon whether positivism or natural law theory holds sway, whether law is viewed as indeterminate or determinate, and whether judicial leeway is considered narrow or broad. [Further], prevailing views of judging depend on prevailing views of the constitutional structure and, specifically, on whether judges are viewed as ‘faithful agents’ or ‘coequal partners’ of [the legislature]”. See: Jonathan T. Molot, “The Rise and Fall of Textualism”, *Columbia Law*

That conventional view looks upon halakhic decision-making as a product of “innocent learning”, conducted by the *Posek* in a deductive (perhaps even syllogistic) manner according to established rules. This view of the halakhic process is oversimplistic: it ignores the question concerning the forces that direct the *Posek*’s mind to specifically those halakhic texts which he considered most relevant to the issue at hand; it fails to account for the many choices (even if unconscious) a *Posek* makes in his journey toward a halakhic decision; and it rests on a problematic understanding of legal interpretation, as an act of passive cognition of meaning, which is not motivated by any concern about the consequences of that process.<sup>108</sup>

Criticism, needless to say, is only the first step. Much more needs to be done, and I do not wish to be understood as pretending to have exhausted all aspects of the process of halakhic decision-making. Thus, for example, a *Posek*’s halakhic inclination, whether toward a formalistic or a realistic approach to the halakhic process, is surely an important component in shaping his halakhic attitude in general, as it may be an important aspect of his halakhic *identity*. As such, it needs to be discussed in detail if we are to give a truthful account of that *Posek*’s halakhic decisions. Similarly, the crucial impact that concrete and *immediate context* has on a *Posek*’s initial approach to the issue at hand, must be acknowledged and incorporated into a critical analysis of his halakhic deliberation.<sup>109</sup>

Neither do I wish to be understood as claiming that the *Posek* has no constraints on his halakhic decision-making, or that he renders halakhic decisions at his free will, without being

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*Review* 106 (2006): 1-70, at 6. It is clear, therefore, that a critical study of halakhic decision-making should relate also to the *Posek*’s conception of the *Halakha*. I am not denying the importance of this question, of course, only calling not to privilege it, as some scholars do.

<sup>108</sup> On the latter point see: Duncan Kennedy, “A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation”, in: idem, *Legal Reasoning: Collected Essays* (Aurora Colorado: Davies Book Publishers, 2008), 153-173.

<sup>109</sup> I am hinting here at the common phenomenon, known very well to halakhic experts, that “divergent answers may be given to an identical halakhic question, depending upon attendant human and social circumstances” (Lichtenstein, “The Human and Social Factor in *Halakha*” [above, n. 29], 8). Thus, for example, a *Posek* might take into account the difficult economical standing of the person asking for his ruling, knowing that had that person been wealthier the ruling might have been different. Evidence for this practice is abundant, and examples for different rulings, depending on the precise audience, can be cited even from the Talmudic literature. See the many sources cited recently by Berachyahu Lifshitz, “‘*Minhag*’ and Its Place on the Scale of the Norms of the Oral Law (*Torah She’Be’al Peh*)”, *Shenaton Ha-Mishpat Ha-Ivri* 24 (2007): 125-133 (Hebrew).

bound by the halakhic tradition. I am well aware of Jacob Katz's caveat that there were many issues in respect to which halakhic authorities turned deaf ears, which is an unmistakable indication that the halakhic process has its own limits.<sup>110</sup> However, in contrast to Haym Soloveitchik, who contends that "An historian has no right to claim extraneous influences unless he or she can show that the conclusion arrived at by the thinker is so atypical that unless something impinged, consciously or unconsciously, upon his thought he could never have arrived at the conclusion that he did",<sup>111</sup> I maintain that a critical study of the halakhic process should concentrate on the constraints and motivations that yield the halakhic decision.<sup>112</sup>

This should ultimately result in a different approach to the study of halakhic texts. As Robert W. Gordon has written:

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<sup>110</sup> See: n. 14, above.

