

**Judaic
SOURCES OF
HUMAN RIGHTS**



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*Judaic Sources of
Human Rights*

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held in Jerusalem in November 1987

Edited by Dr. Etta Bick

The Israel-Diaspora Institute is a unique partnership of Israeli and Diaspora Jews involved in developing action-oriented policies for a modern, democratic, pluralistic Jewish state.

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November 23-25, 1987

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Prologue

Halachic sources have been praised as the Jewish collective's sole solid mold of a normative framework. Two forces worked against this perception: first, the revolutionary Zionist attempt to be "emancipated" from anything linked with Galut; after all, the concept of Halachic sources as a normative framework is clearly a product of "the Galut"; second, the substantive change in the ideational underpinning of the national Jewish collective; that is to say, the result of modernity and secularization. Another weighty element could be added to these two forces that shattered this perception – the lack of flexibility and the diminution of creativity among the ardent adherents to halacha within the religious community. The two forces, and the additional element, did not, and could not have debilitated the historical fact that halachic sources have indeed been an impressive and solid normative framework created throughout a socio-historical process.

In Israel, both thinkers and practitioners who reinforced the stereotypic perspectives that prevail among the different factions within the cleavaged Jewish brotherhood not only depreciated the value of halachic sources (generally as a result of ignorance), but also denied the Jewish society in the making (which Israel is) a highly valuable foundation that could have contributed to its polity. The debate among the cleavaged factions is not over what it is, but over what it should have been; it is over the extent of relevance of these sources to the Jewish modern democratic entity which basically transformed theology into ideology, which moved the sources of authority from the transcendental to the individual. The latter, particularly if he/she is a Jew within the context of the Israeli democratic society in formation, was left without sources of meaning and purpose for his/her autonomous decisions as an individual; the question with which the non-religious Israeli individual does not grapple is whether the halachic sources could and should provide meaning for the non-Orthodox believer as well as for the non-religious Jew. However,

groping with the latter question requires knowledge and recognition of these sources.

Three years ago, the Israel-Diaspora Institute (IDI) initiated, rather naively, a colloquium to discuss the problematic issue of "Who is a Jew?" This colloquium comprised an intimate group and was the first time that rabbis and scholars representing the four Jewish denominations met in Israel around one table. While nothing of significance pertaining to the theme emerged from that meeting, the very act of meeting together around one table engendered the common need to convene. Less than a year later, at a meeting of the IDI's International Governing Council, the issue of a Bill of Rights for the State of Israel was debated. Following the frustrating, albeit serious debate, it was felt that this is a non-implementable, although highly desirable goal.

After that debate, I had a private conversation with one of the discussants, the Honorable Supreme Court Judge (retired) Haim Cohn, asking him whether something could be done with regard to the Bill of Rights; something directed towards removing the major obstacle erected, as he put it, by the religious minority in Israel. Judge Cohn said that as a matter of fact, perhaps something could be done. And from our discussion the idea of re-convening what was later called the IDI Rabbis Forum emerged. This time we re-convened for a very different type of meeting, one in which the dialogue among the representatives of the different denominations would be founded on scholarship and the sources, and the theme would be as relevant as possible to a Bill of Rights.

We are proud to present to the interested reader an edited version of the deliberations that were the outcome of that conversation with Judge Cohn. The IDI is committed to continue the process of constructive dialogue among the different streams of Judaism for the purpose of underscoring the relevance of the sources to modern, democratic societies, and as a means of building bridges over rifts and schisms.

Arye Carmon
President

Session One

The Halachic System

Chairman, Dr. Arye Carmon:

I am honored to welcome you on behalf of the Israel-Diaspora Institute of Tel Aviv University. We are happy to host this conference and hope that it will be productive. Two years ago, several of those here this evening and others who will join us tomorrow met in a dialogue between representatives of different trends in Judaism, in a period when dialogue was not the usual. This dialogue, although not the first to be held among world Jewry, was the first to be held here in Israel. In our naivete, we chose the controversial topic of "who is a Jew?" as the subject of our discussions. The foremost achievement of the conference was that it took place at all. We decided to continue the process of dialogue, but to avoid highly charged topics. We considered selecting a topic or topics which could be studied together based on sources and texts. This was the origin of the idea for this conference.

For the past two years, our institute has been studying the strains between tradition and modernity, between Judaism and democracy, subjects related to our topic today. We would like to expand the involvement of the institute to include considerations of policy and ultimately to arrive at concrete policy recommendations. A year and a half ago, several of us at the institute met in a closed session to discuss the subject of a "bill of rights." In the course of the discussion, we recognized that the religious public is the main stumbling block in Israeli society to the adoption of a bill of rights, or so it seems. Supporters and opponents stigmatize each other and stereotype each other. We therefore considered turning to the halacha itself to seek within it concepts that would relate to this question. For this purpose, we decided to reconvene the participants from our earlier conference plus several others. For almost a year, a think-tank composed of the Honorable

Judges Haim Cohn and Menachem Elon, Professor Ariel Rosen-Zvi of Tel Aviv University and Dr. Hanina Ben-Menachem of Hebrew University and a staff of research assistants have been preparing papers on this subject.

On behalf of the institute, I would like to wish all of us a useful and enlightening dialogue which will be a part of a continuing process.

Chairman, Professor Aaron Kirshenbaum:

This is an important conference. Its topic, participants and goals are important. Our focus this evening will be on two aspects of human rights in the halacha: considerations which go into halachic rulings and remedies, and flexibility within the halacha. It is my pleasure to introduce our first speaker, the eminent scholar of Jewish jurisprudence, Justice Menachem Elon.

Justice Menachem Elon:

The subject before us is very complex. Its difficulty derives not from a lack of sources in the halacha, but rather from the question of how far can we go with it within the world of the halacha. I would like to begin with an excerpt from a decision of the Israeli High Court of Justice, written by Judge Lazerson. He writes:

One of the important principles that we have is that a legal system cannot be maintained based solely on the essence of the law. It requires the spirit of the law as well and even at times an extra spirit. This spirit can be found in a legal system in the form of valued norms which are founded on the overriding principles of doing what is just and good, and acting in good faith. Should one worry that the application of this valued norm will threaten the stability of the law, because there is no accurate way to measure precisely what is "good faith"? The answer is that this is the nature of a legal system which includes both law and justice. The stability of the legal system is far greater in the end because of the principle of "good faith," more than the possible damage that could result from its application in a particular case.

It seems to me that this section includes, in a nutshell, many of the problematic issues discussed in our paper. These values are the spirit of the law and, on occasion, its extra spirit, as for example “and you shall do what is just and good.” If this is true of a man-made system, it is even more true in the world of the halacha. In addition to conviction by the laws of man, there is also in the halacha the concept of conviction by Heaven. According to the commentaries, this is an integral part of the sentence. It is a matter of conscience which is understandably not a part of a man-made legal system whose source is neither religious nor halachic.

Concepts such as *darchei shalom* (the ways of peace), *tikun olam* (reforming the world), *pekuach nefesh* (saving an endangered life) and *sheat hadechak* (in an emergency) are the extra spirit, “*heshama yetera*,” of the world of the halacha. They are an integral part of the law.

Unlike modern legal systems where there is a separation of powers, a judiciary, legislature and executive, in the world of the halacha, the judiciary also legislates. There is no separation of powers in early Jewish law nor in later periods. The Sanhedrin is both a judicial and legislative authority. It empowers the sages sitting on the Sanhedrin with a lot of room to maneuver. The major question, in my opinion, is not whether these principles are present in the halacha, but rather where are their limits in the halacha. There are indeed limits. The halacha is not an open field where each person can act as he pleases. There is an inner logic, a structure to the halacha. The midrash (text interpretation), exegesis, enactments, customs, practices, precedent and analogy are the building blocks of the halacha.

Rabbi Yanai says in the Yerushalmi: If the Tora had been given in a fixed form, it would not have standing [it would not be long-lasting]. If everything was clearly stated in the Tora, what purpose would G-d have to speak to Moses on Mount Sinai? Moses said, “Lord, tell me what is the halacha?” G-d replied, “Follow the decision of the majority. If the majority decides to acquit, then he is acquitted. If the majority finds him guilty, then he is convicted.” The Tora can be interpreted in thirty-nine ways to decide if something is pure or impure.

Rav Yosef Albo said: “Matters are learned by interpretation of texts (midrash). This is because it is impossible that G-d’s Tora be

complete in a way that will be suitable for all times.” There are always new factors in human affairs. In law, there are too many factors to be incorporated into one book. Therefore, on Mount Sinai, Moses was given the broad rules which are written or hinted at in the Tora in an abbreviated form. These were interpreted by the sages in each generation according to the changing circumstances. The rules are open to interpretation, giving the sages almost unlimited authority.

An outstanding example of this is in *sheat hadechak*, time of emergency. There is a well known passage in the Tosefta which asks why is the minority opinion given in the Mishna if the halacha is according to the majority? It answers, so that a Beit Din can base its decision on the minority opinion. It is obvious to anyone who reads a section of halachic discourse that the halacha is replete with opinions. There is a pluralism of ideas. Rabbi Shimon says this, Rabbi Yehuda argues that. The first Mishna in Brachot brings four or five opinions. Why was the opinion of Rabbi Yehuda Hanassi mentioned? In the event that it is needed as an authorization. Much has been written on this subject.

The Kli Yakar discusses this question brilliantly. He explains how it could be that a decision will be based on the minority opinion, even though the halacha is according to the majority. Although the minority opinion was not accepted before, there may come a time in later generations when the majority will agree with that opinion and then the halacha will be decided according to it. The entire Tora was given to Moses with the specification that there are thirty- nine sides to an issue. How then does one decide? The decision is according to the majority. Both sides are the continuation of the words of G-d, “*divrei Elokim haim.*” This is the essence of the world of the halacha which has developed over time. Although the decision is according to the majority, all opinions are legitimate for the purpose of discussion and study.

I will quote another short excerpt from the Kli Yakar’s commentary in Deuteronomy on the well known passage, the source of the halacha itself, “If there arise a matter too hard for thee in judgment . . . thou shalt arise and get thee up unto the place which the Lord . . . shall choose . . . and thou shalt observe to do according to all that they inform thee . . . thou shalt not depart from the word which they shall tell thee, to the right nor to the left.” The

Talmud states, "Even if they should say that your left is your right, you must listen to them." The Kli Yakar writes, "The commentaries found this hard to explain. How could it be that one has to listen if the sages say that one's left is his right? To be honest, I do not see any problem because the rabbis already have stated, "lest a man say that because there are those who say impure and others pure, those who forbid and those who permit, I too will decide from now on?" The text reads, "The Tora was given from one seer to another." But how does this answer the question? What response was given to the "seer"? The answer is that in every instance of pure and impure there are several considerations on both sides of the question. If according to the Tora something is pure, it is because the side that indicated pure is greater than that which indicated impure. This is the law regarding what is permissible or forbidden. Therefore there must be a convention of the Sanhedrin to discuss one hundred and fifty sides to the question, and to consider all the possibilities. The reason is that sometimes a temporary, emergency order (*horaat shaah*) may be required to rule "against" the Tora, following the rule of "*Ait laasot laHashem heferu Toratecha*" ("It is time for the Lord to work, they have made void your Law") [Psalms 119, 126]. The sages are able to include in their emergency decision the reasoning of the minority opinion and to rule according to it. This is a very far-reaching approach for it is actually saying that the law is not absolute. Each issue can be argued on both sides of the question. This raises some serious questions. What are the guidelines? Is the halacha really so open to interpretation?

There really are no clear guidelines. According to the Ramban, the Tora was given to the wisdom of the sages. He explains that the sages have the directives and guidelines before them and they apply them in determining the law.

A new concept has developed in the world of the yeshivot which I do not know when it began and it is called "*daat Tora*" or "*daas Tora*" (the opinion of the Tora). I checked in the Talmud. This concept appears only once in a totally different context. It means today that the Tora scholar is the one who resolves all the contradictions of this world and is the one who decides the law. In effect we see, on the one hand, that the halacha guides our lives and, on

the other hand, it is itself guided by the realities of life. This duality has always been the way of the halacha.

I do not think, in all honesty, that we can solve the difficulties in the halacha with the general principles I mentioned earlier, principles such as *darchei shalom*, *sheat hadechak*, *pekuach nefesh*, etc. These concepts are so broad and ambiguous that it is unlikely that any consensus could be reached in the world of the halacha. The halacha is case law, based on precedents. One has to compare the cases and decisions are limited to the case in question.

Let me give an example of a case which came before the Rabbinical Court which involved the application of some of these principles in deciding the law, the case of Nakash. Nakash was indicted for murder in France. He escaped to Israel and was sentenced, in absentia, according to French law. If he is returned to France, he will be tried again, strangely enough. In the final stages of the case, there was a dispute between the civil court and the Rabbinical Court as to whether to extradite Nakash to France. The High Court decided that Nakash must be extradited. The question came before the Rabbinical Court and I am glad it did. Its decision raised a constitutional question, whether the extradition itself was within the jurisdiction of the Rabbinical court. It is clear that the Rabbinical Courts have jurisdiction on the question of divorce. The point that attracted me here, which is relevant to our discussion, is the argument of the Rabbinical Court. It wrote that it accepts the decision of the High Court (This is itself interesting since there are few decisions in which the Rabbinical Courts say this explicitly.) however it would like to delay the extradition for several months in the interest of Rena Nakash, his pregnant wife. She wants him to give her a *get al tenai*, a conditional divorce, which she would receive before he is extradited. The Rabbinical Court wrote that it does not have the right to revoke the extradition. They only wanted to delay its implementation for several months. It presented many Responsa from the Halacha on the subject of *aginut*.

All efforts must be made to save a woman from being or becoming an "aguna" (an abandoned wife who did not get a divorce and therefore can not remarry). In the halacha, the case

of the *aguna* is a very serious matter. One may not punish an *aguna*, even if she is the wife of a murderer.

The opinion of Rabbi Yehuda, which explains why the minority opinion is brought in the Mishna, is particularly relevant to solving the problems of the *aguna*. One of the most serious problems facing the halacha today is that of a woman whose husband refuses to give her a *get* and she can not continue to live with him. In halachic terms, it is called "*mais alai*". There are several opinions in the halacha on this question. The majority say that one may not force the husband to give a divorce to his wife. The contention that she can not live with him anyone is insufficient. A husband must give a divorce willingly or else it is "*posul*", invalid. Rabbi Gershon ruled that both the wife and the husband must agree to the divorce, except for the specific cases listed in the Talmud where the agreement of one is sufficient. The Rambam, who is the minority on this question, states clearly that a woman who refuses to have sexual relations with her husband is considered "rebellious." If she answers, when she is asked why she is rebelling, that she loaths him and therefore can not sleep with him, he must be forced to give her a *get*. She is not a prisoner of war. The Gaonim rule in a similar way, saying that they want to prevent her from appealing to the civil authorities for a remedy, leading her to follow bad ways.

Rabbenu Tam decided otherwise and his opinion has been accepted by the majority. One can not force the husband to give his wife a *get* because it may be invalid. Most of the Rishonim follow Rabbenu Tam. Only a minority of poskim ruled, like the Rambam, among them the rabbis of Yemen. None of the Rabbinical Courts today, therefore, except for Rabbi Kapach, a Yemenite, force a husband to give a divorce to his estranged wife.

In the Tractate Eduyot, the Mishna states that the minority opinion is written for the day that it will be relied upon (to solve a pressing need). There are in Israel today hundreds of women who are in the tragic situation of being *agunot* because their husbands refuse to give them a *get* and the Rabbinical Courts will not force them to comply. In reality, these women often engage in extra-marital relations with other men, a situation which the rabbis would obviously hope to prevent. Being that this is a sovereign Jewish state, the authorities have a powerful mecha-

nism to force the husband to comply. It would be possible to put the husband in jail until he would agree to the *get*, thus eliminating almost all the instances of *agunot*. This could be based on the minority opinion, because the situation is a *sheat hadechak*, emergency situation. The Yemenite rabbis have done this. In fact, there is one case where the husband has been in jail for the last twenty or so years. He is happy there and therefore still refuses to give his wife a *get*. This is, however, a very unusual case.

A second possible remedy to the problem of the *aguna* can be found in the dispute of the poskim over nullifying marriages because of technical irregularities in the marriage procedure itself. Many problems have been solved this way in the past, e.g., the case of a marriage contracted as a joke. Marriage nullifications were done until the twelfth century. The Ribash, in the 14th century, writes that he will agree to the nullification of marriages if he gets the approval of all the rabbis of Spain. Why did he feel he needed their approval for a practice which had proven to be useful in the past and for which there were precedents? A Responsa from the 15th century from Rabbi Moses Halesker presents a possible explanation. He writes that although nullification is permissible according to the halacha, it should not be used because its validity is not accepted by all communities. This could create a situation where the groom is from a city which does not recognize the validity of the ruling and the bride is from a city which does and each would get a different ruling if a nullification were requested. He therefore would not accept nullification rulings until all the rabbis in all the communities agree to accept it.

Today our situation is different, since we have a Jewish state which is the spiritual center of the Jewish people and a great center of Tora. If the Chief Rabbinate were to rule using the nullification option, it would solve the problem of hundreds of desperate women.

These two possibilities to solve the problem of the *aguna* do not cross the bounds of the halacha. The Talmud itself devises several creative remedies for helping the *aguna* which today we would never dare to initiate. For example, it freed a woman from the *aguna* state without two proper witnesses, accepting the

testimony of a woman or a child. The slightest bit of evidence is sufficient to indicate the husband's death to prevent *aguna* status.

Another guideline in the halacha is the distinction between rulings for the individual and a ruling for the general public. There is a difference between a ruling for rabbis and a ruling for the average person. Rav Ovadia Yosef's far-reaching decision on the Ethiopian question is an excellent example of this kind of distinction. Rav Ovadia Yosef accepts the opinion of the Radvaz and the Marikesh and others who lived near the Ethiopians and knew them and therefore ruled that they are Jews. When individual Ethiopians approached Rav Yosef years ago, he followed the decisions of Rav Herzog and Rav Moshe Feinstein who ruled that they are not Jews. They were influenced by the works of modern historians who wrote that they are not Jews. In a recent decision, that has not yet been published, Rav Yosef writes that today when the issue is not individuals but an entire tribe, he must rule leniently and determine that they are Jews and need not go through the conversion process.

One of the difficulties in using concepts like *darchei shalom* or *sheat hadechak* is that they are very vague. The dispute between the Maharshdan, Rabbenu Shmuel DeMedina of Salonika and the Tsemach Tsedek, Rabbi Menachem Crochmal of Mirne in the sixteenth and seventeenth centuries is an illustration. In several communities, where Jews were allowed local autonomy, a question was asked whether the poor should have an equal vote with the rich. Also, should the ignorant have the same vote as the Tora scholars?

The Tsemach Tsedek ruled that all had an equal right to vote. He bases his ruling on the Agada which is often a source for the philosophy of the law. He brings the last Mishna in Manchoth which states that whether one brings a burnt offering of an animal, a fowl, or grain, there is the same fragrant aroma. The important thing is that the person should direct his thoughts toward Heaven. This is evidence of an egalitarian approach toward the rich and the poor. He also brings evidence from the Talmud on the question of permitting the ignorant to give testimony in court. Rabbi Yossi permitted their testimony in order not to arouse their resentment "*mipne eiva*," lest they decide not to recognize the

authority of the court and set up for themselves their own system of justice.

The Maharshdan in Salonika ruled exactly the opposite, using the very same principles. He states that the principle of following the majority opinion is only when the dispute is among equals. But if there are differences between them, some are rich and some are poor, then we do not follow the majority.

Each posek was influenced by his own social philosophy and was able to find within the halacha arguments which supported his opinion. Both used the concepts of "*sholom*" and "*noam*" to support opposite conclusions. This is the hidden danger in the use of these concepts. The posek gives them "his" own interpretation.

I would now like to comment on pluralism in the halacha. Historically we know that once there was one halacha. Later there followed a period of disputes which led to pluralism of behavior as well. During the period of the Sanhedrin in Yavneh, it was ruled that controversy is the word of G-d, but the halacha is according to Beit Hillel. Since then, there have been many controversies within the world of the halacha, which are part of the character of the halacha. Sometimes, however, this pluralism may have quite serious consequences, as I will illustrate. The Chief Rabbinate ruled in 1944, in order to ensure the unity of the people, for the sake of peace, and to prevent two Toras, that today "*chalitza*" (removing the sandal of the brother-in-law, relinquishing his claim to his brother's widow) takes precedence over "*yibum*" (performance of the levirate rite, that the brother of a deceased is obliged to marry the childless widow). If the brother-in-law refuses to do *chalitza*, thus preventing the widow from remarrying, the Rabbinate obliges him to support her until he agrees.

Rav Ovadia Yosef ruled that this decision is binding only on the Ashkenazim. The Sephardim, he reasoned, have always given precedence to *yibum* over *chalitza* and should continue to do so. This is a very serious consequence of pluralism. In effect, it weakens the supreme institution of the halacha in Israel which had determined that there was a national need today for such a ruling.

The concept of *daat Tora* which is used frequently of late is not the opinion of the poskim. It is the views of the Roshei Yeshivot. This phenomenon began about a century ago. It is the opinion of

Tora scholars who are not involved in the problems of the people and are not asked to take responsibility for their opinions. It is similar to the difference between the opinions of professors of law from the university and the opinion of a judge sitting on the bench. The latter has to decide for the individual before him, not in theory. He must be practical and consider the consequences of his decision. The former is detached from the people.

There is a discussion among the rabbis about which carries more weight, a conclusion in a book of rulings (such as the Shulchan Aruch or the Codes of the Ramban) or a Responsa. The majority of the poskim answer that the Responsa carries more weight because it deals with actual problems and not just with theory.

I will conclude with a story about the Netziv, Rav Tzvi Yehuda Berlin, the last Rosh Yeshiva of Velozin, who was asked an interesting question about the terms of the will left by Rav Dov Bamberger of Vitzsburg. Rav Dov asked that his Responsa should not be published after his death, only his commentaries. The Netziv was asked whether his request must be honored. He responded that Rav Dov did not have the right to make such a request because the Responsa are not his private property. He asked, "Is the Tora a person's private belonging?" He then explained that when a posek answers a specific question, he delves far deeper into the matter, deeper than when he studies it in theory, and he benefits from G-d's help in his decision-making. This is a well known concept in the halacha, of "*siatah deshmayya*" which is assured the posek. This is the real *daat tora*.

Rabbi Aaron Kirshenbaum:

It is well known that there are many differences of opinion and disputes in the halacha. However, the comparison of a rabbi to a Supreme Court Justice and a Rosh Yeshiva to a professor in a university is incorrect. The Rabbinate is not analogous to the Supreme Court because it does not have the authority over the entire Jewish people. It has authority only over a limited number of Orthodox Jews. Secondly, how can rabbis issue rulings for "all the Jewish people" when so many Jews have severed their ties to the halacha?

Today in the Diaspora, the halacha is similar to a song. If one likes a tune or a verse, then one sings it. If not, it is skipped. The same holds true in how one relates today to mitzvot. If Shabbat adds fulfillment to a person's life, then he observes it. If kashrut isn't appealing, then he chooses not to observe it. The modern Jew has no inkling as to what Jewish law is all about. This is unlike the Supreme Court, with which most Israelis are familiar.

Secondly, if we advocate pluralism, then we must also allow views which we find hard to accept, e.g., Rav Ovadia Yosef's ruling on *yibum*. Pluralism can not be only for rulings which are consonant with my way of thinking. However, I may select a posek who shares my attitudes and modern outlook and I need not reject the halacha because it is irrelevant to my life.

Justice Elon:

The Rabbinat in Israel does have authority over all the Jews in Israel on matters of personal status. This is the problem. According to Israeli law, a woman can not marry or divorce without the authorization of the Rabbinat. The Rabbinat in Israel has, on the one hand, a great deal of authority, which no other halachic authority has had since the end of the eighteenth century, and on the other hand, it has not developed the tools necessary to solve the problems of the Jews under its jurisdiction.

The Chief Rabbinat is a binding halachic authority for many Jews in Israel. In the Diaspora, too, there are many Jews who recognize its authority.

On the question of pluralism, it is indeed true that it can lead to many kinds of results, some desirable and some undesirable, as Rav Yosef's Tshuva on *yibum* indicates. Pluralism is encouraged in the halacha in the realm of ideas. Unfortunately, in the world of the Yeshivot today, there is opposition to this kind of pluralism.

Rabbi David Gordis:

We can not just leave it at that, that those who seek out the halacha will be answered by the Chief Rabbinat. We are interested in bringing the wider Jewish public closer to the halacha and its values. How, then, can we use those principles of which Justice Elon spoke to bring people closer to the halacha?

Rabbi Walter Wurzberger:

Authority in the halacha is not determined by official status or statute. It is given to he who is recognized as a Gadol Batora, a great Tora scholar. For example, on many issues, Jews in Israel turned to Rav Moshe Feinstein z"l in New York and saw him as their posek.

Several years ago, Professor Eliezer Berkovits wrote a book on *hafkaat kiddushin* (nullification of marriages). None of the Roshai Yeshiva or eminent Tora scholars were willing to accept his proposal. Rabbi Goren, who was then the Ashkenazi Chief Rabbi, also chose not to use it in one of the cases that came before him. None of the poskim today are willing to do *hafkaat kiddushin*. The question before us is how to allow revolutionary changes in the halacha without destroying its structure.

Rabbi Moshe Malka:

Rav Ovadia Yosef's ruling did not dispute the Chief Rabbinate's ruling entirely. He ruled that in cases when both the widow and the brother-in-law agree to *yibum*, then *yibum* takes precedence over *chalitza*. Why shouldn't they be permitted to marry?

Dr. Hanina Ben-Menachem:

I do not understand the inner logic of Justice Elon's call to halachic scholars to use their authority to make the halacha more flexible to solve contemporary problems. This demand should be directed at the Israeli legislator, to end the legal control by the Rabbinate over marriage and divorce. Halacha is not monolithic. If a person has a problem relating to marriage or divorce, he could turn to the halachic authority which shares his views or he could seek a remedy outside the halacha which the legislature would provide. How can we possibly demand that a halachist adopt any one halachic solution?

Rabbi Walter Wurzberger:

The difficulty with your solution is that my daughter, for example, would then be unable to marry most Jewish men.

Prof. Ariel Rosen-Zvi:

In planning this conference, we had two alternatives: either to confront the question of human rights in Jewish sources directly by bringing sources which deal with freedom of speech, freedom of assembly, the right to vote, etc., or to tackle the question indirectly, to seek those methods which allow the halacha to be translated and adapted to modern times. We chose the latter method. In actuality, the question we must answer is whether the situation in Israel today, where the majority of the people do not observe the halacha, can be considered *sheat hadechak* and as such, be eligible for special leniency and flexibility within the halacha. The problem should not be taken as that of the individual, on a case by case basis, but rather as the problem facing the society as a whole.

Prof. Avi Ravitzky:

When we look for what the concepts *darchei shalom*, *pekuach nefesh*, *tikun olam* and *kevod habriyot* have in common, we really are asking what is the relationship between the halacha and the "metahalacha," the principles which stand above and beyond the halacha. The rights of man are derived from these principles, for example, from "*veaseta hayashar vehatov*" ("and you shall do what is just and good") and from the concept of "*lefneem meshurat hadin*," not following the strict letter of the law. Metahalacha is the general principles which exist parallel to the formal legal system of the halacha.

Rabbi Jeffrey Dekro:

The "misgeret halacha," the framework of the halacha, is really being changed by each halachic ruling, expanding or contracting depending on the nature of the ruling. Different groups of people

find themselves excluded from the halacha as a result of the ruling. They are being acted upon rather than making their own choice as to whether they want to be part of the *misgeret* or not. For example, in the United States, a woman whose husband refuses her a divorce can divorce in the civil courts or outside of the Orthodox framework, even give her husband a *get* herself. In Israel, they have no other alternatives.

Prof. Hava Lazarus Yafeh:

I had hoped we would discuss which mechanisms exist within the halacha which enable it to ingest values that come from outside. This ingestion was done in the past, during the period of the Second Temple and during the period when Jews lived under the influence of Islam. We see this in the writings of Rav Saadia Gaon and the Ramban.

I have adopted certain values which originate from the world outside without checking to see if they also exist in the halacha, e.g., concepts such as the rights of the individual, the equal status of women, relations with the non-Jew. I would like to know if these values contradict the halacha or do they have some basis within the halacha? What mechanisms exist within the halacha which permit me to maintain these values without being in conflict with the halacha?

Rabbi Irving Greenberg:

A good example of what Hava is asking is the prohibition against fraternizing with the non-Jew. The Hava Yair, in one of his Responsa, discusses the question of women getting their hair cut by a Gentile hairdresser. He finds a way to permit it – by arguing that the Gentile of today is not the same as in the past, when the prohibition was in effect. He no longer murders; he is not immoral in his sexual mores. However, he continues, “I have also tried to stop this practice of going to the Gentile and whoever refrains, may he be blessed.”

Here lies the root of the problem as I see it. The real issue is the prohibition against fraternizing with the non-Jew. The concepts that Justice Elon called the extra-spirit of the law, like *darchei shalom* or *mipne eiva* are really of fleeting importance.

Can we in our generation be satisfied with concepts like these which are left open to the discretion of the posek? Today, the state of Israel must have relations with Gentile states. Moreover, any enlightened person today has to cultivate good relations with non-Jewish colleagues at work. Relations with the Gentile must be on a mutual, reciprocal basis. This mutuality, in my view, is based on the metahalachic principle of man created in the image of G-d, that each person has a spark of G-d within him and it is our obligation to seek it in all men. This overriding principle cancels out the prohibition against fraternizing with the non-Jew as it appears in the halacha.

Rabbi Dr. Norman Lamm:

The halacha is fundamentally a system of law which does not change its basic principles because of new values that come along. It has developed, however, a built-in system for making corrections which allows new values to be incorporated into the halacha. *Sheat hadechak, mipne eiva, darchei shalom* need not sound so picayune. They serve the tremendous purpose of opening up the halacha, allowing it to survive quite a few centuries. The question is are we using them enough or not? If we are going to scrap the whole thing and say that we have to have a completely new system, then we are not going to have a halacha in the end. You will have a system with a little “flavor” from Jewish tradition. This is fine for those who want it but if you want to talk to the public that observes the halacha, we must find a way that the halacha itself devises.

Prof. Henri Atlan:

I would like to explain what motivated the organizers of this conference. In Israel today, stereotypes have developed because of the peculiar situation in which we find ourselves. Some of our laws derive from Jewish law, which are binding on those who may not accept the halacha. It is often assumed that values such as human rights stand in conflict with the halacha. In the debate over adopting a constitution for the state of Israel, it is feared that the Orthodox will oppose a “bill of rights” because it contradicts the laws of the Tora, or that a constitution is in itself unnecessary

because we have the Tora. Our question was whether these fears are correct. Does the halacha oppose human rights and the adoption of a constitution or are there sources within the halacha which can serve as a basis, direct or indirect, for Orthodox support for it? Our goal is to break down these stereotypes wherever possible.

Rabbi Walter Wurzberger:

The term *metahalacha* can mean two things: It can mean the kind of postulate which we believe underlies the halacha, or we can say that we are subjecting the halacha to certain propositions and these propositions are for us the ultimate authority. Justice Elon put it very succinctly. Within the framework of the halacha, one has to assume that the halacha is an overriding system, a binding authority including its ethical values. There is a difference between an ethical value and an esthetic value or an intellectual value. The ethical value possesses a certain kind of overridingness. The question is whether it is possible within the halachic system, since “*lo bashamayim hee*”, to apply concepts such as *darchei shalom* to contemporary situations. *Darchei shalom* has been interpreted in Jewish tradition in several ways. Some interpreted it purely as self interest, which dictates that we must pragmatically accommodate ourselves to the needs of the non-Jewish world. The Rambam uses *darchei shalom* in a broader sense, implying universal, ethical and religious values. The halacha has evolved on this question.

There never was a break with the halacha. The interpretative process of the halacha in the hands of the poskim utilized legal loopholes to express within the halacha the values of their time, following the verse “unto the judge that shall be in those days.” I cannot see why there has to be a theoretical difficulty. There is a certain built-in conservatism within the world of the posek which has to be respected, because if you break with this conservatism, the whole structure of the halacha may collapse. Once you say that you are going to accommodate the halacha to the fashions or currents of the time, it ceases to be halacha. It has to be a process of interaction between the halacha and the subjective religious,

ethical and moral convictions of the individual. Out of this interaction the metahalacha appropriate for our time will develop.

Prof. Ariel Rosen-Zvi:

We are speaking of a normative system, not of ideas or opinions. We are speaking of the translation of ideas into legal norms, halachic or otherwise. Law means a normative confrontation with a reality which is not normative. If the framework of the law is destroyed, then it can not confront reality.

Professor Yafeh's question is quite relevant. Is the halacha sensitive at all to these questions? What are the fears of the halacha? Does it fear secularization, or perhaps its own internal breakdown?

Let me offer an example of a change that "broke" the previous framework but yet remained within the framework of the halacha. The halacha states that women do not sit at the seder table together with their husbands, however a woman with stature is permitted. In a later period, the Baalei Hatosafot ruled that, in their time, all women have stature. What happened here? The halachic ruling was left intact, however its application in effect contradicted it. It was done by a halachic technicality. Rabbi Gershon made far-reaching changes using the same technique.

The question before us is how do we get halachists today to engage in a confrontation with contemporary issues and to seek solutions within the framework of the halacha, using the variety of technicalities available to them. This must be done without breaking down the normative framework of the halachic system.

Rabbi David Gordis:

I am convinced that we cannot seriously discuss this question without addressing ourselves to the intellectual context, because the very meaning of the term "normative framework" varies depending on the intellectual and ideological context within which we approach the halacha. Preserving the stability of the halachic framework may be important from one point of view, and therefore change is permitted only through technicalities, to modify a detail here and there. However, if one views the entire halachic framework as essentially a process-oriented one, rather

than a normative framework, then it is not an important consideration.

The question really is what is the nature of these five or six metahalachic terms. It is true that, in a sense, they can be considered halachic because they are within the system, but, on the other hand, I think it can be argued quite persuasively that their very breadth may be a reason not to use them. They are vague. They introduce and assimilate principles, values and sensitivities, not originally contained in the halacha, into the system, i.e., they are the bridges between the halacha and the standards and values which need to be introduced into the halacha. But if we see that change is required in the halachic framework, because by its very nature the halacha is a developmental process, then our ultimate objective is not the preservation of the normative framework but the preservation of a morally responsive, vital and persuasive halacha. Unless we clarify the very nature of the halachic process and what these metahalachic principles are, we will not be getting to the essence of the issue.

Rabbi Jeffrey Dekro:

The word loophole implies a technicality and minimizes the significance of the principles being invoked. However, if we talk about them as part of a built-in dynamic, that assumes that there will always be transformation, change and evolution, then they will be valued. In the pluralistic societies in which we live today, there is no need for people to feel that they must get these rights via a technicality or loophole. They can simply go out and construct their own alternative norms.

Rabbi Irving Greenberg:

As long as the prohibition from fraternizing with the non-Jew remains as the foundation, and *darchei shalom* just the loophole, it will poison our value system in how we relate to the non-Jew. The loopholes of *darchei shalom* or *mipne eiva* apply when the non-Jews are stronger than we are. The problem that faces us today is that in Israel we are not in a situation where the Gentiles are stronger. We are the stronger here. As long as the principle prohibiting relations with non-Jews remains intact, it influences

our relationship with the non-Jews who live in our midst. It has led to a situation where rabbis here have expressed opinions which are supremacist and even racist in overtone. In the Diaspora, such statements are not made, perhaps because the Gentiles are stronger than we are. Here in Israel they have been expressed.

Rabbi Harold Schulweis:

It seems to me that we are overestimating the singular power of the halacha to influence a people's mind and character. We are discussing attitudes which are not really in the most stringent, literal sense halachic. They belong much more to the aggadic, to the interpretive part of our tradition. We should perhaps be less hard on the halacha itself and harder on these aggadic aspects of Jewish tradition.

Rabbi Moshe Malka:

I thought that the purpose of this conference was to find within the halacha sources for human rights. Now I hear that we should cancel certain parts of the halacha and add new things to it. This can not be our purpose. In the halacha, there are many sources for human rights, I agree with Justice Elon that the desperate situation of the *agunot* today may influence the poskim to reconsider the whole question of *hafkaat kiddushim*.

Justice Menachem Elon:

When one discusses the principles of decision-making in the halacha, one must be a part of the world of the halacha. Just as if I were to discuss how rulings are made in American law or Israeli law, I would first have to live it from inside. I cannot come with attitudes from outside and expect them to be incorporated into the system. If they do not conflict, fine, but not if they do?

I would like to raise two questions on the subject of relations with the non-Jew. If we follow Western democratic principles, then our prohibition against intermarriage is in direct violation of the freedom to marry whomever I please. Let us confront this issue directly. We have before us a conflict between democratic

values and the halacha. I clearly reject intermarriage because of my Jewish values. The Law of Return is also anti-democratic because it distinguishes between Jews and non-Jews. Yet, I support it.

Darchei shalom is clearly a halachic concept. Each generation interprets it in its own way and this is the halacha. For example, the Hatam Sofer in Hungary wrote that it is permissible for a Jewish doctor to care for a non-Jewish patient because of *darchei shalom*, to prevent hostility. His reason was that the Gentile was stronger than we were. However, when I use the reason of *darchei shalom* today, I interpret it as did the Rambam, that the ways of the Tora are the ways of peace "*deracheha darchei noam.*" This means equal rights for the non-Jew living with us in Israel. Nonetheless, I do distinguish between Jews and non-Jews. Equal rights but not intermarriage. It is true that a ruling which gives rights to the Gentile because of *darchei shalom*, which leaves the prohibition against fraternizing with non-Jews intact, is not so aesthetic. That doesn't bother me. In law, there are many tricks we use to achieve good things.

The halacha to me is binding. I follow the authority of the Shulchan Aruch which is open to various interpretations. However, if there is no normative authority, there can not be a halacha. It allows for evolution or change, but within its framework, using its own mechanisms. You cannot force change from outside.

In the halacha, there is the concept of human rights. There is a pluralism of ideas and the right to express them. Man has rights because he was created in "G-d's image." There is freedom from incarceration. There are the rights of the accused to a trial.

Session Two

Sheat Hadechak

Dr. Ariel Rosen-Zvi:

I would like to open our second session with some comments on this week's *Parshat Hashavua*, *Parshat Vayetze*. It describes the ladder in Jacob's dream, its top reaching to heaven and its legs on the ground. Let me tie this in to our discussion. The specific laws of the halacha can be said to be "in heaven" and the concepts that we have been discussing, particularly our topic this morning of *sheat hadechak*, are on the ground, grounded in the realities of daily life. The Midrash comments on "olim veyordim", (going up and down), going up and looking above them at the heavens, going down and looking at what is below. It is not enough for a posek to look only toward heaven. He must look at what is below, at the realities around him, at the needs of the people, to see if it is a *sheat hadechak*.

Our session this morning will open with two representatives on the concept of *sheat hadechak*, first by Dr. Hanina Ben-Menachem, who coordinated the material you have received and, second, by Mr. Aryeh Edri, who worked on this concept specifically

Dr. Hanina Ben-Menachem:

Each of us attends this conference with different expectations and interests. Let me briefly explain what I think is not the purpose of the conference. It is not to issue a call to the poskim of today, to tell them how to rule on certain issues. Obviously, we are not the first to discover that technicalities such as *sheat hadechak* or *darchei shalom* exist in the halacha. We have not come to teach the Tora scholars about the possibilities of following a minority opinion in an emergency situation. They know all this. They have chosen not to apply these techniques because they have different motivations, a different world-view, different

values and life experience. Therefore, I suggest that we do not devote our discussion to efforts to prove that flexibility within the halacha is possible, because of this or that technicality.

Our purpose should be twofold. First, we should relate to the question of whether it is possible to internalize and incorporate values, western values for the most part, which come from outside the halacha into the conceptual framework of the halacha and how do we do this. This relates to Professor Yafeh's comments yesterday. I see it as being a long, continuous, and gradual process.

Second, it is important that we break down the assumption that someone has a monopoly on the position of Judaism on this issue or that. The vague nature and openness of concepts such as *sheat hadechak* and *darchei shalom* permit them to be used and interpreted in a variety of ways. In Israel, we often hear that this or that is the Jewish point of view on an issue, such as on relations with the non-Jews. Those who disagree with that view need not be silent. This may be a viewpoint in Judaism, but there are other views in Judaism as well. I need not accept these alternate views but I am willing to hear them and they are legitimate. We all must realize that there is no one absolute representation of Judaism and be open to hearing other interpretations. This has important social implications as well.

Mr. Aryeh Edri:

I was asked to present in a brief, concise way the sources in the halacha on the subject of *sheat hadechak*, without attempting to draw any conclusions on how the concept could be applied to contemporary problems and issues. I will address myself just to the sources in Talmudic and Rabbinic literature which utilize the concept of *sheat hadechak*. I emphasize that our interest is in the specific concept and not a general consideration of emergency conditions which appear in the halacha in other contexts.

The concept of *sheat hadechak* is mentioned sixteen times in the Talmud, eleven in the Babylonian Talmud and five in the Jerusalem Talmud. If we cancel out duplications, then it is really only nine cases. In these nine cases, the ruling is that the law could be altered because of *sheat hadechak*. The Talmud almost does not discuss what is a *sheat hadechak*, although it is understood in

context. The cases in which it is mentioned are in themselves rather marginal, e.g., whether one is permitted to move a Chanuka candle on the Sabbath, writing a megilla by heart, etc. The question is how the poskim in Rabbinic literature used the concept and what principles were established to determine when the concept should be used.

Sheat hadechak appears in the Rabbinic literature usually in two connections: the first, in situations after the fact, *bediavad*. Is *sheat hadechak* similar to *bediavad*, i.e., if something is permissible after the fact, does a *sheat hadechak* permit it at the outset? The second is when there is a minority opinion which was not accepted by the majority, can it be relied upon in a *sheat hadechak*? For example, there is an instance in the Talmud in the Tractate of Nida where the opinion of Rabbi Eliezer is brought in order to be lenient in a *sheat hadechak*. Without it, they could not have ruled leniently. From another source in the Talmud it appears, that if the halacha has already been decided according to the majority, one could not rule according to the minority opinion even in a *sheat hadechak*. There is a posek who rules that even in a situation when the Talmud does not rule explicitly, the fact that the opinion of the minority is rejected in the course of argumentation is sufficient to disqualify it from being relied upon in a *sheat hadechak*. This approach seems to be in contradiction to the Mishna in Eduyot mentioned yesterday which explained why the minority view is included, so that the court can rely upon it if need be.

Many poskim interpret the disqualification of the minority opinion from being a basis for a halachic ruling as applying only when the minority opinion is rejected directly in the Talmud. However, if it is rejected by the later poskim, then it is permissible, some poskim say even in laws *d'orayta*, to rely on the minority opinion in a *sheat hadechak*. Rav Ovadia Yosef, for example, has stated that in a *sheat hadechak* it is permissible to rule against the opinion of the Shulchan Aruch which ruled according to the majority.

There are several examples in the rabbinic literature of disputes among the poskim on this issue. The Re'em, in answer to a question about permissibility of writing a *get* in the evening in special circumstances, ruled that only if this was one of the excep-

tional cases listed in the Talmud where we follow the minority opinion could it be done. He quotes a source from the Talmud itself, where Rabbi Simeon says that he ruled more leniently in a divorce cases in a *sheat hadechak* only because he had a minority opinion of a Tana to rely upon. The Re'em is taking a rather extreme position here and he was criticized by several poskim. They argued that even in a *d'orayta* case, there is room for leniency in a *sheat hadechak*, all the more so in a restriction which is rabbinical in nature.

Rav Avigdor Cohen is quoted in the Mordechai Hayadua as wanting to permit all restrictions which were rabbinical in nature in the case of an *aguna*, because of *sheat hadechak*. He wanted to do it even when there was no minority opinion to rely on. This is an extreme example of leniency which was not accepted by most poskim. Yet we do have evidence that one posek, the Nodedh Beyehuda, used this precedent to help an *aguna* who was married to an apostate whose plight was seen to be a very serious *sheat hadechak*.

Among the few times that *sheat hadechak* is discussed in the Talmud, it is mentioned as a kind of objective way to fulfill the requirements of the law, in cases of halachic distress rather than cases of individual distress or the distress of the community. For example, in the Tractate of Sukka, there is a discussion of what to do in a case where we can not obtain a lulav that meets halachic requirements. The Talmud states that in a *sheat hadechak* one may use a dried lulav. This is an interesting example of the halacha softening its own requirements.

A more important question for our purposes here is whether a ruling in a *sheat hadechak* alters the halacha forever, or put in another way, is it possible that a rule will apply only in one specific, limited situation and no other. For example, the Shvut Yaacov was asked whether a woman whose husband drowned in "waters that have no end," is an *aguna*. He replied that the rabbis forbid her to remarry. However, after the fact, *bediavad*, she is permitted to remarry, because of *sheat hadechak*, lest she become an *aguna*. The rabbis then ask when such a situation is not a *sheat hadechak*? When is the ruling of the rabbis that she is forbidden to remarry ever applicable? The Shvut Yaakov answered that the rabbis'

ruling applied in the case of an old woman who isn't interested in remarrying.

This brings us to another question which is important for our discussion today. Is the distress of the public considered a *sheat hadechak*? This is discussed quite a bit in the poskim and public distress was considered in many cases a *sheat hadechak*. An excellent example of this consideration was in Rav Kook and Rav Ovadia Yosef's decisions on working the land during the Sabbatical year. They ruled that it is permissible to work the land during the seventh year because it is a *sheat hadechak*. They also found a way of selling the land to a non-Jew for the duration of the year.