<sup>111</sup> See: Soloveitchik, "Halakhah, Hermeneutics, and Martyrdom" (above, n. 15), 77. To be sure, even Soloveitchik admits that halakhic decisions are shaped by various types of considerations (see his "Religious Law and Change: The Medieval Ashkenazic Example", *AJS Review* 12 [1987]: 206), but in his opinion, these considerations, if not stated openly by the *Posek*, should not be considered when studying *Halakha*: "This is not to say that in such instances the individual was not influenced by an extraneous force, only that the historian has no basis for claiming that he or she was" (ibid.). Not only do I see such an approach as entirely a-historical, but far beyond: it rests on a false view of the ways halakhic authorities actually approach halakhic problems, a point that has been emphatically emphasized by Rabbi Aharon Lichtenstein: "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 shimshu*. 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 ... recognition of this factor is the rule rather than the exception; and responsa include frank acknowledgments of this theme" (Lichtenstein, "The Human and Social Factor in *Halakha*" [above, n. 29], 7). Indeed, there are many Talmudic and post-Talmudic rabbinic texts indicating that halakhic authorities make their decisions knowing very well that at times their halakhic decisions may even *contradict* the "law"! See: Ben-Menahem, *Judicial Deviation* (above, n. 1); Steven D. Fraade, "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization" *AJS Review* 31 (2007): 8-9 (especially n. 22 therein); Adiel Schremer, "Ha-parshanut Ha-oqeret Ve-Ha-aqira Ha-meforeshet", in *Renewing Jewish Commitment: The Work and Thought of David Hartman*, eds. A. Sagi and Z. Zohar (Tel-Aviv: Ha-Kibbutz Ha-Meuchad, 2001), pp. 747-769 (Hebrew).

<sup>112</sup> For an excellent example of such an analysis (although not in the realm of *Halakha*) see: Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", *Journal of Legal Education* 36 (1986): 518-562. Lamm and Kirschenbaum's, "Freedom and Constraint in the Jewish Judicial Process" (above, n. 102), although very similar in its title, goes in a different direction and is disappointing. After a lengthy *philosophical* discussion, they refer to "Three major constraints [that] limit the freedom of a judge: the body of substantive law (which they consider as "the greatest constraint on the judge"), the rules of civil and criminal procedure, and the rulings and decisions of his predecessors ("precedent") and superiors" (ibid., 121 ff.). Kennedy's treatment of the subject is much richer, and much more sophisticated, as it refers to many other kinds of constraints (such as personal ideological inclinations; fear of review; and other considerations as well), which are beyond Lamm and Kirschenbaum's horizon.

Formalist legal history focuses exclusively on the development of legal doctrine, while Realist legal history considers doctrine as one component of a general, if not always well-coordinated, policymaking enterprise. Further, formalist legal history considers phenomena outside the legal craft as distorting judicial decision-making or as simply irrelevant to the important story to be told; the Formalist hero is the judge or treatise-writer who best clarifies doctrinal categories. Realist history, on the other hand, takes as its main subject the relations of function or dysfunction between law and major trends of social development; the Realist hero is the social engineer who masterfully wields law as an instrument of policy.<sup>113</sup>

In contrast, therefore, to a history of *Halakha* which concentrates on halakhic ideas and concepts, and on the manners by which they are constructed by genius halakhic experts through an intellectual analysis of halakhic texts, a history of *Halakha* which will be written under the direction of Critical Halakhic Studies will be asking: what was the social problem which the *Posek* was facing, and which he attempted to solve? What were the social – economic, political, power-relational, and other – interests involved, and which may have shaped his approach to the problem? And only at last (but not least), will it ask: how did the *Posek* justify his halakhic decision? What were the sources he chose to quote, and which sources he decided to disregard?<sup>114</sup> Approaching halakhic discourse from the perspective of such questions can make the study of *Halakha* a truly reach intellectual enterprise.

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<sup>113</sup> Robert W. Gordon, “Critical Legal Histories” (above, n. 20), 67.

<sup>114</sup> Here lies the difference between my project and the manner by which Ariel Picard describes the study of *Halakha*. According to Picard, “The mission of the student of *Halakha* is to understand the methods of interpretation the *Posek* uses in order to bridge [the gap] and to fuse the original text and the changing reality” (idem, *The Philosophy of Rabbi Ovadya* [above, n. 6], 75), while the set of questions I propose is much wider. For the sake of fairness it should be said that in reality Picard’s discussions do not concentrate exclusively on Ovadia’s “methods of interpretation”; rather, he frequently engages questions such as those I outlined above.