I would like to conclude my presentation with an interesting Responsa written by the late Chief Rabbi Herzog. He wanted to prevent women in Israel from becoming *agunot* as a result of war. He suggested preparing divorce papers in advance for all soldiers on combat duty which is forbidden according to the halacha. He based his suggestion on a precedent from the Rambam who permitted preparing *gitten* in advance leaving blank the names of the couple. Moreover, he suggested that the forms be prepared in advance, when it is not a *sheat hadechak*, in preparation for a hypothetical *sheat hadechak* in the future.

Dr. Ariel Rosen-Zvi:

Our next speaker, Rabbi Dr. Louis Jacobs, will present the social implications of the concept *sheat hadechak*.

Rabbi Louis Jacobs:

I must confess at the outset that I had hoped that we would discuss the broader topic of whether there is room within the halachic framework for ideas such as the rights of man, religious toleration, etc. These are western values which come to us from John Stewart Mill or Jean Jacque Rousseau, which most of us accept but which are clearly not in halachic sources. I would like to first comment on the technical side of these concepts and then address the broader question.

The idea of "*shaa*" occurs in several places in the halacha. *Sheat hadechak* is obviously connected with the aggadic concept of "*hadochek ketz hashaa*", pushing when the circumstances do not

allow yielding. It is then unwise to push and so you yield. *Sheat hadechak* is the opposite, when it is an opportune time to do something. I am surprised that three other concepts which, to my mind, clearly tie up with *sheat hadechak* have not been mentioned. First, there is the question of *horaat shaa*. The classical example of it is the story of Elijah on Mt. Carmel. It is forbidden to offer sacrifices outside the Beit Hamikdash but he did it because it was a *horaat shaa*. What is the difference between this and *sheat hadechak*? *Horaat shaa* is a decision to do something that is admittedly illegal, but it is done not because it is permitted but because the time demands it. The concept of *horaat shaa* unlike *sheat hadechak* is severely limited. It is very rare that you find among the poskim the idea of *horaat shaa*.

The other concept is the halachic concept of *et laasot*. It is an established halachic principle. It differs from *sheat hadechak* in that *et laasot* is an illegal act which is tolerated not just in particular circumstances but rather more or less in perpetuity. The classical example of it is the permit to write down the Tora *shebaal pe*. Once it was permitted because of *et laasot*, this permission is ongoing which allows us to continue writing it.

The most germane concept to what we are discussing is not *sheat hadechak*, but *haidna*, a more general concept than *sheat hadechak*, meaning that nowadays the law has changed because circumstances are different. It is mentioned in several places in the Talmud and in the poskim, especially in the Tosefists. The Tosefists and the whole Franco-German school seem to have accepted the idea that the halacha can change under the pressure of external circumstances. *Sheat hadechak* means that the law stands, but in an emergency the law can be bent. *Haidna* means the law has changed because circumstances are different. If we are exploring the flexibility of the halacha, we should stress this idea rather than *sheat hadechak*.

In the discussion last night, everyone seemed to assume that the halacha is an exact science and that halachists are disembodied spirits or objective scientists, not influenced by their surroundings, without individual temperaments. This is not the case at all. Halachists are human beings. There is no halacha without the halachists. Behind every sober, "objective" halachist, there is a warm, emotional, involved agadist. Often he may even introduce

aggadic motives into his halachic discussion. He is sub-consciously motivated by his concept of Judaism as a whole. He has values and that is how two halachists dealing with the same question can come up with totally different solutions.

An example of this is the dispute between Rav Moshe Feinstein and the Satmar Rebbe on the question of artificial insemination. Rav Moshe writes in this Tshuva that the halacha accepts the idea that a woman wants a child. It is natural and good. He does not seem to be bothered at all by the moral question. At the end, he says artificial insemination is not worthwhile, although he is insistent that the halacha permits it.

The Satmar approach the question differently. They say that it is immoral, against the values of Judaism, for a married woman to have a child from a donor. If you approach it in a purely halachic way, it is clear that Rav Moshe Feinstein is right and the Satmar Rebbe is wrong. The Satmar's argumentation is tortuous. On the moral question however, many feel that the Satmar Rebbe is right and Rav Moshe is wrong. The point here is that each decided the way they knew would be accepted by their particular school or community. Even before the Tshuva was written, the Satmar Rebbe knew what the answer would be, what his hassidim would accept. This applies to many ethical and moral questions in the halacha.

On moral, ethical questions, the halachists use the machinery of the halacha to decide according to their world view. For example, the *heter mechira*, the selling of the land to a non-Jew during the Sabbatical year, is permitted by some and forbidden by others. Each use halachic arguments but no one will convince me that the differences on this issue are purely halachic. Rav Kook was motivated by theological considerations and political considerations. He wanted to strengthen the yishuv. As a halachist, he had to use the halachic machinery in order to do it. Similarly, those who opposed the *heter* were motivated by the idea of *shmita* as *kiddush hashem*, and of leaving the land to lie fallow as evidence of the divine blessing and other theological considerations and not by the interests of the developing yishuv.

I am not impressed by the argument that one must not step outside the system, that the halacha is a closed system. It is not closed. Justice Elon mentioned yesterday that we can not accept

western values when they conflict with Jewish values or interests and he gave the example of intermarriage. Most of us would argue with him on intermarriage. The question of intermarriage takes us to the heart of the question. Halachically, the objection to intermarriage is comparatively minor. According to most poskim, it is a rabbinical prohibition. It is a greater offense to eat *hametz* on Pesach or to eat *trefa* than to marry out. But which halachist would try to find a way of permitting intermarriage because of *sheat hadechak*? No one would do it because he realizes that the halacha is not the final word. We have to take into consideration the totality of Judaism and the preservation of Jewish values and ethical values and that is all part of the halachic process. Although from the point of view of pure halacha, it is not necessarily a serious offense, from the point of view of the totality of Judaism, it is a very serious offense.

Although the Hatam Sofer writes in one of his Teshuvot that it is wrong to introduce philosophy or kabbala into halachic deliberations, he himself is not able to refrain from doing so. He could not help it. The halachist is human, working in a Jewish community. He is part of the community. He must know the needs of his people. He knows what his people can buy or will buy and what they won't buy.

I once checked the sources where the Hatam Sofer uses "*asur hadash min hatora*" (new is forbidden according to the Tora). He quoted it for the first time in a Teshuva forbidding alterations in the synagogue. He says one must not introduce anything new in the synagogue, even if the motive is good because one should not innovate. And then he puns and gives the example of new wheat which is forbidden in some communities and not others. In Hungary, for example, they ate new wheat. He writes that anyone in Hungary who chooses not to eat it is wrong because he is going against the tradition of the community. He argues that you must preserve tradition but not be more strict than the tradition because that too is forbidden according to the Tora.

The question which should be asked is why did the Hatam Sofer introduce this idea, followed by a whole school of thought which prohibited innovation in halacha? The answer is clear to anyone who knows the history of the period. Hungary bordered on Germany. He was fighting the influence of reformers from Germany.

He saw himself in the midst of a struggle for the very continued existence of traditional Judaism. Yet, in reality, the Hatam Sofer was one of the most creative halachists in several centuries. He was not consistent, nor could he be.

In my book *Tree of Life* I bring examples of halachists who were influenced by what they saw as the total value of Judaism. They used the machinery of the halacha in order to arrive at solutions that would satisfy the sum total requirements of Judaism. In our discussion of human rights, I assume we are all concerned with the preservation of Judaism. However, what do we mean by Judaism?

In reading the prepared material *onsheat hadechak* and other concepts, I found that my difficulty was not with the conclusions but with the basic premise. I don't accept the premise. It is assumed that the ideas held by rabbis in the past still hold true today rather than suggesting that the rabbis held views that were suitable to their time and that today we are right in accepting the values and views of our time. For example, on the question of attitudes toward the Jewish non-believer, the *apikores*, it is assumed that the idea of killing a person for his false beliefs is right, although not applicable today because of various conditions which are not met. We should not expect the ancients to have had the ideas that we have today, which have developed over a long period of time. However, that does not mean that we must accept the values or premises of their time. The halacha was developed over time. It has a history and this must be taken into account.

Last night we mentioned Rav Ovadia Yosef's Tshuva on the status of the Ethiopian Jews, saying that they are descendants from the tribe of Dan. Who are we kidding? Ultimately the Ethiopians are to be welcomed because it is the right thing to do. If the halacha seems to say otherwise, then great halachists have reinterpreted the halacha so that it would come up with a humane and decent conclusion. This is an example of halachic development.

I think that sufficient note has not been taken of the fact that the Talmud is not a code of law. It is a theoretical work, a work of literature. It is purely academic. The rabbis in the Babylonian Talmud engaged in the study of Tora because it was the word of G-d and it was irrelevant to them whether it led to practical

consequences or not. There are of course some case laws in the Talmud, but that is not its thrust. At Cambridge, there used to be a toast, "to pure mathematics, may it never be of any practical use what so ever." That was the attitude of the Talmud on the whole. The codifiers from the period of the Gaonim created the term and concept "*chazal*", lumping all the rabbis together and with it the idea they they are infallible supermen. We often hear expressed the reservation that if it is done in the Talmud, then it is okay, but how can we do it today. The Talmud has become a sacred text, denying historical development. I do not know how the idea of historical development can be introduced, or for that matter, the idea of human rights, to make them viable. I hope that perhaps some light will be shed on this at this conference.

There has been massive research done on the history of the halacha, work by Isaac Hirsch Wise, Louis Ginsburg, Louis Finkelstein, Saul Lieberman, and others. How can we ignore their work and discuss the development of halacha as if it is just static transmission with a degree of flexibility?

In conclusion, I would like to ride my own particular hobby horse because that is what I accuse the halachists of doing. I think that there is a Jewish fundamentalism today, a fundamentalism of the Talmud. It is the idea that the truth was given for all time to the ancients and there has simply been static transmission. If you see it as the word of G-d, how can you argue with it? There is nothing you can do about it. Then be honest and say that the word of G-d tells me not to accept the idea of human rights because it is contrary to the halacha, because it is a new concept. But if you accept new ideas, than I fail to see why this should not include concepts like human rights and religious tolerance. If you see the halacha in dynamic terms, in terms of history, these questions can be dealt with.

I am an unabashed supernaturalist. I believe in Tora *min hashamayim* but it depends on what you mean by Tora, what you mean by *shamayim* and most of all what you mean by *min*. It may be that we are engaged in an impossible task. There are some pure halachists who would say that this gathering is against the halacha, because we are discussing the nature of halacha and because we are discussing it with people who do not have the traditional view of the halacha, who have a historical approach. Perhaps out of our

deliberations something of value can emerge. As Dr. Max Hartz used to say, “*eem tirszu, ein zu halacha.*”

Prof. Ariel Rosen-Zvi:

I would like to add to what Rabbi Jacobs said about the parameters of the halacha. Rabbi Norman Lamm recently wrote in an article in *Tradition* entitled “Centrist Orthodoxy” that when we approach new discoveries in science, we should not view them as being foreign to us or as a threat. We need not be on the defensive. We should regard them as an expansion of the parameters of Judaism. In other words, Judaism relates to all facets of this world and is in “control” over them. It can incorporate new discoveries into its realm. I find this view of the relationship between Judaism and the outside world very appealing. In this vein, I would like to raise several questions.

I disagree with Rabbi Jacobs that the concept *haidna* is more general and that *sheat hadechak* relates only to a specific case. Although its application is specific, there are standard situations of *sheat hadechak* described in the halacha which are considered by the posek. For example, the state of *aguna* or financial loss are standard considerations. *Sheat hadechak* may not be as sweeping or dramatic as *haidna*, but it also allows flexibility in the halacha.

In general, we must distinguish between the rhetoric of the halacha, which we may find distasteful, and the rulings themselves and their results, of which we may approve. The rhetoric is often part of the technique which the halacha uses in order to reach the desired result. When the Gaonim, for example, ruled that it is permissible to force a husband to give his wife a *get* when she says he is repulsive to her, they give the reason that it is to prevent Jewish women from seeking a remedy from non-Jewish authorities, thus leading to immorality. The women may have wanted the *get* for licentious reasons. The end result of forcing the husband to give the divorce may actually serve the contrary interests of the women and the rabbis.

When the posek applies the concept *sheat hadechak*, he must consider if in certain situations, it is better to be lenient in the interpretation of the halacha for a few in order to insure the greater observance of the halacha by many. In which circum-

stances should the posek refrain from demanding the strict observance of the halacha because of the inability of the public to meet these demands? Specific to our situation today, how does the reality that so many Jews today are secular and their lifestyles more free influence the decisions of the posek? For example, is the current situation in the United States, where divorce rates are high and moral standards more free and where most Jewish women do not accept the authority of the rabbi, a *sheat hadechak*? Does the situation demand that rabbis authorize the inclusion of a conditional clause in the marriage contract which will dissolve a marriage when no *get* is obtainable? The fundamental question is what are the boundaries of a *sheat hadechak*? Can they be expanded and what factors have to be taken into account?

Rabbi Immanuel Jakobowitz:

I think that Dr. Jacobs' opening remarks were exceedingly valid and relevant. *Haidna* is a more relevant principle than *sheat hadechak*. *Sheat hadechak* is a departure from the norm; it's an exception. *Haidna* becomes the rule; it is the norm. However, because Dr. Jacobs said this, all the rest of his comments can be invalidated precisely for this reason. He brought evidence that the posek introduces into his rulings emotional factors and political assessments in order to conclude that there can be no such thing as objective halacha. He is suggesting that because of the exception to the rule, the exception becomes the rule.

It is my contention that the subjective is in itself part of the halachic system. There is a principle "*ein ledayan ela ma sheinav roeot*," that a dayan is expected to rule on the basis of what he sees before him and not on abstract principles. Furthermore, development is part of the halachic system. The rabbis interpreted the verse "*el hashofet asher yehye bayamim hahem*" that the halacha is open to the interpretation of the authorities of each generation, in response to changing circumstances. They clearly predicated that there is history, that you cannot give the same ruling in one generation as was given in a previous generation. This is the norm of the halachic system.

The Talmud in the Tractate Rosh Hashona says, "*Yiftah bedoro keshmuel bedoro*," Yiftah is in his generation as Samuel is in his.

This means that in Yiftah's generation, he is the authority even though he is not as great a scholar as Samuel. David Hoffman, rector of the Rabbinical Seminary in England, once asked, what happens if Yiftah really is ignorant? Nevertheless one has to follow his ruling because, as the Rambam says in *Hilchot Yesodei Hatora*, "*lo bashamayim hee*," the law is not in the heavens. The Rambam says that if a prophet says he knows the halacha because he had a prophecy, he is to be sentenced to death for he is a false prophet. The Tora was given to human beings for them to apply it according to their intellectual capacity, according to the judgment of each dayan. There is no absolute halacha outside of human consideration.

Finally, the Rambam makes an interesting point on the authenticity of the Talmud in his introduction to the Mishna Tora. It is not authentic because the rabbis are the ultimate custodians of the Oral law and therefore everything written in the Talmud is intrinsically immutable. It is immutable because all of the Tora scholars were in agreement on its authenticity. There was a democratic endorsement of it.

Rabbi Walter Wurzberger:

I tried to suggest before that the halacha is not purely objective. The whole distinction between subjectivity and objectivity is a relative one. In science too, there is no objective truth. Science is a methodology. There is no such thing as a pure given, philosophically speaking, because we all come with a whole baggage of cultural categories with which we interpret reality. Whatever we accept in the field of science as "scientifically proven," is scientific only to the extent that we accepted the presupposition of scientific methodology.

By the same token, there is a halachic methodology, which in no way implies that subjective components are unimportant. Rabbi Soloveichik often points out, in spite of the fact that he speaks of the halacha as an a priori system of constructs, that it is the intuitive awareness of the posek which helps him determine and select the kind of "objective" principles to apply in a given situation. This being the case, we ought to lay to rest the canard that "fundamentalist" halachists speak of an objective halacha

which is somehow found in the heavens. The halachic system contains ample latitude to bring to bear the subjective convictions of the individual posek which can not be treated as something external to the halachic process. Halacha has to operate within a methodology which is not determined by its results but rather by its methods. Whether a certain proposition is scientific or not does not depend on what is stated, but rather by the methods of verification used.

The question is if there is a clash between our value system and the value system of the halacha, what to us is the ultimate authority. For example, when there is a conflict between my commitment to the western values of equality and democracy, and my Jewish commitment to oppose intermarriage, I decide according to the halacha, even if it is hard for me to accept. This is my *akeyda*. I bind myself to the objective authority of the halacha and subordinate my personal values which believe in the equality of man. I do not misinterpret the halacha or distort it. I do use my own value system to interpret the halacha but if there is a conflict, I accept "*ol malchut shamayim*," the authority of the halacha. Ultimately, my authority is not autonomy, but heteronomy.

Rabbi Samson Raphael Hirsch writes of outer revelation and inner revelation. The former is the revelation of G-d at Sinai; the latter is a revelation which comes to us in our moral consciousness. The Merri, an earlier authority, explains that there is a halacha which stipulates that if one is present at the moment of a person's death, "as the soul departs," he is required to rip his clothes because a human being is compared to a sefer Tora. A sefer Tora contains halacha and laws. Likewise the human heart, it also discerns for us various obligations which we owe to G-d. These are discerned by the human conscience and become religious obligations. Therefore, if there is no outright conflict between what the halacha stipulates and what my conscience tells me, then I believe that the message of my conscience has religious value as well.

Rabbi Norman Lamm:

Let us step back just for a moment. Some of us seem to be taking a rather critical attitude to the whole effort to find technical

solutions for the confrontation with modernity. It was said that we do not need concepts like *sheat hadechak*, *darchei shalom* or *mipne eiva*, that they are technicalities, mere loopholes.

Let us consider it anthropologically. Here is a community of thinking people, that are engaged in a vast cultural enterprise. They are trying through every possible way to preserve the continuity of a millennial system. They would have a fairly easy task if they were to take the attitude — if our contemporary attitude towards non-Jews does not fit in with the attitudes of the halacha, toss out the halacha and create a new one. Step by step the halacha unravels, one fundamental after the next. There will be many things which are in conflict with the modern temperament. If you do not seek technical solutions, then you are jeopardizing the whole structure. Those so-called “mere loopholes” are really the way of the halacha from the very beginning. By using legal fiction, the law accommodates itself to changing reality, to the flux of life. Legal fiction is very powerful in halacha itself. These so-called technical solutions are a marvelous way of moving the halacha on and creating a dialectic between a fairly fixed system and a constantly changing reality. There is an understanding that there must be movement but at the same time, the halacha is not infinitely malleable.

An example of the difference between theory and practice is the attitude of some poskim towards the Jewish non-believer. The Rambam is probably the most reactionary on this issue. He says that the non-believer is not part of *klal yisrael*. Yet he uses a so-called legal fiction to be able to blunt the sharpness of his ruling. In the third chapter of Mamrim, he speaks about the *bnai haKaraim* who are judged to be *apikorsim* or *mumarim*. Their sons are considered to be *bnai hatoim*, sons of the lost, who are considered to be held against their will. In theory, he is very strict, but in practice, he found a way to be lenient. The Hazon Ish goes even further and says that in early days there were open miracles and therefore a non-believer was an *apikores*. Today when there are no open miracles, there can not be *apikorsim*. Moreover, he says that today we do not know how to admonish the non-believer. Since we can not properly admonish them, the entire category of *mumarim* or *apikorsim* is irrelevant in practical terms. This may be uncomfortable for some. The result is that we have

our freedom and we have our halacha. Any other way, we jeopardize one of these things.

Neither science nor the halacha are closed systems. I am not worried by two halachists coming to different conclusions. It's like two doctors giving two different opinions. They are both dealing with the same science and yet both come to different conclusions. Almost every issue in modern science, including mathematics, has different schools.

Much of the conservative twist in halachic thinking in later years stems from or was articulated by Rav Haim Volozin. In the third shaar of *Nefesh Hahaim*, he describes a successive reduction of the freedom granted to the sages to make changes. *Horaat shaa* is eliminated, other *takanot* too. Today we are in a very tight situation. But even for Rav Haim and for all those after him, there is still an abundance of ways, some general and some more specific to make changes, e.g., *hefsed meruba*, *neshtanu hativim*, *nimatu hadorot*, *ein anu bekeem*, etc.

Dr. Hanina Ben-Menachem:

I would like to comment on the relationship between *horaat shaa* and *sheat hadechak*. The first is a type of category of ruling; the latter is simply a reason. There are different kinds of *horaot shaa*, one of them being because of a *sheat hadechak*.

I considered the concept *et laasot lahashem* when I made up the list of concepts for the conference. I decided not to include it because it is a legislative consideration and not a judgmental factor, taken into account by the posek. I chose to center our discussion on the concept of *sheat hadechak* and not on *haidna* because *haidna* is simply a change in the halacha which is not particularly interesting for our discussion. *Sheat hadechak* is more interesting because it reflects a certain tension between the halacha and digressions from the halacha or exceptions to the rule. It points to the existence within the halacha of two systems of law; one, which is directed to each individual, and the second, which is directed to the dayan. He may distinguish between *bediavad*, (after the fact) and *lekathila*, (a priori) between the halacha and the halacha *lemaaseh* (in actuality), and the halacha, and times when it should not be enforced.

These principles of judgment indicate that the halacha recognizes a dual system of law. For example, *sheat hadechak* does not nullify the law that a woman whose husband drowned in endless waters is forbidden to remarry. That is the norm; however, the *beit din* has the prerogative not to apply it. The explanation offered that the rule applies in the case of an old woman is really unnecessary since there is a duality of norm and judicial application within the halacha. This exists in other systems of law as well. There is a growing awareness among legal scholars that in all systems of law, there is a duality between the law as directed to the individual and the law as applied by the judge in a specific situation. If we adopt this understanding of the halacha, several of the difficulties raised by Rabbi Greenberg will be alleviated, e.g., relations with the non-Jew should not be understood just from the theoretical opinions mentioned in the halacha but from the actual rulings of the *poskim* in specific situations.

Prof. Ariel Rosen-Zvi:

At our law faculty this year, there is a researcher from University of California at Berkeley who is studying “the acoustic problem in criminal law,” i.e., what the law really says and the message it projects to people. For example, the law states that one may not drive faster than 80 kilometers an hour, however, the police radar is set at 100 and all the drivers know it. The law on the books remains at 80 because if it were changed, the drives would race at even higher speeds. The lawmaker really wants drivers to drive at 100 so he keeps the 80 and lets drivers “speed” up to 100. I suggested to him that this concept has existed in Jewish law for two thousand years — “Halacha ve’*ein morim ken*,” exceptions to the rule. I gave him a whole slew of examples. He was astounded and appointed a special research assistant to study the relevant sources in Jewish law.

Rabbi Arthur Green:

I would like to try again to convince my friend Dr. Lamm on the issue of loopholes and legitimation through loopholes and to explain why those of us outside of the Orthodox community continue to be unhappy about them, although realizing their good

intentions. Let me give an analogy to our relations with the Catholic church. Suppose someone in the Vatican discovered in the writings of Cardinal So-and-So that the reason they can now have a dialogue with the Jews is because today they really do not know how to evangelize properly. They therefore might as well accept our legitimacy. Somewhere in the back of our minds we would feel, that if they really had the opportunity and could evangelize, they would.

The dialogue just does not work anymore. It is undercut because the real possibility of our legitimacy is undercut and there just cannot be a dialogue without that. The Hazon Ish technicality that today we do not know how to admonish is very nice but it does not really allow us to engage in a conversation. The ruling that there are no real *apikorsim* today is somewhat better but also does not give us sufficient grounds for dialogue.

I identify very strongly with what Dr. Jacobs said. There is a new kind of neo-Litaim today. *Mishpat ivri* is a strange kind of secularized neo-Litaim. I do not know how it happened since many secular Jews are involved in it. It is an approach which disregards the history of the halacha. Halacha is quoted without regard to which generation wrote it and where. In the paper we were given, there is no mention of place or time of the halachot. It is important to understand the historical circumstances in which they were written.

Whether there is room in the halachic system for subjectivity as Rabbi Jakobowits suggested, or whether it is outside the halachic system, depends on where one stands politically. I think Rabbi Jakobowits wishes, as I wish, that more halachists would operate in that way. My impatience puts me outside. His desire to stand within puts him inside. We seem to agree that often the halacha does not operate in that way.

Although I think that these technical categories are really inadequate, I would like to play the game for a minute and ask for clarifications as to the application of the concept *sheat hadechak*. What does it really mean? What is *dochek*? Is it only external circumstances or can it be internal circumstances too? Is the possibility of a *hilul hashem* considered to be a *sheat hadechak*? For example, does the changed attitude toward women in society today create a need for change in the halacha to prevent *hilul*

hashem? I would also like to know more Aggadic sources to see how the concept became crystallized.

Rabbi Aaron Kirshenbaum:

The basic question is who is to decide when it is a case of *haidna*, that in our time the halacha is not to be enforced. Historical circumstances create the need to rule *haidna*. The Hazon Ish ruled that one can not make new rulings, yet he himself made several. How could he make them? Who is to determine that there is a case of *hilul hashem*? Here we return to the subjectivity of the posek.

I share Rabbi Jakobowits's dissatisfaction with some contemporary rulings. Yet I do not see myself as being able to change them. Within the halacha, there is an element of *yirat horaa*, of humility. I feel inadequate to make changes even though I may feel that *mamzerut* or *aganut* are terrible things. There are poskim who know more than I, who are more pious. I would accept such a posek and disqualify myself. I would not go to a posek who would be swept away by western values, because then I do not need him; I can give the answer myself. I recognize however, that there is a subjectivity in the ruling. Part of my belief in the wisdom of the posek is the belief that his subjectivity is based upon the Tora he has learned. Therefore he will determine when and where there is a serious danger of *hilul hashem*.

In the final analysis, the basic question is one of authority. Whom do I accept as my authority? There is a tension between my being a product of western society and part of a very holy Jewish tradition. I go to my posek with a certain faith that he, although not the product of western civilization as I am, nevertheless has the subjectivity and the sensitivity to know when to say yes and when to say no. My subjectivity is expressed in my choice of posek.

Rabbi Irving Greenberg:

Professor Kirshenbaum said, and here I will paraphrase, that in Judaism there are some lofty beautiful things and there are also some that are repugnant. The posek is the one who recognizes both. The problem today is that the poskim have taken a hard line.

They are not flexible and open to change as many of us here would like. This is the reality we face. They speak of an eternal, timeless halacha which is not open to change.

The crux of the question before us is whether this is in fact true. Is change impossible? Mr. Edri gave us the example of the dispute among halachic authorities as to when one can rely on a minority opinion, in a *sheat hadechak*, to permit the *aguna*. The Re'em said only if there is a precedent in the Talmud. Other poskim disagreed and said the precedent was unnecessary. What factors did each side consider? I assume that those who said that Talmudic precedent was unnecessary were motivated by a wish to help the woman and prevent her suffering. The Re'em was more concerned about preserving the impregnability of the law. I would like to believe that both sides were motivated by *kvod haTora*, preserving the honor of the Tora: the former, so that the Tora would not be accused of being unjust; the latter, to preserve the law which is decreed by G-d and not necessarily merciful. Upholding the law is also *kvod haTora*. However, this kind of *kvod haTora* brings some of us to conclude that there are some basic assumptions in the Tora which are unacceptable to us today and which were unacceptable to others in previous generations. The Rishonim too found some laws unacceptable, even in the Tora itself, e.g., the law of the iniquitous son. They legislated it, in effect, out of existence. Another example is male dominance in divorce. The husband had been sovereign until it was legislated that the woman must agree to the divorce.

The question remains who has the authority? In my opinion, it is he who is concerned about the continuity and consistency of the Tora, one for whom all men have value because they are created in G-d's image. For whom will he be the authority? For those who will follow him, who share those values and concerns. The Jewish people throughout the generations have been a voluntary union. The Tora was accepted by choice. There never has been only one authority. There have always been many Toras and that is what will be today too. This is preferable to having only one Tora which is observed by a small sect of Jews, leaving the rest of the Jews alienated and detached. The Tora will become the monopoly of a few. The real question today is how to preserve the honor of the

Tora because if it is lacking, Jews will not unite voluntarily behind it.

Rabbi Jeffrey Dekro:

The principles you just stated are particularly appropriate for us who are outside the Orthodox community. We feel ourselves deeply bound by the tradition of Tora. We want to honor it and we find ourselves deeply frustrated both in Israel and in the Diaspora. It is hard to find a way to closely identify with the halacha since we are unable to be bound by it as Rabbi Wurzbeger has described.

My objection to the word loophole stems from a feeling that it trivializes the significance that those categories have, particularly for non-Orthodox Jews. We want those categories to be seen as empowering and inclusionary rather than exceptions in the law. People will honor the halacha and want to participate in it wholeheartedly, if these categories are regarded as mechanisms which make room for new perspectives, which are not discontinuous with the basic principles of Judaism.

Rabbi David Gordis:

We are all committed to the idea of the continuity of the halacha or else we would not be here. We all accept the notion of the authority of the halacha in some sense. The question is what is the common denominator among the five or six concepts being discussed here. They have three characteristics in common. First, they are all general in nature, in the way they are applied. Second, they are not exegetically derived. They rather appeal to moral, social, ethical principles which are beyond the exegetical. Third, they can be analyzed only by looking at the way they have been applied empirically in specific cases.

What are the implications of the existence of these modes of halachic process? I fully embrace the notion that they are part of the halachic process, but what does that mean? It is inconsistent to argue, as did Justice Elon last evening, that when there is a conflict between my western value of equality of man and my Jewish objection to intermarriage, I bow to "G-d's will," to "ol malchut shamayim". Rather, it should be seen as a choice that we

make to adhere to principles which, in our view, are higher and greater than principles of democracy, e.g., the preservation of the Jewish people. "*Ol malchut shamayim*" is not an acceptable reason, because what would happen if we would come to the opposite conclusion? What if we would conclude that the situation demands following western democratic values and permitting intermarriage? We are using our own judgment, evaluating conflicting principles and not just passively following G-d's will. It is a trivialization of "*ol malchut shamayim*" to use it in this way.

These concepts are internal to the halacha and they allow legislative change after all exegetical and classical hermeneutic mechanisms have been exhausted. This is necessary when I come to the conclusion that the music is wrong, that the halacha is breaking down because the people are becoming alienated from it. The music is wrong on certain fundamental principles such as the role of women in Jewish life, or relations with the non-Jew or with the *apikores*. If we are going to make the halacha something to enhance the quality of life and not just a burden to us, then we have to be willing to make a variation on the music, responsibly, with a concern for continuity. If, for example, we see *mamzerut* as immoral and wrong, do we just sit back and blame G-d for immorality? We must ourselves correct the music. However, these are only the first resort to allow for change. When they are exhausted, we must move the halacha in a way which will reflect human values, "*lo bashamayim hee*".

There is clearly a fundamental difference of *hashkafa* (outlook) between an Orthodox rabbi and myself. We do not mean the same thing when we speak of the halacha. When I think the music is wrong, I must, of course, act with humility, but I must act. None of us should become a posek for himself. There is a community of interest. We must, on the other hand, have faith that if we make a mistake, there will be greater sages after us who will correct what we did wrong. Humility can not be an excuse for continuing a moral outrage. We must act in moderation, with consultation and study, but act nonetheless, because of "*et laasot hahashem.*"

Rabbi Harold Schulweis:

We should discuss at some point whether the principles of democracy derived from western culture, mean that we must permit mixed marriage. This is a concern of many who come from western tradition.

My congregants are not being represented in this gathering. They are serious Jews. Perhaps they could be called anti-halachic Jews, I am not sure. They ask different kinds of questions from those being raised here. When I came back once from the Rabbinical Assembly and told them that “*yayin nesech*” (wine touched by heathens) was now permissible, they raised a lot of questions. First they wanted to know what it was in the first place. When I told them, they were appalled that there was such a notion at all. It seemed to them to be extremely condescending to the non-Jew. They asked very specific questions on things like why is a *cohen* prohibited from marrying a divorcee, why he can not marry a proselyte and why this should be relevant today? Is the proselyte thought to be promiscuous today as he was in years past? It was especially difficult to answer because the person who asked was a convert herself!

They asked me whether Kahane represents the authentic halachic mentality. Do concepts like freedom of conscience, democracy, individuality, have roots in Judaism or are we just fooling them? I think if they had heard Justice Elon’s presentation, they would say “so Kahane is right after all.” The people aren’t fools. One of the important questions we must deal with is how do we persuade the overwhelming majority of the Jewish people to have respect for the promise of the halacha?

When I was at the Seminary, there was a moderate, centrist group that promised there was nothing in the way of overcoming whatever moral disabilities you may think exist, through the process of halacha. These promises were not kept and the question is why. Was it a systemic problem, intrinsic to the inadequacy of the halacha? Was it a false promise to think that the halacha can do anything about concepts such as *mamzerut*? Or, is it a political question, that the authorities, who really did believe as we did, did not have the “*chutzpa*” to be able to do these things?

There are good Jews out there who are frightened to death because the rabbi has told them that their sons or daughters are mamzerim and they want to know what can be done.

It is important to remember who is out there, the larger community. Those Jews have to feel that the present is important, that Judaism is not just by quotation. They want to know "what would you say rabbi?" They regard me as their authority and they want answers.

Rabbi Irving Greenberg:

I would like to comment on Jewish values and intermarriage. There is a relevant quote from the Lincoln-Douglas debates of the nineteenth century. "That I do not want the black as a slave does not mean that I must have his daughter for my wife." Translated for our discussion, "because I don't want the Gentile distanced from me, does not mean I want his daughter for my wife." Even though I would argue for change in the attitude of the halacha towards the non-Jew, I am not, in any way, advocating intermarriage.

Each side in this discussion has been denying an important part of the way it functions. I would like to make people more conscious of the discrepancy between what they are saying and what they are really doing. The Orthodox here have said repeatedly that they sympathize with the other side's values, yet they cannot make changes because they are bound by the system of halacha. That was the answer given to certain moral dilemmas which were raised. It was said as if the tradition itself does not contain moral arguments, starting from Avraham, as if there is not authority for human beings to make such judgments. What is the halacha doing when it uses a so-called loophole, as for example, in the case of a *mamzer*? The ruling is that if they are assimilated into the Jewish people, it is O.K. A *mamzer* is not supposed to go looking. This is a deliberate decision, that because the law is morally unsatisfactory, I have an obligation to evade it. There has been a kind of denial going on here, a reluctance to confront what has actually been done. Orthodox Jews have to answer why at one time such evasions were done and why today we can't do them.

Rabbi Harold Schulweis:

I asked many Orthodox rabbis if they would officiate in a marriage between a *cohen* and a convert and every one of them said no. What you are saying is great. If I have been talking to the wrong Orthodox rabbis, I wish you would direct me to the right ones.

Rabbi Irving Greenberg:

Every posek and rabbi faces the question of what is tolerable in his community. Today the balance of power is against recognizing the moral difficulties I mentioned. One must, however, offer specific explanations why a moral stand is not being taken. It is not anti-halachic or outside the system.

The non-Orthodox have also not been open about their considerations. Why do they hesitate to say that the music is wrong because of their genuine social experience of humanity which is offended by some of the language or categories in the halacha? This is a major challenge for all of us and so it should be put openly on the table without embarrassment. Orthodox Jews have much less social experience with non-Jews than do non-Orthodox Jews. We must admit that there is on one side a process of assimilation which influences its perspective. We should all consider how much weight should be given to our own instinctive personal reactions and social experiences.

Rabbi Louis Jacobs:

I disagree with Rabbis Jakobowitz and Wurzberger that the halacha has a consideration of historical development built in it, as in the example of Yiftah in his generation and Samuel in his. This quotation is not a halachic principle. It is Aggadic and all it means is that one can not say that if he cannot go to Rabbi Akiva, he will not go to anybody. One must say, he is going to the rabbis who know the ideas of Rabbi Akiva. It says that unless you recognize the authority of contemporary rabbis, the law has no authority.

Similarly, the statement "*ein ledayan ela ma sheeinav roeot*", that a dayan has only what he sees before him, means that when a dayan makes a decision on a case, he can base it only on the facts before him, not on facts which may be revealed in the future. It certainly does not mean that a dayan should see things differently than the dayanim who lived in former times. So I do not apologize for introducing the idea of fundamentalism because I think that the division between us is really on this issue.

What do we mean when we say that we accept certain western values because they are ethical but if they conflict with the halacha, we follow the halacha to which we are bound? The question is why is one bound to the halacha? There are two ways of looking at it. One is to say that I don't see how but somehow, the halacha is stating an ethical view. That is a reasonable attitude to take but I find it hard to defend in a case like *mamzerut*. You cannot say that although it seems unethical in my eyes today, in the future I may be able to see it as ethical.

The second way is to say I am bound to the halacha, even though I think that on this issue the halacha is immoral. G-d apparently wants me to do something which in my eyes is immoral. Then you accept that the law of *mamzerut* was given to Moses at Sinai and you marvel at the remarkable flexibility of the rabbis who were able to make it a dead letter, using various halachic technicalities. Then, ultimately, if there is a case, you say that there is nothing that can be done. You bow to the will of G-d.

This too is a reasonable point of view, but I do not share it. You can take that view only if you don't have a notion of history. You then don't see that it is questionable what the term *mamzer* means in its original context. One can still believe in *Tora min shamayim* in a broad sense. Revelation is through the people, in a historical way. If you are prepared to sacrifice your western principles and bow to the halacha, to let it be your *akeyda*, that is all right if you are sacrificing only your own moral principles. But when you are sacrificing the moral or ethical principles of others, that is another matter.

Halacha is not a science and it is useless to compare it to a science. In many instances, the conclusion comes first and then the premise. Then the halachic machinery is used to find reasons for it. The Jews in France danced on Yom Tov or did not use

mayim achronim and then a reason for it was found in the halacha. The halacha could not proclaim them all sinners so it found a way to reconcile their behavior with the halacha.

A distinction must be made between the machinery of the halacha and the motivation of the halacha. The machinery has to be purely legal, but the motivation is extra-legal and considers other values of Judaism. Can this extra-legal motivation influence the machinery of the halachic process? There is an interesting example in the Trumat Hadeshen in the fifteenth century of a ruling which permits saying *maariv* on Friday evening before sunset, right after *mincha*, even though it violates the rules of when one must say "*shma*." He explains that he permitted it because people will not return to pray *maariv* later if the two prayers had to be separated. The interesting thing here is that the later poskim base their rulings on the Trumat Hadeshen. Once he said it, it became a precedent.

The Rema was asked whether a *mamzer* can serve as a rabbi. He answered that halachically there is no reason why not because there is really no such thing as a rabbi in Jewish law. However, he continued, in our generation it would not be a wise thing to do since the people already do not respect the rabbis.

This was obviously an extra-legal motivation. However, once the Rema said it, it was then in the halacha. Rav Moshe Sofer later ruled that a rabbi can not be a *mamzer*. In the case of an American rabbi who found out that his mother did not have a proper divorce from her first husband, he ruled that he should resign from his post and divorce his wife, based on the ruling of the Rema!

Rabbi Avraham Steinberg in Grovna was asked whether one can use a brothel as a synagogue. Most of us would say this is not a halachic question at all. We would respond instinctively that it is inappropriate. Rabbi Steinberg answered first on instinct and then he anchored his answer in the halacha, by arguing that one is not permitted to give a ruling that would seem strange to ordinary people. To permit the brothel would bring Judaism into disrepute. Once he ruled, it became the halacha.

Another example of extra-legal motivation is the differences in attitude on the status of women between medieval Spanish authorities living in countries under Islamic rule and those authorities living in Christian countries. The Rambam says that a

woman can not be appointed to any position in the community. The Tosefot, on the other hand, discuss whether she can be a judge. The Rambam says that under certain circumstances, a wife who does not perform her wifely duties may be flogged by the beit din. German authorities say this could never be. You can not tell me that the Rambam, French or German authorities approached the sources like scientists, and used pure reasoning to arrive at diametrically different conclusions about women. What really happened is that the Rambam and Spanish authorities living under Islam knew that they had to decide one way or it would not fit in with the general mores of the time. It was axiomatic for them. There is a conscious motivation and a sub-conscious motivation by which most halachists operate. They know deep down that they have to come up with a certain solution. Satmar halacha is different from Lithuanian halacha because each posek knows what his people will buy.

I cannot accept a concept of halacha which sees it as an exact science, what can be called the "computer method" of halachic decision-making. There is a human element and a historical element in the halacha. Once that is recognized, the question is, where do we go from here.

Session Three:

Darchei Shalom

Prof. Emmanuel Rackman:

I once heard an explanation of the saying “*Talmidei hachamim marbim shalom ba’olam*” (scholars increase the peace in the world) from one of the disciples of Rav Kook. The Rav described the learning process. Tora scholars argue about the halacha. One presents an idea; that becomes the thesis. A second disputes what he says; that is the antithesis. Then they continue to argue and they discover that it is possible to find a common thread in both their arguments. It is possible to fuse the two positions into a synthesis. That is the peace that is referred to, a peace of ideas, that there is dialogue and mutual respect for a difference of ideas.

We are gathered here today for such a dialogue on all topics. I hope that our discussion of the concept of *darchei shalom* can in some way contribute to solving the problems we face in Israel and in the Diaspora. One of the difficulties with the concept of *darchei shalom* is that there is no evidence that changes can be made in halachot *d’orayta* based on it. Our speakers on *darchei shalom* are Dr. Eliav Shuchtman, who prepared the paper on this subject, and Rav Haim David Halevi, the Chief Rabbi of Tel Aviv.

Dr. Eliav Shuchtman:

First, just a brief comment on the issues discussed yesterday. Jewish law, as a system of law, operates according to principles. One cannot expect it to make internal changes according to principles which are derived from outside it. Change must be internal and not external to the system.

In the Tractate of Gitten, we find a series of reforms or remedies on the subject of *darchei shalom*. Some refer to relations among Jews and some refer to relations between Jew and non-Jew. They are found in the Mishna, Bryta, Tosefta and in the

Yerushalmi. Another concept clearly tied to *darchei shalom* is that of *mipne eiva*, to prevent animosity. This appears in Talmudic sources and not in Tanaic sources.

There are two fundamental questions that we must consider. First, to what extent can these principles be applied by poskim today in rulings on contemporary issues? This is an important question because it is often thought that because a reason is given by the sages for a ruling they made, it can be used by the rabbis today as a basis for change in a totally different context.

Second, what is the nature of these remedies? Are they only after the fact or can they apply in advance as well? For example, there is a ruling that one gives support to non-Jewish poor together with Jewish poor because of *darchei shalom*. This could be interpreted in two ways. One could say that this ruling is intended a priori, in order to develop within us a higher moral sense and a standard of justice. The rabbis required us to have compassion toward the non-Jew, above and beyond the requirements in the Tora, because it is good and we are obliged to seek the good. This could, however, be interpreted another way, after the fact. Where Jews live with non-Jews, it is important to prevent bad relations with the non-Jew and therefore we must do certain things after the fact, to prevent these relations from deteriorating. This raises a further question. To what extent are our relations with the non-Jew related to his feeling of discrimination? If the ruling is only after the fact, in order to prevent the deterioration of our relations with the non-Jew, then if the Gentile does not care or does not know about our laws of charity, is one free of the obligation? In the laws of charity, for example, *leket*, *shihicha* and *pa'ea*, one is obliged to seek out the Jewish poor and give him. Is one obliged to seek out the non-Jew if he himself does not ask?

In practical terms, this question of *darchei shalom* was discussed in the recent case in Israel of the burial of Teresa Angelovitz, a Christian woman who was buried in a Jewish cemetery. When the burial society found out that she was indeed a Gentile, they asked the Ministry of Health to issue a permit allowing them to move the body to a Christian cemetery. The rabbis all agreed that she must be moved. The Minister of Health refused to issue a permit and the burial society appealed the case to the High Court. The Court upheld the action of the minister. Justice Shamgar wrote

for an unanimous court, that one of the most sanctified principles of Judaism is respect for man, in life and in death. Moreover, he wrote, the time had come for the public uproar over the case to cease because of the principle of *darchei shalom*, to let the dead rest in peace. He based his use of *darchei shalom* on the following source: "One buries non-Jewish dead with Jewish dead because of *darchei shalom*." Rashi explains that this does not mean "together" in one cemetery but rather if there are two dead men, one Jew and one non-Jew, one is obliged to bury both and not leave the non-Jew unburied.

This is just one illustration of how this concept was used in a recent ruling by the High Court. It is doubtful if the rabbis would agree to this interpretation of *darchei shalom*.

Rabbi Haim David Halevi:

I would like to relate first to the remarks of Dr. Shochetman. In my opinion, there is no doubt that the concept of *darchei shalom* in the halacha is meant to be *bediavad*, after the fact. This is quite clear. The rabbis permitted giving charity to the Gentile poor, visiting their sick and burying their dead because of *darchei shalom*, so that there won't be bad relations with the non-Jew.

The whole concept of *darchei shalom* in the halacha only applies to a period when we live in *galut*, among Gentiles, and we want to prevent animosity and bad relations with our non-Jewish neighbors, or to a period in Eretz Yisrael when we lived under foreign domination. The question then arises whether this ruling of *darchei shalom* is at all relevant today in the State of Israel.

Let me first firmly ground our discussion on sources in the halacha. The Rambam in Hilchot Avoda Zara writes: One supports the poor of the *Akum* (idolater) together with the Jewish poor, because of *darchei shalom*. And we do not prevent the *Akum* from taking *leket*, *shihicha* and *paea* (agricultural benefits of the Jewish poor) because of *darchei shalom*. And, we ask how they are, even on their holidays because of *darchei shalom*. But, we do not repeat our friendliness, or enter their homes to wish them well on their holidays. If we meet them in the market, we greet them gravely and half-heartedly. The Rambam adds that all these conditions apply only when Israel is in exile among the

nations or when the *Akum* dominate Israel. When Israel is dominant over the *Akum*, it is forbidden to allow the idolater to live in our midst.

It is important to point out that all the *poskim* disagree with the Rambam on this matter. They interpret the Biblical injunction “they shall not dwell in your land” as referring only to the seven nations of Canaan, and not to other nations.

There is a rather strange ruling in the Talmud, in the Tractate of Taanit, which contains a gesture to the Christians. It states, “Men on duty (the *Cohanim*) would pray that the sacrifice of their brothers would be accepted and the Israelites on rotation would assemble in the synagogue and fast four days a week, Monday, Tuesday, Wednesday and Thursday. On Friday they would not fast because of respect for the Sabbath. Why didn’t they fast on Sunday? Rabbi Yochanan answers because of the Christians.” Rashi explains that Sunday was their holiday. This is quite strange since the Christians were only a small sect then, just beginning. Is it possible that we would make such a gesture to them? It seems that the reason was so that the Christians won’t say that the Jews fast on Sunday because it is a Christian holiday. (Sofrim, chapter 17)

How does the concept of *darchei shalom* apply to our contemporary situation in an independent, sovereign Jewish state? Must Israel not be dominant over the non-Jews in order for *darchei shalom* to apply today according to the Rambam? It is indeed true that from one perspective this is in fact the case. Today there is the United Nations and in the western, democratic world, a state is not free to discriminate on the basis of religion. In that sense we are not dominant today. However, I would contend that most of the halachot connected with *darchei shalom* do not apply today at all.

The non-Jews living in our midst today are Moslems, those who the Rambam calls the “*Ismaelites*.” The Rambam himself rules that, “It is forbidden to drink the wine of *Akum* who do not engage in idol worship, like the *Ismaelites*, but one may have benefit from it.” All the *poskim* agree that the Moslems are not considered to be idolaters. Their wine is forbidden as is their bread, in order to distance them from us, to prevent intermarriage.

It is questionable whether Christians are considered idolaters in the halacha. We have a long account with the Christians, not only because of the persecution throughout the centuries, the Jewish blood they spilled, the six million Jews that were murdered in the Holocaust. The Christians uprooted the innocent faith in one G-d and introduced in its stead belief in a Trinity. They erased the practical commandments which are the foundation of a healthy, meaningful society.

In actuality, Jewish sources relate very little to Christianity. The old score with Christianity dates back to the end of the period of idol worship, when idolaters wanted to leave their idols and sought a new religion. Many turned to Judaism as an alternative. There is a dispute in the Tractate of Yebamot over what is the law of a convert who has been circumcised but had not immersed in the mikva or one who had immersed but had not been circumcised.

Rabbi Eliezer permits circumcision without immersion and Rabbi Yehoshua permits even immersion without circumcision and the Rabbis require both circumcision and immersion. In my opinion, Rabbi Yehoshua based his opinion on the reality. Many idolaters were turning to Judaism. The stumbling block to their conversion was circumcision. He wanted to exempt them from it as a temporary decree, in order to bring them closer to Judaism. This is just one of the sources from which we see there was a mass flocking toward Judaism. Christianity came along and eliminated these laws and requirements and therefore the idolaters went to Christianity. The only positive thing that can be said in Christianity's favor is that it eliminated idol worship from much of the world.

It would seem on the face of it that Christianity is itself a form of idol worship, because of its belief in the Trinity, its crosses, icons, and holy pictures. But this is not really the case. In the Talmud, in the Tractate of Hulin, it says that slaughter by an *Akum* is considered a carcass, and it defiles one who carries it. Then it asks why does it only defile one who carries it and yet it is not prohibited to gain benefit from it? The Talmud answers that a distinction should be made between an idolater who is devoted to idol worship, who lives and breathes it all the time and one who is just a ordinary *Akum*. Rabbi Yochanan explained that Gentiles outside of Israel are not really idolaters; they are merely following

the traditions of their fathers. We see that even then, the laws that apply to idolaters did not apply to the Gentiles.

Today, in our generation, we do not know how to engage in idol worship. I am sure if we did, it would be rampant, i.e., people would devote themselves to it wholeheartedly. People today seek instant gratification and that is what idol worship gave. The Talmud, in the Tractate of Sanhedrin tells a story about Rav Ashi who concluded his lecture in the Beit Midrash with an announcement that he would speak about Menashe, King of Judah the next day. That night he had a dream. Menashe appeared in the dream and taught him some details in halacha. Rav Ashi asked him in astonishment, "If you are such a great Tora scholar, how could you engage in idol worship?" Menashe replied, "I swear, that if you had lived in my generation, you, too, would have rolled up your robes and run to worship idols. You can not begin to understand the pleasures we derived from idol worship."

It is likely that in our materialistic times, people would run after idol worship if they knew how. Today we do not know how to go about it. This is why the rabbis ruled that non-Jews outside of Israel are not considered idolaters but are merely following the traditions of their fathers. In talmudic times, the rabbis already classified the *Akum* of their day as mere followers of their father's tradition, ignorant of authentic idol worship. In practical terms, the halacha is that all the restrictions on the interaction of Jews with non-Jews, and all the special rulings permitting it because of *darchei shalom*, do not apply today. All interaction is permitted today because they are not idolaters.

Rav Yosef Karo explains that the fact that they are following their father's ways indicates that they lack expertise and understanding of what they are doing. If this was the case in a period when real idolaters still could be found, today when there aren't any, how could Christians possibly be considered idolaters? Belief in the Trinity is considered idolatry for a Jew because we were commanded to believe in one god. The sons of Noah, however, were not commanded to believe in one god; they were commanded not to engage in idol worship. Therefore, belief in the Trinity is permissible for them.

The Rambam is the only one who disagrees with this approach. He rules in Hilchot Avoda Zara, in the uncensored version.

“Adomites are idolaters and Sunday is there day. It is therefore forbidden to negotiate with them, etc.” The Rambam considers Christians to be idolaters. In my opinion, if the Rambam had to decide today, he would not rule that present day Christians are idolaters. In our times, adherence to all religions has declined, unfortunately even among us, and therefore the Rambam’s ruling surely does not apply.

The M’eri writes a very interesting opinion on the question of relations with the Christians. He says the halachot forbidding speaking to them and asking how they are and restricting interaction with them do not apply to non-Jews who believe in one G-d, even though their belief differs somewhat from ours. Even the halachot that permit interaction because of *darchei shalom* do not apply.

The question of whether it is required to return a lost object to a non-Jew is relevant to our discussion. The Rambam ruled in Hilchot Gezaila Veaveyda,

It is permissible to keep the loss of an idolater because it is written “thy brother’s loss,” and he who returns the loss is sinning because he is strengthening the hands of the wicked. If he returns it to hallow G-d’s name, so that Israel will be praised and recognized as believers in G-d, that is praiseworthy. When keeping the loss will lead to the desecration of G-d’s name, the loss must be returned. In any case, one brings their tools inside as one would a Jew’s so that they won’t be stolen, because of darchei shalom.

The Rambam here rules in accordance with the Talmud which prohibits returning a loss to the non-Jew even for reasons of *darchei shalom*. Why was the Talmud so harsh in this case?

The Talmud in Sanhedrin states, “Rabbi Yehuda says in the name of Rav that he who returns a loss to a non-Jew, it is written of him *’lemaan sefot harava et hatzemaya*, (to add drunkenness to thirst) G-d will not forgive him.” Rashi explains that one does not return a loss to the non-Jew because by doing so one is equalizing treatment of the Jew with the non-Jew and as such disregarding the commanded nature of the law. This seems far-fetched. In my opinion, it means that when a man sins out of temptation, then he

is called a "tzamey", he has a thirst of need. His sin is understandable. However, one who returns a loss to a non-Jew is doing it to irritate. He is taking a loss, sinning on purpose, with premeditation.

The Rambam explains it that he who returns a loss to an idolater, to one who engages in promiscuity and other repugnant, immoral acts, is acting like one who "adds drunkenness to thirst," i.e., being deliberately irritating. He includes Christians in this category. In my opinion, the Rambam did not know the Christian world too well. He lived after all among Moslems. It is interesting that Rav Moshe Ravkesh also thought that the Rambam was rather extreme in his opinion on Christianity. He writes that the Rambam must have meant idolaters and not Christians who recognize one god when he wrote that it is prohibited to return their loss.

The M'eri writes that it is forbidden to steal from idolaters but one does not have to return their loss because a found object is in itself partial possession and to return it is "*derech hassidut*," charitable, which we are not required to do for one "who does not have religion." We are required to return the loss of those who "have religion," even if not the same as ours as long as they believe in G-d.

Let me give an example from a later period. Rav Haim Palatchi in his book *Haim B'yad* writes that he was asked whether it is permissible for a Jew to pray for a non-Jew who is ill and to give charity to Tora scholars so that they will pray for his recovery. He permits it and quotes from the Rov Dagan who permitted it. The latter quoted the case of Elisha who healed Naaman and Naaman converted as a result. He writes that even if the Jews were not in exile, it would be permissible to pray for and heal the sick among the non-Jews. Today they are not considered idolaters. Also, one may pray for their recovery to prevent their animosity. It is interesting to note here that even though the non-Jews are not idolaters, he still uses the argument of *mipne eiva*, to prevent animosity.

Today, because the non-Jew who lives among us is not an idolater, we have a moral and human obligation to act toward him with friendship, not out of *darchei shalom* or considerations of

mipne eiva. That means burying his dead, visiting and caring for his sick, treating him with respect.

Darchei shalom is a concept that applies to relations among Jews as well as to some of our relations with non-Jews in Israel and in the Diaspora. Let me give an interesting example of a question I received recently from a Jew in the Diaspora. A man writes that his car remains parked in front of his house each Shabbat because he is a shomer Shabbat. His Gentile neighbor asked if he could borrow it on Shabbat for his own use. The man asked his local rabbi for a psak and was told that it is forbidden. Dissatisfied with the answer, he wrote to me to ask my opinion. He writes that he could not understand the basis in the halacha for the rabbi's response. He has good relations with this non-Jewish neighbor and is afraid that he will not understand why he is being refused. Could *darchei shalom* be a reason to permit the loan?

There is a discussion in the halacha about lending an animal on the Sabbath. However, that is another matter entirely because there is a commandment that one's animal must rest on Shabbat. This does not apply to a car which is a "tool." There is no law requiring one's tools to rest, and I wondered why the local rabbi forbid it. I did not, however, wish to take a stand against the rabbi and so I asked for the address of the rabbi so that I could write to him directly. Perhaps he had considerations which I don't know about.

The point I am making here is that no rabbi understands the particular circumstances and considerations of his colleague in another area. There will always be considerations of *darchei shalom* in halachic rulings but they are specific to their place and time. The halacha is very flexible and broad and within its framework a rabbi can rule on questions of *darchei shalom*. There is no room for flexibility in relations with idolaters but there is room for each rabbi to use his judgment and sensitivity in relations with non-Jews today. There are no clear cut rules in this matter. In rulings that are "*halacha lemaaseh*," the rabbi is promised "G-d's help" to rule wisely and sensitively.

Rabbi Irving Greenberg:

It is apparent to all of us that the organizers of this conference had a hidden agenda. It was hoped that through a Mishpat Ivri approach to the halacha, we would find sources that would show how to make the halacha more responsive to the expectations and values of western society. The organizers would like a response on issues such as attitudes toward Gentiles, the rights of individuals to their own lifestyles, the legal standing and the rights of women, the right to pluralism and pluralist religious positions, etc. A marvelous sourcebook was prepared. My reaction to it all is that if this is an experiment to find sources which will resolve the issues that divide us or bring the sides closer together, then it is a failure. This method cannot meet the expectations of the organizers.

Even the definitions of the concepts that we are discussing create frustration because they are ethically ambiguous when we start to analyze them. In the long run, they are not helpful because they set up expectations on both sides which can not be met. They promise exceptions to prohibitions which are already out of step with the outside world and justify behavior already adopted. They do not even begin to respond to the more fundamental demands. For example, on the question of women's status and rights, Justice Elon's recommendations on the *aguna* are indeed far-reaching but they don't begin to deal with the more fundamental questions such as their standing in the halacha, their right to be witnesses, their right to have a voice, etc.

On the question of *darchei shalom*, we see that the Rambam permits relations when the Gentiles are dominant over us, but when we dominate them, they are prohibited. Rav Halevi argues that the ruling only applies to idolaters and therefore it is irrelevant today. That is because Rav Halevi has a fundamental decency. I can show you, however, throughout the sources, evidence of rabbis who take this prohibition quite seriously. Rav Moshe Feinstein ruled that Christianity is idolatry as the Rambam determined. Rav Moshe is not what we would call a marginal posek nor is he an unethical person. He is a scholar of major proportion. It is easy to say that because of our decency we do not want to affirm these things, but in reality, in the world of the

poskim, these sources are taken quite seriously. They can not be dismissed simply by saying that one disagrees.

Another example is the concept of *mipne eiva*. It applies to our relations with Jews. So, for example, one is required to return a lost object to a non-Jew if not to do so will cause the desecration of G-d's name. However, the Shulchan Aruch continues, this only applies in the case of non-Jews. However, if it is the loss of an apikores, of one who eats *trefa* in order to provoke, one is prohibited from returning it and neither the principle of preventing a *hilul hashem* or that of *mipne eiva* apply. So much for pluralism within the halacha.

Our conference is based on the wrong set of assumptions. The classic example of my point is the issue of medicine for Gentiles on Sabbath. The Minhat Yitzchak is quoted in the source book at length. He says that one should desecrate the Sabbath for an *Akum*, if the desecration is only rabbinical in nature. The reason is that we do not wish the Gentiles to think that we make light of their blood, and then the Gentile doctors may retaliate against our sick. He adds, that in the State of Israel, where the secular Jews dominate over us, it is permitted to desecrate the Sabbath on their behalf because if we do not treat them, they will retaliate against our sick. It is permitted to violate only those laws which are rabbinical in origin. He cites the Mishna Berura that one should try to avoid desecrating the Sabbath on their behalf, but if one must, then afterwards one must do *kapara*, repentance.

In my opinion, the low point on this issue is expressed in the following citation from the Beit Yehuda. He was asked if it is permissible to give food and drink to a Gentile who is starving and close to death who comes to beg at one's door in a time of famine. I would have assumed that here we have a wonderful chance to help keep a person alive. He responds quite differently. First he says that if you feed him, you are only violating a prohibition of rabbinical origin, not a *d'orayta*. It would not be interpreted as giving a gift to a Gentile but rather that one is himself deriving benefit from the act of giving because charity will contribute to the reduction of hatred. Since it does not violate a *d'orayta* and it involves *darchei shalom*, one may do it (and violate a rabbinical law).

I was struck again by the fallacy of the formulation. It puts the halacha in a no-win situation and places an impossible psychological burden on people like myself who are halachic, but prefer to ignore these kinds of images in the halachic literature. Do not misunderstand me. I think that functionally we can find solutions. For example, the Tzitz Eliezer, Rav Eliezer Waldenberg, writes that in Eretz Yisrael we have to be concerned about *darchei shalom* because there is a world-wide communication system which broadcasts news about Israel. If we mistreat the non-Jews in Israel, the rest of the world will criticize Israel. He also mentions the fear that the secular Jews will retaliate against the Orthodox if we do not come to their aid on the Sabbath.

Now it seems to me that what is lacking here is a consistent theory of rights and obligations based on ethics. The sources presented are the particular insights offered unsystematically by a variety of rabbis. We could perhaps take up the option of the Shulchan Aruch in Yoreh Daiya which rules that the restrictions on relations with Gentiles do not apply to the Gentiles of today. The Kesef Mishna states clearly that the Gentiles of this time are not idolaters. However, most twentieth century poskim act as if this source in the Kesef Mishna does not exist.

If we ask the wrong questions, the demands we make will be interpreted as wanting to override the halacha. It is perceived, as it was last night and this morning again, as an outside system assaulting the halacha. I would like to say to those who are not observant, or not halachic, that if you want to influence the halacha, you must show self restraint and be willing to take a different approach. When you approach the halacha, do not use your own standards. Indicate the sources you think can open up the halacha but do not make generalized demands for change. The system is not designed to respond that way. Generalized demands are not only futile; they are counter-productive.

Where there is an opening, it should be allowed to develop internally. The Ramban on burial is an example of this. He rules that one must bury the dead of the Gentile because of his "*tzelem Elokim*," and he quotes the Midrash that when you see somebody hung, you actually see the image of G-d hanging before you. The reason of *darchei shalom* is secondary.

Another example is from a ruling by Rav Moshe Feinstein who says some interesting things in a psak he gives to a convert. She asks whether it is permissible to visit her mother who is ill, whom she has not seen in twenty years, since her conversion. Rav Moshe permits her to go visit. He does not base his response on *darchei shalom*. He gives three important reasons which are interesting for our purposes. First, he says she may go to prevent others from saying that the laws of the Tora are unjust. Here we can see that sensitivity to contemporary conscience is a legitimate basis for a psak. Second, if she were not permitted to visit her mother, it will be said that by converting she has lowered her standard of morality and filial obligation, since as a Gentile she would have felt morally obligated to visit her mother. Here he expresses a fundamental principle that Judaism must uphold the highest standards in contemporary society. Whatever the standard among the non-Jews, we Jews must top it because we are commanded to be a "light unto the nations." Third, he suggests that she would be guilty of ingratitude if she did not visit her because having been given life by this person, the least she can do is to show some courtesy and go to visit her when she is sick.

It is my contention that by asking little questions on specific cases, perhaps even by holding conferences like this one, we can give a challenge or a conscience pang to those who are committed to the halacha, to get them to be more responsive to these moral issues. Is that all we can do? I have a few more suggestions. I return to the question of what is halacha. The answer is that it is what the halachists say it is. I do not believe that the halachists act anarchistically or arbitrarily but they do have a tremendous influence in its determination. The question is why is this influence not used?

Justice Elon presented us with the extraordinary possibility of nullifying marriages. The question again is why is it not used? We must consider two important factors, the ideology of the poskim and the community to which they belong. There is a fundamental claim which currently governs those who train poskim and governs almost all those who act as poskim, that the posek has relatively little authority. There is "objective" data that he can feed into a computer and get an "objective" ruling. In this perception of the

role of the posek, there is no room for subjective reactions, conscience, social influence of the claims of the time.

Daat Tora as it is used today articulates this position. The worst dimension of the *daat Tora* today is not what Justice Elon said, that it favors the academic as against the practitioner, which is a problem, nor is it what Avi Ravitsky said, that it is given without any explanation and it stands beyond criticism or justification. What is most disturbing to me is the denial of any elements of judgment of subjectivity and therefore by implication, it denies the right of disagreement. The scholar is seen as the incarnation of Tora and G-d speaks through him. Rabbi Wurzberger stated that any time a posek rules he has *ruach hakodesh*. How else could he know all the things that he claims to know? And how else can he rule of things on which he has little or no experience? I am amazed how often they are right.

A recent example of a ruling without knowing the facts was the psak of five roshei yeshiva of RIETS on the question of women's *minyanim*. If you read the psak, you will find that they have the wrong facts about the women's actual practices; they have pejorative judgments of the women's motives, and they never met with the women involved to check out the facts. The women had asked to meet with the rabbis before the ruling was written, but were refused. One of the five was asked publicly how he could rule without meeting the women and when the facts were wrong. He answered that he knew the facts without meeting with them. If he had made the same comment about a psak on a chicken, he would have been laughed out of the auditorium. But he made this comment in good faith and his psak was accepted by his students as valid.

What is the alternative to this kind of philosophy of the halacha which is willing to admit that there are priorities and fundamental principles in the halacha? The Rambam, for example, writes that *darchei noam* is a fundamental principle, that the Tora itself is *darchei noam*.

This refusal to recognize that there are priorities within the halacha had serious consequences in our history, in the time of the Maccabees. The hassidim refused to fight on the Sabbath because it involved *hilul Shabbat*. The Maccabees ruled that one can fight, that *pekuah nefesh* takes priority over the Sabbath. If in

one's ideology there is no hierarchy in the Tora, and no distinctions between commandments because all are the word of G-d, then one must die on the Sabbath and not fight. The whole notion that *pekuah nefesh* comes first is a fundamental theological vision of the Tora and of halacha. This vision is tacitly accepted but because it is not articulated, the way is paved for this kind of inability to make judgments and to relate to the kind of ethical questions we have been asking. These questions demand making distinctions which can not be made without some guiding principles. These distinctions are not made because the poskim lack universal culture and direct contact with the reality of the people who are asking the questions.

Rabbi Unterman ruled in the Shachar case that one should desecrate the Sabbath in order to save the life of a non-Jew because of *darchei noam*. This, he said, is a fundamental principle. He was able to articulate the notion of a fundamental principle of *darchei noam* because he comes from a cultural background which accepts the non-Jew as having *tzelem Elokim*, created in the image of G-d. It is perhaps because the Reform and Conservative, who have changed the halacha in ways unacceptable to the Orthodox, have posited the notion of priorities in the halacha, that the Orthodox reject it as dangerous. They refuse to admit that the principle is correct and that our argument is really about its specific application.

The second point is that a posek rules for a community, not in a vacuum. The problem today is that the poskim live in one community and rule for it but their rulings are being applied in other communities as well. The community makes the difference, not the posek. At the very same time that Rav Moshe Feinstein ruled that reform marriages have no validity, in an attempt to solve the problem of *mamzerut*, Rav Yosef Henkin was working on the question of *hafkaat kiddushin*, nullifying marriages. It would have involved getting the major poskim of the generation to agree and getting the non-Orthodox to cooperate and use a *get* in all cases when it was possible. *Hafkaat kiddushin* would be used when all other remedies were exhausted. That proposal sank into oblivion, not because Rav Henkin was not a great tzaddik or not as learned as Rav Moshe. The reason was really that the community was going in a different direction. It was going toward greater separa-

tion and isolation. Rav Moshe's ruling solved the Orthodox problem, that the *baalei tshuva* joining their ranks should not be *mamzerim*, by distancing the Reform and other groups even further.

I submit that when Yeshiva University will begin to take itself seriously, with the full seriousness that it deserves, and will develop its own cadre of poskim, this situation may change. When we have poskim who accept the fundamentals of secular culture, the dignity of women and the responsibility to take charge of our history and who have a theology of halacha with priorities and values, we will get rulings that are more acceptable to us.

This is where I challenge the organizers. If the halacha is perceived as nothing more than a legal system, which acts solely on the basis of precedent, and legal weight is purely a matter of numbers, then no change is possible. This perception is shared by *mishpat ivri* scholars as well. But the halacha is not a pure legal system. It is a system which uses legal process but the system itself involves ideas such as "*tikun olam b'malchut Shadai*" (reforming the world), *tzelem Elokim*, changing the world into a Garden of Eden. This is the beginning of the written Tora which is equally as important as the Oral Law. These are fundamental ideas of Judaism.

The halacha is the method to realize these principles. It is the best possible realization under the circumstances. For example, kashrut is the best form of vegetarianism in this world, but it is not the final form. The Jewish slave was the best form of slavery in its time. Is anyone prepared to come today and say that the Jewish slave is the Tora's ideal? Is that the official position of Orthodox rabbis? It will be if we allow the present psychology to develop, that we must agree with whatever they say. This certainly is not the correct vision of the Tora.

Tora is an unstoppable, continuing legal process, but nothing in it is outgrown. What makes me Orthodox is not that I deny change of growth but that I insist that nothing is outgrown. I do not share the arrogance of the twentieth century that says it is all primitive. I think that every word is the word of G-d and each contains a lesson, even if we do not practice it now.

Three of the greatest rabbis of the last hundred years tried to make this point and, in all three cases they were defeated, I would

argue that they failed because their communities weren't ready for it. The three rabbis are Rav Kook, Rabbi Soloveichik, and Rabbi Yisrael Salanter.

Rav Kook speaks about the definition of *kefira* (heresy) in our time. It is a moral heresy founded on a search for justice and righteousness. The heretics think that their fine moral ideas do not exist in the Tora and, in fact, they are the very essence of the Tora. He says we must devote ourselves to a renewal of philosophy. The problem is that "the most talented among us have devoted themselves to the practical side of Tora, totally leaving aside the theoretical aspects." Those who have decried this have been attacked as being vulgar or insane. He says this crisis in Tora persists because the Tora is being studied in the Yeshivot in a narrow and monotonous context, out of ignorance and conceit. He then founded his own yeshiva which would follow his philosophy of the halacha.

When Rav Kook ruled on the question of the Sabbatical year, he naturally relied on sources in the halacha. The fundamental conflict between his opponents and him was that he was convinced that Jewish society in Israel must not be based on charity. It had to be responsible and self-sufficient. Those who opposed him had two basic arguments: 1) Depend upon G-d and He will provide the extra food. 2) G-d warns us in the Tora that if the Sabbatical year is not observed, we will be exiled from the land of Israel. Rav Kook's consideration was that one must first build up a financially independent society and then it will be able to observe a complete Sabbatical year. He was willing to defy the threat of exile mentioned in the Tora. In his theology, man is the partner of G-d in the interpretation of Tora. The rabbi must therefore take responsibility and rule in the interest of the society and not just on precedent alone.

The halacha's purpose, according to Rabbi Soloveichik, is to perfect the world, a messianic vision of reform. Man is called to complete G-d's world, to correct what is wrong with the world. He speaks, therefore, of the posek as being responsible for the whole of society and not just a part of it. The halacha regards religiosity which becomes restricted to a select group or elite as a drawback rather than a benefit. The "*ish halacha*" according to Rabbi Soloveichik is the co-creator of the halacha as man is the co-crea-

tor of this world. He is G-d's partner in the creation. This is meta-halachic theory, a fundamental vision of the theology of the halacha which paves the way for serious responses to the kind of questions that were raised here.

I will mention the third rabbi, Rabbi Israel Salanter, only briefly. He discusses how subjectivity, human need, and psychology, enter into halachic decisions. G-d affirms human decision in halacha, because "*lo bashamayim hee.*" It is not the heavens. Man's subjectivity in determining the halacha is legitimate.

You may ask why these rabbis did not follow through in their rulings. The answer is two-fold. First, they too did not share a wider universal experience. Second, they were defeated by the fact that they did not have a community prepared to follow them.

My final comment to those who are non-Orthodox is that if you really want the halacha to go in this direction, make yourselves part of the community and ask for a rabbi who will rule that way. Outside one gives up the right to influence the community. Moreover, by pressuring from outside, you also are counterproductive.

Rabbi Emmanuel Rackman:

For many years I have tried to expound what I call the teleological approach to halacha to which Rabbi Greenberg just gave most eloquent expression. In one of his letters, Rabbi Kook once criticized bitterly the *roshei yeshiva* of his time for not linking the teaching of Talmud to the study of its underlying value system. He blamed them for the fact that the secularists turned to secular sources, to socialist and communist thinkers, to arrive at conceptions of a just society when the entire Tora itself is dedicated to the concept of building a just society. Obviously they were not teaching the Tora in the right way.

I disagree with Prof. Greenberg that the conference failed to achieve its purpose. I think that it does a lot of good to discuss these issues. The sources that were prepared were quite helpful in showing how *darchei shalom* has been applied constructively in the past. *Darchei noam* and *darchei shalom* are closely related. They appear together in one verse. Rabbi Unterman used the

concept *darchei noam* to explain why a Jewish doctor is permitted to desecrate the Sabbath to save the life of a non-Jew.

I once had a discussion with Rabbi Soloveichik on this whole question. I suggested to him that the time had come to permit a Jewish doctor to desecrate the Sabbath to treat a non-Jewish patient not because of *darchei noam*, that it is a nice thing to do, but rather because of *tzelem Elokim*, that it is the Gentile's right because he too was created in G-d's image. He did not object to what I said or tell me that my reasoning was faulty. He just was shocked by the revolutionary character of the suggestion.

I have tried in the past to advance the idea of *hafkaat kiddushin* discussed by Justice Elon, and to mobilize support for it. The sources clearly support it. It is the only possible approach that can solve the problem.

There are parameters to the halacha but they are wider than Dr. Shochetman seemed to indicate. They include the value system of the halacha. *Darchei shalom* is a value. It is possible that once we broaden these parameters, we can reach solutions to the problems today.

Rabbi David Gordis:

In a way, I feel like I am sitting in the midst of a family discussion among the Orthodox. Actually, the approach that Yitz just described is the approach of the Conservative movement. Granted that on certain issues you disagree with its approach. I come to you with the same invitation – if you want to influence what is going on, it is better to join us, being that we share the same approach, and to use your efforts to make operative changes.

I was amazed that neither Justice Elon nor Rabbi Rackman mentioned the Conservative when they discussed *hafkaat kiddushin*. The Conservative movement has been following this approach for a while, in our view, in accordance with the halacha. If the halacha is what the poskim say it is, then it is important to determine who are the poskim. To my mind it is those who accept the approach you described. We then must try to influence them to follow it in their practical decisions.

Rabbi Harold Shulweis:

I disagree with Dr. Gordis. I don't think it is an Orthodox or Conservative issue at all. It is really the clash between modernity and traditionalism which is faced by all the movements.

Justice Menachem Elon:

I would like to ask Chief Rabbi Halevi to explain, if he will, how he arrived at the conclusion to adopt the approach of the M'eri toward Christians, that they are not idolaters. I would like to be allowed into his laboratory to gain insight into how he reached his decision. The M'eri is after all a single opinion. All the Rishonim disagree with him. How do you handle the opinions of the other Rishonim?

Rav Haim David Halevi:

Due to lack of time, I omitted some of the sources. The M'eri is not the only one to rule this way. Rabbenu Ovadia Mebartenura says, in the beginning of the Tractate of Avoda Zara, "All that is said in this tractate is not applicable today; everything is permissible today." Tosefot Yom Tov also rules that way. Neither had ever read the M'eri. They came to their conclusions independently. The Toor quotes Rashi and the Rashbag as sharing the same view. Rabbenu Tam wrote that he wanted to permit the wine that was touched by Christians because in his view, they are not idolaters.

Justice Menachem Elon:

I am aware of these sources. However, the M'eri is the only one who follows such a daring approach throughout, in all kinds of cases. For example, he is the only one who disagrees with the Rambam on the question of returning the loss of a non-Jew. The other Rishonim follow the Rambam. I too agree with the M'eri, however, I am not in the position of a posek. I therefore would like to ask you how you arrived at the decision to adopt the M'eri's approach.

Rabbi Haim David Halevi:

I followed the approach of the Peair Hagola when I discussed the question of returning the loss of non-Jews. He does not dispute the Rambam. He interprets the Rambam's restriction "not to strengthen the hands of the wicked" as not being applicable to the non-Jews of today. He implies that the Rambam and the Shulchan Aruch would also agree that their restrictions do not apply to the non-Jews of today. None of the poskim disagree with the Peair Hagola. Their silence on this issue is very significant. They were unwilling to come out against him.

Rabbi Walter Wurzberger:

I would like to ask Rav Halevi to explain why he thinks that today the concept *darchei shalom* does not apply. The Rambam considered *darchei shalom* not only as living in peace with non-Jews, but rather as a moral obligation. However, halacha can not be founded on morality alone. He therefore ties it to the halacha "*vehalachta bedrachav,*" and you should walk in his ways. One must seek perfection, what is called today "virtue ethics." According to the Rambam, one is obligated to follow in G-d's ways, to aspire to perfection, to imitate His virtues. *Darchei shalom* is one of the ways of G-d which we have a moral obligation to follow.

I was shocked to read recently a Responsa of a well-known posek in the United States who ruled one should not return a coin found in a pay phone to a non-Jew because the non-Jew does not expect it and therefore there is no question of adding honor to G-d's name by doing so. Since the only justification for returning the coin was in order to have a *kiddush hashem*, and it does not apply here, he prohibits its return to the non-Jew.

Rabbi Haim David Halevi:

It is an important principle that no one, not even a rabbi, may dispute rulings that have been set down in the past. Each decision must be firmly rooted in the halacha. Halacha means a way that we follow. The word itself is derived from the verse "the way in which they will walk and the deeds they will do." From Mt. Sinai

until today, we go with the same Tora. Laws that were written fifty or twenty years ago are very often outdated and require amendment or repeal. Society undergoes change, realities change, and the laws must be updated to reflect the new situation.

The Tora is three thousand years old and still the same. Its laws are relevant and applicable today as they were then. We have followed them for three thousand years and we will continue to follow them three thousand years hence. It is eternal. It continues to guide the Jewish people throughout the generations because it has been open and flexible to each generation's needs. It has developed with time. The serious question before us is why should this process of adaptability and development have stopped in our generation. We observant Jews should be the ones who seek a halacha which shows greater understanding and openness towards current realities, not the secularists. We are the ones who want the halacha to become the guide of the entire Jewish people! We must, therefore, read the fine print in the halacha to find permissible ways to adapt the halacha to the needs of today. We may not however nullify any laws. If the law cannot be circumvented by using concepts such as *darchei shalom*, then it stands as is.

Although the Rambam ruled that the Christians of his day are idolaters, it is quite possible that if he were alive today and would observe contemporary Christianity, he would rule differently. This way of interpreting the Rambam gives us a flexibility within the framework of the halacha without contradicting him. The Peair Hagola followed this methodology as well.

Shalom is a concept deeply rooted in the halacha. The essence of peace is morality, understanding, and relating to another with decency. There is a story told of two neighbors, one Jewish and the other Gentile who had a quarrel. The non-Jew came to the Jew's home to resolve the matter. The Jew was in the middle of praying. His family asked the Gentile to wait until he had finished. The Gentile watched the Jew pray and, at the finish, take three steps back. He asked the Jew what was the meaning of the three steps back. The Jew explained that the prayer ends with the words, "*oseh shalom bemiromav, hu yaaseh shalom etc.*" Words about peace are not enough. If a person stands in his place and shouts

peace, peace will not be achieved. If he steps back a few steps and says peace, he will achieve peace.

Rabbi Irving Greenberg:

If there is disagreement among us, it is over what is doable and what is not. It is not over the existence of sources but over the willingness to use them. We have differences of consciousness and conscience which are determined in part by our communities and by our social and intellectual experience.

Rabbi Eliezer Berkovits:

Many years ago I wrote that one of the most serious problems we have is that we have turned the Oral Law into a written law. We have become Karaites of the Oral Law. I agree with Rav Halevi that the halacha is open and flexible, however, where do we find rulings today that try to solve contemporary problems of the Jewish people except in Israel?

I am happy to hear that the idea of *hafkaat kiddushin* is coming to public attention. The truth is that I was the first to discuss this solution in a book I wrote several years ago. I indicated all the sources which support such a solution today and I argued why it was imperative that we now apply it. Before publication, the manuscript was given to Rav Moshe Feinstein for his comments. Rav Moshe wrote in a letter to Rabbi Jung that he had no objections to the halachic aspects of the solution. Whether to implement it in practice, is another thing entirely. This is the problem we face today.

I am surprised that with all the sources mentioned here, no one quoted the saying in the Talmud “the entire Tora is because of *darchei shalom*, for it is said, *‘deracheha darchei noam ve’chol netivoteha shalom’*.” This is the foundation of the Tora.

Rabbi Louis Jacobs:

I would like to return to the question of values that are not found in classical sources. We heard a discussion of whether Christianity is idolatry. Rav Halevi just gave us a very liberal interpretation. But what about relations with idolaters who do

exist today, with Buddhists, Hindus and theoretical atheists? My point is that the notion that man is created in the image of G-d is not really a halachic motivation and it was never used as such. If we use it today, we use it because we find in it the germ of the idea that one has to respect every human being because he has a soul. I do not see how we can cope with this kind of question without stepping outside the system and incorporating values from outside into it.

The Mishna Brura discusses the question of desecrating the Sabbath in order to save the life of a non-Jew. He castigates Jewish doctors for doing it and he says that they really shouldn't. There is a note added later that it applies to Jewish doctors in India! That is not what the Mishna Brura meant at all. He meant Jewish doctors in Russia. How would the rabbis answer in the case of Buddhists or Hindus? If we are talking about religious tolerance and human rights, we have moved away from what is usually considered to be the framework of the halacha.

Rabbi Emmanuel Rackman:

Don't you think that the prohibition to murder any human being because it is deicide, man being created in the image of G-d, is an important concept in Judaism?

Rabbi Harold Schulweis:

This issue raises the question as to our own ability to judge if a halacha is ethical or not. We all share a moral sensibility. We are quite sure that to treat non-Jews unfairly is certainly wrong. Obviously, we did not derive this from an isolated verse. We are making an ethical judgment by which we are implying that the halacha should be judged by an ethical standard. We are applying a kind of moral teleology.

Rabbi Emmanuel Rackman:

There is a verse in Deuteronomy in which Moses asks the Jewish people whether there is any nation which received such "righteous" laws. He was appealing to the people to recognize the ethical content of the laws.

Prof. Hava Lazarus Yafeh:

The question we must ask ourselves is whether the halacha is able to meet the challenges that come from outside. No one really expects the halacha to consciously accept values from outside. This afternoon we heard two splendid examples of how the halacha can grapple with values that, in my opinion, originate outside it. Rav Halevi said that our relations with non-Jews today are based on moral considerations and not just *darchei shalom*. This is the message I am looking for. Call it meta-halacha or whatever. I am looking for standards by which I can evaluate my tradition according to the value system which I have derived from outside. If we can find common ground on this point, I think that the general public, too, will be more open to the halacha. One of the reasons that Jewish tradition and halacha are so detested in Israel is because these values are never expressed. People do not know them. Make people aware of them.

More attention should be paid to the historical period in which the rabbis lived and to the culture they were exposed to. The Rambam ruled that Christianity was idolatry because the Moslems ruled that way. This should not be overlooked. It is an important factor. The Rambam did not live in a cultural vacuum.

The rabbis sitting here today are, in a sense, unfaithful to their communities. Their communities are much more extreme in their opinions. You must take a stand and lead them and not wait for them to follow. For example, when recently a gifted archaeologist met an untimely death, the haredim put up a wall poster celebrating his death, writing all sorts of terrible things. None of the moderate, more enlightened Orthodox issued statements condemning the poster. They did not think it was necessary. But it is necessary, because the general public lumps all Orthodox in one basket and thinks that these extremists represent Judaism. They do not know that there is another way. You have a moral obligation to denounce such deplorable behavior. I am not defending the ignorance of the public. I am merely suggesting that it is important to educate them that these are not the values of Judaism.

Rabbi Irving Greenberg:

I would like to relate to the question of our attitude towards Hindus, Buddhists and atheists. The honest answer is that out of a process of dialogue, our attitudes toward these groups will emerge. I am not prepared to say that all groups are automatically dignified or correct in their substantive religious claims. We cannot be value-free in our assessments. It is crucial that there be a process of dialogue and encounter. The second step is formulation and clarification through existing norms and values and the last step is the final formulation itself. Modernity should not mean "anything goes."

I disagree that *tzelem Elokim* is not the basis of Judaism. This is one of the main distortions of our tradition. The written Tora is the fountainhead of Judaism. The problem today is that the legal process which is itself a fountainhead of the written Tora is marching off by itself, as if it were not guided or commanded by the written Tora beginning with that first chapter in Genesis. This chapter is the program of Judaism and of the Tora and, in that sense, it is the basis for what follows. Many times over the centuries that basis was lost. That is explainable by the nature of the Gentiles themselves. They did not act like "*mentchen*" and so we treated them as if they were not "*mentchen*". All men have a *tzelem Elokim* and if the situation were to change and the Gentiles were to act like "*mentchen*", then there would be a shift in our attitude toward them. We do not simply borrow values from outside. The system itself brings to the fore or reduces to the back certain values as against others.

Rabbi Wurzberger used the model of the akeyda. To me, the relevant model is the dialectic between the akeyda and Abraham arguing to save Sodom. To be a religious Jew means to wrestle with both sides of that dialectic. If we are truly partners in the covenant, in the creation of the Tora and Oral Law, then it is our task to perfect the halacha, to complete it. This includes making changes when necessary in its approach toward non-Jews or women. Our job in this generation is to make the next step in that process. No one thinks today that slavery is the last position of the halacha. Similarly, the present status of women is not the last

position of the halacha either. What is at question here is the willingness of the contemporary Jewish community and in particular, the halachic community, to take appropriate responsibility for their co-creation role. It is hiding behind G-d and hiding behind Rav Moshe Feinstein not to take that responsibility.

Can the halacha address modern-day women seriously and not just respond “you are on a pedestal” or “do you want to be like men”? The resources are available. The question is will this generation take responsibility. To say that I do not have the authority, is to espouse an ideology that justifies inaction. We are in the midst of a battle and I am responsible for this part of the road. When I am dead, somebody else will take over but right now I am here and I cannot say I don’t have the authority. Once it is decided that adjustments need to be made, sources will be found to support that decision, just like a decision not to act can be supported by sources.

If we are partners with G-d in the covenant, then we argue with Him. We have a conscience and if we feel that we must treat a non-Jew on the Sabbath, then we argue with the halacha and we don’t accept the ruling that it is OK to let him die. We have an obligation to argue as did Abraham.

I would like to explain how my position differs from that of the Conservative. They do not have a good balance on the claims of modernity versus the claim of tradition. They are over impressed with contemporary values. I am too, but they are even more so. It is a matter of degree. I have great respect for them. I have learned a lot from the Conservative. In some cases they have gone too far in their twentieth centurism, in seeing some aspects of the halacha as primitive. I have yet to see anything primitive in our Tora. Some things may no longer be applicable but they are morally applicable as a model and lesson. The Conservative movement does not say this and as a result, its public has misunderstood its entire message. The message has become, whatever is contemporary goes.

I am trying to help Conservatism get back to where it wants to be and where I believe it should be. I am committed to helping every group. I would like to get the Reconstructionist and Reform movements to be more effective. They have a lot to contribute. I have learned from them and I would like to return the favor by strengthening them. So, Rabbi Gordis, do not try to co-opt me

into your movement. Let us listen to each other and we can work together.

After the destruction of the Temple, the rabbis concluded that G-d wanted them to take more responsibility. It is undoubtedly true that after the destruction, Tora study and learning became more central. After the Holocaust, we must ask ourselves what is our responsibility. Part of it is to uphold *tzelem Elokim*. The ultimate attack of the Holocaust was the denial of the *tzelem Elokim* of the Jews and therefore their degradation in addition to genocide. It is therefore a mitzvah to be "*mahmir*" (strict) on *tzelem Elokim*.

Rabbi Soloveichik once explained that the poskim from Brisk were accused of being lenient because they would do anything to save a life. Rav Haim responded to this by saying that he is not lenient; he is just "*mahmir*" on *pekuah nefesh*. Rabbi Soloveichik said he was amazed to see how many nineteenth century rabbis looked for reasons not to desecrate the Sabbath to save the life of a non-Jew. Today, we must be strict on *tzelem Elokim* and that means toward the non-Jew. Once the non-Jew qualifies as *tzelem Elokim*, then there are many sources in the Talmud which oblige you to save his life.

The reality today is that the community in which the poskim live is overwhelmingly dominated and colored by the right-wing. It is therefore difficult for the moderates to come out on every issue (such as to condemn the wall poster Prof. Yafeh mentioned). There is a lot of pressure on the moderates. In this kind of dialogue, we should each criticize our own community and not just criticize each other.

Rabbi Haim David Halevi:

I would like to add to what Prof. Greenberg said about the relationship between the written Tora and the Oral Law. It is stated, "Write these words because it is on these words that I have made a covenant with you and with Israel." G-d explains to Moses that the covenant was made with the Oral Law and not the written. Does this mean to imply that the written law is less important than the Oral Law? The answer is simply that the written law is sealed. If it is written that one must eat matza for seven days, one cannot

add or subtract days. The Oral Law, however, was given to us to interpret ourselves, using our human intelligence and logic. That is the strength of the Oral Law.

Rabbi Arthur Green:

I think that much of our discussion about learning values from outside the Jewish tradition is, to some extent, misguided. We are really talking about learning from the history of the Jewish people. It is our history and how we have been treated in history which influences our commitment to issues such as relations with the non-Jew or towards racism. My plea is not to open up the halacha to non-Jewish values, which I neither expect nor think is appropriate, but to open up the history of the Jewish people and its experience as a source upon which to base a psak. Part of the problem of the separation of Agada, which reflects the historical experience of the Jewish people, from the halacha.

Irving, I am very moved by some of the things you said. Your invitations to rejoin the community of halachic consensus are the only ones that still speak to me. You have, in fact, been saying two opposite things. To those of us who stand outside, you say come in and join me and be part of the community of consensus; only working within the halacha can something be done. On the other hand, you say to the halachic community, how frustrated you are with that system and how much it doesn't work!

Rabbi Irving Greenberg:

You have another option. You can create your own alternative if you are responsible to the halacha as best you can. I believe that there is a pluralism of service to G-d and of carrying out the covenantal mandate of trying to get the Jewish people into "*malchut shadai*." There are many things at the present time that we cannot do and you can. You must however do them better, with less assimilationist influence, less distortions from outside. I am inviting you to play another role. But you must stay in a dialogue with the Orthodox community and not dismiss it. My message is not just one of frustration. We have a long way to go but I do recognize that you have accomplished some remarkable things, too.

Rabbi Norman Lamm:

Professor Greenberg said that we need rabbis who have had a broader, more worldly social and educational experience. This is not necessarily true. Rav Halevi is evidence of open-mindedness without secular degrees. The decision denying women the opportunity to set up their own minyanim was written by rabbis from my yeshiva (RIETS) who have had a broad secular education.

The M'eri which was so broad-minded in understanding our relations with the non-Jew was not influenced by values external to the halacha. He found these values within the halacha, because "turn it and turn it again, for everything is in it." The Tora has within it the values you are looking for. One just has to look for them.

Judaism is like a symphony. There are many notes in this symphony, not all of them heard at all times. Sometimes a note is played outside and that makes us aware of the same note in our symphony, e.g., the western value of respect for man. When we hear it outside, it motivates us to seek that note within the halacha. It is true that some people don't hear the note from outside. I can't help them. But if we do hear it then we must make that note "Jewish," convert it by finding it in our sources. This is the intent of the M'eri.

Rabbi Shlush:

First, I would like to disagree with what was said about the attitude of Islam toward Christianity. Islam accepts Christianity. It says that the final version of the Bible is the Islamic version, which comes to correct both Jewish and Christian beliefs. Second, in the case of the Rambam, it is incorrect to say that he was unfamiliar with the writings of his day. He was well read in Greek sources and the writings of his day. He made his decision on Christianity with great thought.

We are in a dangerous situation today. The Jewish community is polarized between Orthodox extremists and secular extremists. We must find the middle road, the common denominator which can unite us and allow us to work together. This common base must be our belief, a belief in G-d and in Tora from Sinai.

There is a principle in the halacha that one can be lenient in interpreting a rule which is rabbinical in origin and one must be strict in one's interpretation of a rule that is *d'orayta*. On the issue of returning the loss of a non-Jew, there is no Tora derived prohibition from returning it. It is a rabbinical ruling and is therefore open to a lenient interpretation. If we share a common belief in G-d and in Tora from Sinai, then we can surely find remedies in the halacha which will be consonant with modern values.

I have discussed the question of permitting *hafkaat kiddushin* with the Chief Rabbis. *Aginut* is a very pressing problem today. Sephardic poskim have discussed this solution on many occasions. Our present situation demands that this solution be accepted, more than in any other time in our history. Then, why isn't it done? The answer is that it cannot be done by one individual. There must be a consensus among Tora scholars, men who devote their time to learning, who understand the profundity of the law. They would have the authority to do it.

Session Four:

Pekuah Nefesh

Rabbi Immanuel Jakobowitz:

We have been discussing two basic questions. Does the halacha itself have values or are there values separate from the halacha which we try to relate to by way of the halacha? I believe that the halacha is heteronymous and that its ultimate purpose is precisely to define what Jewish values are. This I will illustrate with examples from the concepts *pekuah nefesh* and *kvod habriyot*.

The Talmud, in the Tractate Yoma, asks where do we learn the principle that *pekuah nefesh* takes precedence over the Sabbath. It suggests several answers. One answer is because it is written, "The children of Israel shall keep the Sabbath, observing the Sabbath throughout their generations." From this the rabbis learn, "desecrate one Sabbath in order to be able to keep other Sabbaths." In other words, what "pushes aside" the Sabbath is the many Sabbaths in the future which have a higher value than this one Sabbath. What "pushes aside" the Sabbath is not the value of life itself, but what you do with life.

The Hafetz Haim in the Mishna Brura rejects this reasoning and says that, in that case, "momentary life" would not take precedence because he will not live long enough to observe another Sabbath. Yet the law is that we do desecrate the Sabbath for a moment of life. The reason therefore is the intrinsic value of life itself. Life itself has a superior value. Shmuel, in the Talmud, derived this rule from the words "and you shall live by them," i.e., live by them and not die because of them. If a commandment will cause the termination of life, then it is canceled. The Mishna Brura was looking for a value system, to see what constitutes the absolute value. Is it the purpose for which we use our lives, or is it life itself?

The M'eeri, on the same passage, says that the reason why you should desecrate the Sabbath even for a moment of life is that a

person may repent in that one hour and it may be worth more than the whole of life. It is the value of the time with which you repent that pushes aside the Sabbath.

The Mishna Brura rejects this interpretation because one desecrates the Sabbath to save a newborn infant as well, or for someone who is in a coma, even for only an hour of life. His final conclusion is that life itself is the ultimate value, because it is written “and you shall live by them.”

My second example is from the concept *kvod habriyot*, respect for mankind. The whole question of permissibility of autopsy is based on this concept, that even in death one must treat a human being with respect, because of his *tzelem Elokim*. The verse reads, “*ki kilelat Elokim talui*,” which Rashi interprets that when a person is hung, it is as if G-d himself is hung. The Rashbam explains this verse differently. He interprets *elokim* to mean judges, and he says that when people see somebody has been hung by the court, they curse the judges and say, “look what they have done.” Therefore the Tora says not to leave him hang there.

This interpretation relates to the whole controversy over autopsy. Those who favor permitting autopsies argue that they are necessary to advance medicine which is in the human interest. The rabbis who oppose it are thinking of respect for the dead, *kvod habriyot*. Both are values. The end result was that the people in Israel cursed the rabbis, e.g., the Rabbinat in Israel, “*ki kilelat Elokim talui*.” There is clearly a conflict of values here.

We mentioned yesterday issues such as *mamzerut* and the status of women in Judaism. There are values involved here, but there are counter-values as well. We have paid a very heavy price for change in the status of women, the breakdown of Jewish home life, the destruction of marriages because women today do not live according to halacha. On the question of *mamzerut*, it is indeed possible that because we had a law of *mamzerut*, there was no adultery in Jewish homes. It was unknown in former days, because of the fear of producing a *mamzer*. Therefore, the “moral outrage” expressed yesterday against certain halachic norms should be weighed against other primary values. The halacha determines which values are to prevail.

We saw in the Mishna Brura and in the Rashbam how the rabbis sought to grapple with the derivation of values from the halacha

itself. My proposition is that the halacha itself, if we study it deeply enough, teaches us the Jewish priority of values.

Dr. Shimshon Ettinger:

The concept of *pekuah nefesh* pertains to the conditions under which I am obligated to violate a commandment in order to save a life. There are several Tanaic and Talmudic sources for *pekuah nefesh*, the main source being the tractate of Yoma, as mentioned by Rabbi Jakobowitz. Most of the sources discuss it in relation to Shabbat. The reason is that the rabbis were pragmatic and practical, and Shabbat, with all its laws, was the commandment that would limit our efforts to save a life unless it was ruled otherwise. The Rambam followed a different course. He explained that the reason why Sabbath laws are discussed in connection with *pekuah nefesh* is that *pekuah nefesh* does push aside the Sabbath, even though desecration of the Sabbath is seen as idolatry, and *pekuah nefesh* does not push aside the prohibition on idolatry.

Another well known source of *pekuah nefesh* is in the Talmud, in the tractate of Sanhedrin, where it discusses the three transgressions which one is forbidden to commit, even at the cost of one's life: murder, idolatry, and incest. A man need not sacrifice his life, and in fact should not sacrifice his life in order to perform other commandments. The Rambam comments that we learn from this that the laws of the Tora are not revenge on the world, but rather bring mercy, kindness and peace to the world. Professor Twersky, from Harvard University, in his book on the Rambam, asks why the Rambam adds this comment. Who ever thought that the Tora is the revenge of G-d? He answers that the Rambam was answering the Christians who said that the Tora was G-d's revenge to the Jews, his punishment.

The discussion of *pekuah nefesh* in the Talmud is mostly pragmatic and technical, about which violations of the law are preferable, under such circumstances. There are value questions that arise in the application of the concept. For example, there is a discussion in the later sources whether it is permissible to desecrate the Sabbath to save the life of a non-Jew or to save the life of a Jewish criminal. Most of the poskim discuss the issue substantively, without resorting to technical reasoning. The

Hatam Sofer, for example, asks regarding a criminal, how does one know who is really a criminal? How can we be the judges of our fellow man? Do we know all their actions?

The question of the permissibility of autopsy involves both the concept of *pekuah nefesh* and the concept of *kvod habriyot*. It is an interesting example of a conflict between these two values. The key question is what is the definition of *pekuah nefesh*. If we give it a narrow definition, then an autopsy performed without a specific patient in mind whose life is in danger, is not permissible because of *pekuah nefesh*. If *pekuah nefesh* is given a broad interpretation, then an autopsy performed now which at some point in the future will contribute to the ability of doctors to save lives is permissible. In strictly legal terms, it is really a question of defining the term *pekuah nefesh*,

The poskim from the eighteenth century onward have given a narrow definition to the term, that *pekuah nefesh* only applies to a patient whose life is in danger at the time of the suggested autopsy. The Nodeh Beyehuda asks if we were to permit autopsies because of some hypothetical patient in the future, why shouldn't we then permit the desecration of the Sabbath to prepare medicines that might be needed for some hypothetical patient in the future or permit a pharmaceutical factory to be open on the Sabbath because of the possibility of *pekuah nefesh*? One of the Talmidim of the Hatam Sofer does permit preparing medicine on the Sabbath if it is needed to be done even if there was no specific patient who required it right away. However, he too does not permit an autopsy when there is no specific patient who will benefit. The only posek that I know of who interprets *pekuah nefesh* in the broader sense on the question of autopsy is Harev Ouziel.

The Maharshal, in his book *Yam Shel Shlomo*, discusses if it is permissible for rabbis to decide together to change a law because of *pekuah nefesh*, if a certain law poses a danger to the Jews in their relations with non-Jews. He refers to the law which states that if the ox of a non-Jew gores the ox of a Jew, the former is required to pay damages. However, if the ox of a Jew gores the ox of a non-Jew, the Jew is exempt from paying. This law is bound to incite the anger of the non-Jews and cause them to attack us. The Maharshal rules that the law cannot be changed, even in a situa-

tion of *pekuah nefesh*. This indicates the limits of the halacha. The law may be interpreted in this way or that, but it may never be changed or invalidated.

Rav Moshe Feinstein gives a similar response in a totally different matter. He was asked if it is permissible for the bride to give the groom a ring at the wedding ceremony and say to him "you are sanctified to me." he prohibits it and warns against making arbitrary changes in the law. The halacha is a legal system. It is open to interpretation and is flexible within certain bounds. However, its laws cannot be changed arbitrarily whenever we think that they conflict with this value or that.

Dr. Hanina Ben-Menachem:

I would like to relate to the question raised by Rabbi Jakobowits whether there are values within Judaism or whether they are derived from outside. We must distinguish between the resolution of conflicts of values which is surely a halachic determination and the question of the source of these values. The very fact that there is a conflict of values signifies that there are values that are derived from outside the halacha, because if all the values were created from within, there would not be any conflict at all. For example, if there are two values: one, that I must speak the truth; the second, that I must save human life. Sometimes there develops a conflict between them, but it is only an apparent conflict. The real value that resolves the two is that one must speak the truth, providing that in doing so one does not endanger human life. Included within the value itself are the exceptions as well.

Values are universal. It does not make sense to speak of "Jewish" values or "non-Jewish" values. There may be a Jewish way of interpreting a value but the value is universal. I was quite moved by Professor Greenberg's remarks but I was not convinced by them. Yesterday's presentation by Rav Halevi is evidence that one should not ignore the dynamism of the halacha in the area of values. Rav Halevi spoke about improving relations with the non-Jew from within the sources and framework of the halacha.

The different perceptions of the halacha presented by Rabbi Jakobowits and Rabbi Jacobs as to whether the halachic system

is open or closed are the result of different underlying ideologies. There is an underlying ideology hidden in the presentation of any legal system. If one has a progressive ideology, then one will see the same system as more closed. Both rely on the very same sources, acceptable to them both. The dispute between them is actually quite narrow. It is not really an argument about how the halacha will develop or whether the halacha is able to make the changes we would like, but rather it is about how to present the halacha.

Prof. Avi Ravitzky:

In my presentation, I will deal with the central question of our conference, which is the relationship between the halacha, values, and the source of these values. I would like to open with three examples from decisions of three past Chief Rabbis of Israel and then try to suggest a general model. All three discuss the concepts of *darchei shalom* and *kvod habriyot* as part of the metahalacha, the moral, inner corrective of the halacha. This metahalacha sometimes seems to be in contradiction to the formal halacha. The whole question of what is the “framework” of the halacha is not clear. It is not just a legal system. It is a legal system and far more. It is the entire cultural and belief system of the people. For example, I have never heard that a legal system can require a person to act “charitably,” i.e., not to follow the letter of the law. Judaism does require it.

Yesterday, Rav Halevi said that *darchei shalom* applies only after the fact in our relations with non-Jews, when we are not dominant over them, and it does not apply in advance, *lekathila*. The Rambam, however, in Hilchot Melachim (chapter 9) clearly states “This is one of the attributes of G-d which we are commanded to imitate, and his mercy is over all his works.” He quotes this verse as a model for the principle “and you shall walk in his ways.” He rules that one must support the non-Jewish poor together with the Jewish poor because of *darchei shalom*, because “The Lord is good to all and his mercy is over all his works.” I asked Rav Halevi if the Rambam wasn’t saying clearly that one must treat the non-Jew charitably in order to follow in G-d’s ways. Rav Halevi replied that this was just a recommendation of the

Rambam, to encourage people to act charitably, but such behavior is not required *lekathila*, only after the fact.

Rabbi Unterman, referring to the Rambam, categorically states that *darchei shalom* is the basis of morality in the Tora. It is the overriding principle, the inner corrective of the halacha or the metahalacha, if you will. In his view, the real meaning of *darchei shalom* derives from the morality of the Tora, and it is not merely a “charitable act” or a means of self-defense. He explains that the Rambam quotes the verses “and his mercy is over all his works” and “its ways are ways of pleasantness and all its paths are peace” as the source from which the sages derive the authority to make rulings on *darchei shalom*, to act righteously and charitably (*hesed*) towards non-Jews. Rulings based on *darchei shalom* derive from the depths of the Tora’s morality. Rav Unterman says that these verses even take precedence over the concern that by giving charity to the non-Jew, one is taking away from the Jewish poor, and thus infringing upon a commandment in the Tora. The corrective here is, in a broad sense, within the framework of Judaism. He concludes, “We ought not give the title ‘observer of Tora and mitzvot’ to one who refuses to observe the moral obligations which relate to others, as in the rulings of *darchei shalom*.”

This indicates the breadth of interpretation within Tora. On the one hand, an important, liberal rabbi such as Rav Halevi interprets the Rambam as merely recommending charitable relations with the non-Jew. For Rabbi Unterman, on the other hand, it is seen as the overriding principle of the Tora itself.

My second example is a ruling by the former Chief Rabbi Goren who discusses being charitable or righteous (*hassidut*) in connection with protecting the lives of non-Jews. In capital offenses, there is an attribute of righteousness which we should adopt even though sometimes it is contrary to the halacha itself. For example, in the Tora, Jacob is angry at Simeon and Levi for killing Shechem, even though they acted according to the halacha. The Rambam explains that they deserved to be killed because they did not observe the seven Noabite laws; they did not set up judges as commanded. However, Jacob expected his sons to follow a higher standard of morality and justice, to be charitable and righteous in

their behavior toward their fellow man, even towards idolaters like Shechem and family.

My third and final example is from the writings of Rav Kook, The first Chief Rabbi in Eretz Yisrael. He discusses values or metahalacha which derive from an inner spontaneity of natural morality, which is not commanded and which sometimes must overcome what may seem to us to be the literal meaning of the halacha. Rav Kook writes in his book *Orot Hakodesh*,

Love of man must erupt from the source of hesed, not out of commands of law. Universal love of man must be spontaneous, not by commandment, but far greater than that, as a powerful spiritual drive from within. However, the universal love of man has to face difficult challenges. It must overcome the many contradictions in the sources, which, like stumbling blocks, are distributed in many sayings in our literature, which interpret the halachot in a superficial way. Love of man must overcome superficial interpretation of these halachot and the attributes which derive from limiting the revealed part of Tora and from limiting the morality of our people.

All three Rabbis consider morality to be an inner corrective of the halacha. Is their concept of morality derived from inside the halacha or does it come from outside, from western culture? In my opinion, this question is unimportant. It is significant with regard to the halacha but not in regard to the metahalacha or values.

I will offer an example from theology. We are all familiar with the Socratic question, does G-d command something because it is good or is it good or become good because G-d commanded it. On this question, there is a controversy between two religious movements in Islam, the Ashariya and the Muatazila. The Ashariya interpreted the story of the sacrifice of Isaac that because G-d commanded that Issac, a human, be sacrificed, sacrifice is good, even if its end result is murder. The Muatazila interpret good the other way. G-d only commands what is good. Therefore, in the story of Abraham arguing to save the people of Sodom, it is possible to come to Him and ask if He will kill the righteous with the wicked, or if the Judge of all the land will not do justice.

In the Jewish metahalacha, there is the obligation to “walk in his ways.” Goodness does not mean that there is a good that is beyond G-d which G-d himself is bound by. Good is not good because G-d commanded it arbitrarily. Good is good because G-d himself is the essence of good. G-d is compassionate and therefore you must imitate him and be compassionate. In the halacha, I must obey his commandments. In the metahalacha, I must do what G-d is. I must know what he is in order to “walk in his ways.”

The halacha is Tora *min hashamayim*, from heaven. The metahalacha is Tora *leshem hashamayim*, for the sake of heaven. The halacha was received by Moses at Sinai. It has a formal legal structure, which is binding. If external factors are introduced into the halacha, the system is undermined. The metahalacha is for the sake of heaven. The determining factor is the purpose, the teleology. We want to achieve *darchei shalom* or *kiddush hashem*. We want to prevent *hilul hashem*. We want to reform the world.

Unlike the metahalacha, if there is no ultimate purpose of the halacha, it is not revoked. But, if the teleology of the metahalacha does not apply anymore, i.e., *darchei shalom* are not achieved in that way or *kiddush hashem* is not the result of a deed, then the metahalacha does not apply anymore. The importance of the metahalacha is its intent, its goal, and this must be seen through the prism of the reality, the given. Would I try to achieve a *kiddush hashem* without first considering what things today would be considered a *kiddush hashem* in the eyes of men?

When, in the Yerushalmi, it tells of Rabbi Simeon ben Shatach who returned the loss of a non-Jew, it says that he said that he didn't want the Gentiles to say that Rabbi Simeon ben Shatach is a barbarian. He wanted the non-Jews to say blessed is the G-d of the Jews. We must take into account what the non-Jews say and think of us. External factors, therefore, do influence the way we reach the goals we set in the metahalacha. We saw this in the response of Rav Moshe Feinstein to the convert who wished to visit her dying mother. He didn't want the Gentiles to think that she converted to a religion which honors parents less than her original religion did.

I will conclude with an example from two groups which have the most extreme attitudes toward the state of Israel and Zionism, the Satmar or Neturei Karta, and the disciples of the Mercatz

Harav yeshiva. It could not be said that either is acting outside the framework of the halacha. I would like to show how they take what they consider to be metahalacha and make it more important than the halacha.

In the tractate of Ketubot, it is stated that G-d gave two oaths to the Jews: not to rebel against the nations, and not to climb over the wall. The Satmar view these oaths as the central principles which determine our Jewish understanding of historical events. The Satmar Rebbe explains that the Rambam did not include these oaths in his index of commandments because they are more than commandments. They are the most central principles, the very essence of Judaism, the distinctiveness of the Jewish people.

The disciples of the Mercaz Harav yeshiva ask why the Rambam did not include the commandment of settling the land of Israel in his index of commandments. Unknowingly, they answer similarly to the Satmar. The Rambam did not include it in his list of commandments because it is equal in importance to all the other commandments combined. It is the metahalacha, the over-riding principle, which is, in a sense, a corrective to the halacha itself.

Prof. Ariel Rosen-Zvi:

I would like to tell a story which I think will indicate how problematic these issues are. I once discussed a difficult case of the *aguna* with Chief Rabbi Eliahu. He told me that, strictly speaking, according to the halacha he was under no obligation to try to seek a solution for the woman because she had lied to the Beit Din. However, he said, "I acted leniently, generously in this case," finding a solution to the woman's problem. I asked the Chief Rabbi to explain. Wasn't the plight of the *aguna* the concern of the posek? He replied that the Beit Din is legally not obliged to solve the problems of those who lie to the court, or who try all kinds of tricks.

Rav Moshe Feinstein wrote a response on the question of an *aguna* that one should be lenient in helping to solve the problem of the *aguna* if she is observant, i.e., he tells the Rabbi who asked the question to check to see if she will keep the laws of *nida* (family purity). The practical conclusion here is that the rabbi need not

try all possible ways to permit her to remarry if it is likely that it will result in promiscuity, i.e., one should relate solving the problem of the *aguna* to the general question of Tora observance. This is the way I understood the response and several others whom I consulted concurred with this interpretation. In actuality, Rav Eliahu and Rav Moshe have the same approach, but with different practical results. The question we must ask is whether the posek will use the technicalities available to him within the halacha to expand the limits of the halacha. It is a question of the motivation of the posek.

Rav Halevi said yesterday that the halacha is actually compelled to reach a far-reaching conclusion on *darchei shalom* because of considerations of its image in the world, and also because of our own feeling of discomfort with discrimination against the non-Jew, a discomfort which the outside world has instilled in us. Professor Greenberg said the need for change in the status of women comes from outside the halacha because the status of women in Judaism has always been influenced by their status in other societies. There is a difference between wanting to change the law because of outside influence and wanting to change it because of an inner discomfort.

I agree with the approach of Professor Ravitzky that uprooting parts of Tora to remedy the plight of the *aguna* is itself part of the Tora. We learn from this that the Maharsha who explained that the value of *darchei noam*, for example, justify “uprooting” the Tora, because the Tora itself is based on these principles. What seems on the surface to be uprooting is really building. The technicalities needed for building are *darchei shalom*, or *kvod habriyot*, *pekuah nefesh* and others. You need some kind of anchor within the halacha on which to base the solutions you want to give. There is a saying, “give me an opening the size of the eye of a needle, and I will open up the world,” i.e., the smallest anchor can suffice if the will to find a solution is there.

Many of the problems in the halacha today are not really halachic in nature but rather sociological. Neither the Chief Rabbi nor the rabbis from the haredi community offered halachic reasons for their opposition to women serving on local religious councils. They gave answers like, the time is not yet right, this generation is not ready for it. What they really want to do is

preserve the social fabric of their communities from what they perceive as the threat from outside. This was the danger that was mentioned yesterday in the discussion. The poskim rule for one small community but the ruling affects the broader society whose interests they do not consider.

I was present when the issue of including women on religious councils was discussed with Chief Rabbi Shapiro. Sources were brought from the halacha to support the inclusion of women. Rabbi Shapiro answered that it is really permissible according to the halacha, however, a ruling on this issue must be acceptable to all parts of the Jewish people. I asked him whether the Chief Rabbinate itself is acceptable to all parts of the Jewish people. It is not, and yet he is willing to serve as Chief Rabbi! I appealed to him to solve the problem of the public that accepts his authority and not to consider the opinions of those who don't even recognize his authority. This, in my opinion, is the root of the problem. Even the more moderate rabbis look over their shoulders to seek the reactions of the haredim.

Dr. ? :

I would like to comment on the so-called loopholes which allow the halachic system to adapt to new conditions. They really derive from a thermodynamic model. There can be no life without an open system, i.e., a system which exchanges energy with the environment. The holes do not have only marginal importance; they are what makes the system viable. We thank G-d each morning for giving us holes which allow our bodies to exchange energy with the environment.

Why should the halachic apparatus be sustained at all, if its rulings are the result of the motivation of the posek, his values, subjectivity? The reason is that values alone cannot be the basis for anything. They are open to discussion and definition. Several people have pointed to this value or that as the most important, as the overriding principle. Values are not clearly defined. What is peace? We can speak of the value of life, but what is life? Some of our most valued principles are not defined at all, at least not openly. No legal system can be based on lofty values that can not be clearly and publicly defined, as, for example, values derived

from the Kabbalah. Our norms must derive from another source. They are derived from G-d, from Heaven. The value system which is influenced by external circumstances exists parallel to the norms of the Tora, but one cannot take from one in order to change the other. They must develop together, parallel to each other, but one cannot make deductions from one to the other.

Rabbi Norman Lamm:

The theological question which relates to our discussion is what comes first, doing good or following the law, the commandment. There is a dispute in the talmud, in the tractate of Brachot, between Rabbi Ishmael and Rabbi Simeon Bar Yohai whether a person should learn Tora at set times so that he can also earn a living or is he obliged to devote his whole day to learning. Rabbi Simeon Bar Yohai asks, "If one seeds at seeding time, and plows at plowing time and reaps at reaping time, when does one have time to learn Tora?"

The Talmud quotes two verses that seem to contradict each other. It says in Deuteronomy, "that you may gather in your grain, your wine and your oil," that you are supposed to work at the appropriate time, to earn a living. In Isaiah, there is a verse which says, "Strangers will stand and watch over your sheep." This verse implies that others will do the work for you. The Talmud resolves the contradiction by saying that when the Jews do G-d's will, then "Strangers will stand and watch over your sheep" and when they do not do G-d's will, "you may gather in your grain . . ." i.e., you will do the work yourself. However, this seems to contradict the first part of the verses in Deuteronomy, "and if you will carefully obey my commands which I give you today . . ."

Rabbi Tsaddok Hacohen gives an interesting explanation. He says that there is a difference between doing the will of G-d and obeying the commandment of G-d. The commandment of G-d is "And if you will carefully obey my commands," the law, the minimum which G-d demands of us. If we just follow the letter of the halacha, it is not considered doing the will of G-d. Followings G-d's will demands more from us; it demands a measure of piety and righteousness, acting not according to the strict letter of the

law. G-d's will is not always expressed in the law itself and it is often beyond the ability of the average man.

The problem is how do we know what is G-d's will. The halacha is clearly defined. But what is his will and who among us has the authority to define it? As a *baal halacha*, how do I determine which values are more important, which are in fact his will? Perhaps by emphasizing one value, I am in fact damaging an equally important value. The answer is that there may, in fact, be hidden values in the halacha, which are contained in the technicalities available to me in my decision making.

The whole question of values is a later invention, dating from Kant. The halacha does not discuss values as such. The halachist is within his rights in saying,

Don't bother me with values, because your values have as much pilpul as my halachot and can lead to destructive results, just as the halacha can. If I have to choose between relying on your subjective sense of what is a good value and what is bad or simply following the halacha itself, I would rather trust the halacha as ultimately yielding what is good for society, if not for every individual. Values keep changing depending on the social context.

This does not mean that the Rabbi must be closed or removed from society, but he should be skeptical about the values which it espouses. He must act honestly and courageously without worrying about what others will say and he must have trust in the halacha.

Rabbi Walter Wurzberger:

There is no absolute distinction between halacha and metahalacha. In philosophy, there was a period when we distinguished between ethics and meta-ethics. Now we have come to the conclusion that they are really independent. Several years ago, I wrote an article on metahalachic prepositions in which I wanted to show that there is an interaction in both directions. The halacha influences the metahalacha and the metahalacha influences the halacha. There is no concept of ethics as such. There is a concept

of what G-d demands of you, “and you shall do what is good and just,” which comes from within, an obligation to follow one’s conscience. The Hatam Sofer ruled that one should not inject philosophy or Kabbalah into halachic decisions. He recognized, of course, that he himself was influenced by such considerations. However, he says that the essence of Judaism is to look to the halacha for guidance. When the Rambam, for example, uses the principle “Its ways are ways of pleasantness and all its paths are peace” it is a means by which he interprets the Tora. If there is room for interpretation in a halacha, then the guide is *darchei noam*.

Moral values do not stand by themselves outside the halacha. In determining the halacha, one cannot decide on the basis of values that are derived from the outside. One decides according to what our conscience demands from us, which is to do what is good and just, following the precept, “and you shall do what is good and just.” Our conscience demands certain values of us.

Rabbi David Gordis:

The concepts we have been discussing are actually the bridge that connects the practical halacha and the more abstract metahalacha. There is a tendency to think that if we limit our discussion to the halacha itself, we will overcome the question of subjectivity and value priorities. There is some truth in that, however, I do not think we can eliminate subjectivity entirely. The mechanics of the halacha prevent arbitrariness and anarchy in the halachic process. The history of the halacha reflects the influence of the metahalacha, the corrective to the halacha, on the halacha. The halacha reflects the metahalacha which accounts for the variety in the halacha, the subjective factor which influences the halacha. This is the influence of the human factor on the halacha. It is a desirable influence and not something we should try to overcome. We are fooling ourselves if we think that a “purely” halachic discussion will be free of that human, subjective influence.

We should, therefore, focus our attention on the point where the metahalacha and the halacha converge. We must confront issues boldly and directly and not try to avoid challenge by saying

that we, as humans, cannot decide which values are more important. We must reach decisions based on our human reason and if it leads to many different ideas, then that is all right too. That is pluralism, based on different philosophical approaches, and it is welcome. I agree that the mechanics of the halacha are central to our discussion, however, we should not use their inability to allow for change as an excuse not to progress on issues that demand our attention.

Rabbi Harold Schulweis:

It seems to me that we are now at the real crisis of our conversation. On the one hand, we are discussing a concept of the halacha which is supra-moral, i.e., in Kantian language, a theonomous ethic. If you have a theonomous ethic, then you can not judge the halacha. The halacha judges you and your ethics. Therefore, the question whether ethics come from sources inside or outside is ridiculous. There are no outside sources. Something is ethical because G-d commanded it and you cannot ask any serious questions about it.

I think that what has been expressed here is the recognition that theonomous ethics is not sufficient because we do not have other notions as to what is moral and immoral. There are times when we have the audacity to challenge the theonomous ethic. For example, the Midrashim which end with a "*lemadtani*," seem to contain an autonomous ethic where the prophet seems to reject or defy a biblical verse or command. Part of the excitement of this dialogue is that G-d says that he made a mistake.

Can you do anything within the halachic process to correct what you sense is an immoral act or rule? You can say that what seems to be immoral is not really immoral, because G-d said it and who are we to judge G-d. The whole issue is then dismissed. But, if you do not give some weight and credibility to your moral sense, is change possible? If you change the halacha, then it loses its power; it loses its capacity to say "no." On the other hand, if you can not use the halacha to eliminate immoral consequences, then you are dealing with either an immoral halacha or a supra-moral halacha, which binds you either way. These Kantian questions are very relevant. An attempt has been made here to try to blunt the

sharpness and tension of the opposition to change through a kind of semantics.

We must show greater candor as to the humanistic aspect of our decision making. We are really divided by two different notions of how to regard the halacha. There are many things that I do not accept in the halacha or in the Bible because I regard them as being immoral. No text, neither written nor oral, is absolutely binding upon me. I admire and applaud those who do not agree with me and who are instead going to use their ingenuity and moral sense to sort of squeeze in their moral ideas into the halacha, using the concepts we have been discussing. However, I think when it comes to the ultimate crunch, they are going to have to decide – either they accept a theonomous ethic or an autonomous ethic.

Rabbi Jeffrey Dekro:

I agree with Rabbi Schulweis, and I would like to add that when a number of us choose an autonomous ethic, we still want to find ourselves doing it clearly within a sense of “*Tora min shamayim*” and by doing so, offer an alternative halacha which is not Orthodox halacha.

There are so many in the United States who are trying to develop a so-called “Exodus theology” which draws on values and leads to halacha. It says very seriously that Shabbat, Pesach, other holidays and many of the other halachot have within them a very strong, explicit, and sometimes implicit, set of values that dictates a set of behaviors that we actively want to adopt because we are Jews. In that sense, the Tora is the halacha and the prophets are the metahalacha. We also draw strongly from the Talmud and the Agada.

The greatest challenge of the haredi community is that they boldly present a view of Judaism which is maximalist. Their Judaism has political and value implications that they are willing to manifest in their daily lives. We fail to meet their challenge when we try to have a halacha which is somehow distinguished from its value base. The halacha is irrelevant to most Jews in Israel and in the Diaspora because they see it as separate and uninte-

grated to their lives and unable to influence their lives in any meaningful way.

Dr. Shimshon Ettinger:

I would like to address my remarks to what Avi Ravitzky and Ariel Rosen-Zvi said earlier. We differ in our interpretation of the same phenomena. Halachists are influenced by subjective factors and values. The most fundamental question before us is whether one puts oneself inside or outside the system of the halacha.

To act more leniently, not according to the letter of the law, is itself a legal norm which is part of the legal system. The halacha recognizes it as a legitimate consideration of the halachist. The halacha has general principles or values within it that the posek may consider when he decides the halacha. These principles are basic and intrinsic to the halacha itself. Calling it metahalacha is merely a semantic differentiation.

The nature of the rule involved is significant, i.e., whether it is a consideration of returning a loss to a non-Jew or whether to desecrate the Sabbath for a non-Jew. In both cases, we consider the general principle of "and you shall do what is good and just." However, the seriousness of the violation involved is an important halachic consideration. There were cases in the past where the rabbis even suspended a law, e.g., in the Yerushalmi, on *hafkaat kiddushin*. It was done under extraordinary circumstances. It was done however within the framework of the halacha, by those who were within the system and saw themselves as bound by its authority. If those on the outside suspend laws, the authority of the entire system breaks down. There is a mutuality of influence between the law and the dayan. The halacha influences the dayan and the dayan influences the interpretation of the halacha.

There have always been controversies within the halacha, like the dispute over Zionism and the State of Israel with Mercaz Harav or the Neturei Karta. These are controversies within the framework of the halacha. On the matter of the refusal of the Chief Rabbinate to permit women to sit on religious councils, their decision was based on a value judgment. Rav Shapira is not afraid of the reaction of the haredim. He himself is not convinced

that the time is ripe for such an innovation. He did say that a time will come when women will be included. I am sure that if women do get to sit on the religious councils, the rabbis will not walk out.

Rabbi Irving Greenberg:

The issue is not whether we choose between the inside values or outside values, but rather that at times, certain inside values are heard louder than others. It is undoubtedly true that what you hear is influenced by the culture and world around you. The value of *tzelem Elokim* is intrinsic to the halacha. The Chief Rabbi is trying to make temporary values absolute, in opposition to its eternal values. This is where I take my stand.

The laws of the halacha have no claims in their own right except that they are in the service of G-d. They are never presented as laws which stand by themselves. The posek cannot rule correctly if he is not aware of this. Those who claim that they are simply "ruling" are doing something worse. They have hidden values which they are projecting into the halacha, perhaps out of ignorance. Those are not the hidden values of the halacha.

Rabbi Norman Lamm:

It is unfair to say that those who are not sensitive to outside values cannot come to a decent conclusion. We have a history of several thousand years of enlightened halachic rulings, by men who were not aware of outside values, who were totally within the halacha. They did not come to barbaric, cruel conclusions. We should not take the painful exceptions that we have been talking about and assume that they are the norm.

Rabbi Irving Greenberg

It is impossible to "*posken*" halacha without being responsible to the written Tora, the Agada, and their values. Nobody ever ruled that way and those who claim to do so today are, in fact, projecting their own personal values into the halacha. The Chief Rabbi is really saying on the issue of women sitting on religious councils that halachically speaking, he agrees that women are allowed to sit, but that he doesn't want to sit with women. He finds

it offensive that women should decide who should be a rabbi. That is his privilege, but I, as a halachic Jew, am not bound to uphold his cultural prejudices. I am saying that we should admit all our values; put them on the table.

Our dispute is over what are the values in the Tora and the halacha and not over who is outside and who is within. It is true that the halacha is a legal system but it is more than that because it does not present itself only as a neutral legal system. It presents itself as the word of G-d who has ambitions for us and plans for his universe. We have no right to ignore these elements when we ourselves are trying to be faithful to the halacha.

The non-Orthodox and secular positions are not merely outside positions. They are making an additional claim to hold positions in good conscience that are in contradiction to the halacha and they want to know whether they have the moral, ethical and religious right to hold them. At some point, we must address ourselves to the question of the claims of pluralism within Jewish life. No matter how liberal I am and no matter how visionary the halacha is, there will still be value gaps and behavioral gaps between the halacha and the non-Orthodox community. We must discuss how we should relate to it in order to live together. We see the conflict today in the dispute over cinema on the Sabbath in Jerusalem. The question is unavoidable.

Rabbi Arthur Green:

Thank you Yitzchak (Irving) for getting the conversation back on track a little bit. I had been feeling that our discussion this morning was rather trivial, about whether values derive from inside or outside, and, if you will forgive me, boring. We are in the strange position here of being a group of Orthodox Jews who are not themselves *poskei halacha* and non-Orthodox Jews who are not really experts in halacha.

We are really a group of thinkers more than anything else.

I feel that the non-Orthodox world is a bit on the margin of this discussion and maybe not quite welcome. I suspect that people here don't really want to hear about our concept of halacha. It's a little embarrassing and better not said. You can deal with us better as long as you don't know what we do and don't do. I think

this is the tone of the conversation in this room. We ourselves are embarrassed because we know how awful our communities are out there and how ignorant they are, etc. We would rather let the Orthodox talk about problems in their world instead.

In this group, we share many things in common. We share western values, and an interest in world Jewry. We are concerned with human rights. We share a love for and a loyalty to Jewish sources. We are all engaged in a life of reference to Jewish sources. The hardest thing for us to talk about is the halacha. This is what we don't share in common. The discussion was to be based on the source book. As one who comes from outside the Orthodox world, I don't know what to say. Some of the things in the booklet are quite awful and some, so beautiful. I feel quite marginal to the discussion about whether the posek is a scientist or not. I am dissatisfied with the communication we have had between us. Perhaps if we discussed Agada instead of halacha, for example, the commentaries on *tzelem Elokim*, we could teach each other and share a relationship to the sources without this barrier of halachic Jew – non-halachic Jew. There is a lot of defending going on here, of the poskim, of the halacha. I don't need it defended. I love it and yet, I am not part of it.

I belong to a generation of Jews who live half inside and half outside. I could never subject myself to a posek who is also not half outside. It would be a betrayal of my own self, of my own "outside" self. When I teach Judaism, I always teach from outside and from in. I say something about Judaism and then I bring in history of religions or a comparative point of view. I live in both worlds, and I'm not making a judgment whether it is good or bad. Our talking around halachic issues is not working. I would like the non-Orthodox here to offer everybody a *heter* – you do not have to defend the halacha. It's O.K. We love it. We realize we are outside it and you realize we are outside it. Can we move beyond it and begin to talk about where we really are?

Rabbi Louis Jacobs:

Several have spoken of the halacha as if it were a defined entity. This is not accurate. Everything that a great halachist says becomes part of the process. Therefore, those who oppose autopsy

in the sources based on the Nodeh B'Yehuda do so because they see the word of G-d in the opinion of the Nodeh B'Yehuda and to disagree with him, even on excellent grounds, is to disobey the will of G-d. The rabbis did not decide between the conflicting values of *kvod habriyot* or *pekuah nefesh* on this issue. They came down on the side of the Nodeh B'Yehuda.

It is important to introduce a historical consideration to explain why the Nodeh B'Yehuda ruled that way. He ruled in the late eighteenth century, in response to a question sent to him from London. John Hunter was then beginning experiments with autopsies and the Nodeh B'Yehuda was afraid that if Judaism will permit autopsies, he would use Jewish corpses, since the Christians forbid using their corpses. That was his real motivation. He advanced very weak halachic arguments to support his prohibition. Why should contemporary halachists be bound to what he said in response to historical circumstances decades ago?

Rabbi Jakobowits said earlier that the question of *mamzer*, although painful, is really a conflict of values. It is a conflict between the pain of the *mamzer* and the preservation of the Jewish family. If we were to approach this issue objectively, I cannot image anyone saying that, in this conflict of values, it is right to penalize a person and his descendants forever. This is contrary to the spirit of Judaism and contrary to our ethical ideas, whether they are autonomous or theonomous, and it is contrary to our conscience.

Rabbi Irving Greenberg:

Every time a soldier is sent to the front to die for the nation, a choice is being made to sacrifice this individual for the sake of a larger collective.

Rabbi Louis Jacobs:

Most reasonable people would agree that sending a soldier to the front is a painful but acceptable choice. Most would not agree on the question of *mamzer* if they were left to decide on their own reason. The reason you see them as comparable is because you believe that the law of *mamzerut* was given by G-d. Would anyone here tell me that if it were not in the Tora, and the Tora being the

word of G-d, that they would favor such a law or would have ever thought of such a law? Will they admit that the law is abhorrent and monstrous but that they are bound by the fact that G-d said so? It really comes down to the question of revelation, whether one believes that the entity called halacha is the revealed words of G-d. If I believed that, then I would believe that it must be without any amelioration or tampering because you cannot tamper with the word of G-d. I disagree that you can look to the written Tora and invoke the concept *tzelem Elokim* to find a remedy for the *mamzer*.

Rabbi Irving Greenberg:

There is a half truth in what you are saying. There is no question that we defend *mamzerut* in part because it is the word of G-d. However, I object to the absolution of the contrast. I agree that *mamzerut* is a moral problem and I think the halacha felt it long before me. I do my best to reduce it or eliminate it. However, I will not make an absolute statement that there is never going to be the sacrifice of a lesser good for a higher good because that is the essence of all moral systems, including yours.

Rabbi Harold Schulweis:

Nothing follows from a theological proposition like *tzelem Elokim*. You can believe in *tzelem Elokim* and treat the *mamzer* harshly. You can have capital punishment. Everything and anything can be founded on *tzelem Elokim*.

Prof. Avi Ravitzky:

As a human being, I am limited in my understanding of which values are more important than others. Nonetheless, I am obligated to decide according to the guidelines set forth in the Tora and according to morality as I see it. There are no absolutes. We must make value judgments using the techniques of the *metahalacha* and following the principles set down in verses such as "The Lord is good to all, and his mercy is over all His works."

Rabbi Harold Schulweiss:

The verse “you should love your neighbor as yourself” is interpreted by the rabbis in contradictory ways. One says it refers to Jews exclusively. Another says it does not refer to Gentiles and a third says it refers to Jews who observe the *mitzvot*. These marvelous concepts of *darchei shalom*, *kvod habriyot* and *tzelem Elokim* are dependent on how they are interpreted and applied within the halachic process. In reality, the halacha contains widely contradictory conclusions. It is not a moral guide at all.

You make the claim that the halacha has some sort of divine validation. I do not make such a claim for my ethical system. The corrigibility of my system is totally different from that of yours.

I disagree with Arthur Green. This is a terribly important conference. It is a wonderful occasion to talk with distinguished Orthodox people who are willing to at least examine some of the prepositions of the halacha. One indication of the real philosophical problems of the halacha is the various consequences of the different interpretations of the concept *tzelem Elokim*.

Rabbi Immanuel Jakobowitz:

It is as important for us to know where we differ, as to find the common ground which unites us. In this, we must be honest and not try to blur the boundaries or try to agree with each other. We must acknowledge that there are positions which are unbridgable.

Dr. Gordis asked yesterday, what happens if the music is wrong? My answer is if a Beethoven is wrong and you can correct it, you have new music. It may sound better, but it is not Beethoven. If the music is wrong in the halacha, don't correct the halacha and then claim that it is still halachic Judaism. It cannot be both. If the rabbis did it, then they are the Beethovens. If those from outside the tradition who are no longer in the line of the Nodeh B'Yehuda and the Hatam Sofer think that the music is wrong and correct it, they may not claim that it is being done within the framework of the halacha. Only when you are within the tradition, can you argue with the poskim.

I disagree that the rabbis make rulings for all the Jewish people. The poskim rule for those who submit to their rulings and for no

one else. The entire Responsa literature is composed of questions asked by individuals and the answers given by rabbis. Rav Moshe Feinstein did not give abstract Responsa. He ruled for a community which recognized his jurisdiction and not for a constituency that did not. He did not have to consider the needs of *klal Yisrael*. In Israel this is not the case and this creates a problem. The Rabbinat has a constituency which does not recognize its authority. Its authority derives not from those who subscribe to its jurisdiction but rather from the Knesset. This is unhealthy. It is an untraditional Jewish situation that we have never had before.

I look to the Tora to give me absolute values even if they may conflict with other values such as individual liberties. For example, if the Tora tells me that homosexuality is an abomination and forbidden, then to me this is the absolute value. We must have compassion and understanding but the value we have is that it is an abomination.

It is dangerous to take concepts like *darchei shalom* or *tzelem Elokim*, which are monumental ideals in Judaism, and make them a substitute for the halacha. They are part of the halachic process. The metahalacha is a useful guide in the gray areas, where the law is not clearly defined. In areas which are black and white, like homosexuality, or the marriage of a divorcee to a Cohen, metahalacha is not useful. I may not like the result or know the reason, but the halacha is clear and there is no room for interpretation.

When I received the invitation to this conference, I had doubts as to the suitability of the topic. The whole concept of a bill of rights is something alien to the Jewish way of thinking. The rights of man is a modern concept. In classical Judaism, we talk of commandments. We see the relationship between two people as being what I owe someone else, not what he can claim from me. This is not just a semantic distinction, the Tora says "*patoach tiftach*" in connection with the laws of charity. Does it mean that the poor man shall stretch out his hand to receive, or that the rich man shall open up his hand and give? The rabbis responded that the commandment is directed to the rich. It is the obligation of the rich to give to the poor.

Today the whole world suffers from a rights complex. Our children are brought up to believe they have rights. Everybody

claims rights, workers, women. This is undermining our moral order because people think in terms of what society owes them and not what they owe to society. The Jewish contribution is that we are to think in terms of mitzvot, of what we owe to others and not what others owe to us. This is fundamental. It is one's obligation to recognize the rights of another, not to claim rights. The Midrash explains that man was created alone so that one man will not say to his neighbor, my father was greater than yours and claim rights.

Prof. Ariel Rosen-Zvi:

As a jurist, I would like to comment that there cannot be a situation where there are only obligations and no correlative rights. A child must honor his father. However, he must be given food because the Tora requires it as *tzeddaka*. This is a correlative right. This is true in relations between husbands and wives as well. Each obligation carries with it a correlative right.

Rabbi Norman Lamm:

From an educational point of view, it is important to distinguish between rights and obligations. We should be concerned, first and foremost, with our obligations toward G-d, toward man, toward our people and toward our country. This does not mean, however, that we abnegate our rights.

Session Five:

Recommendations

Rabbi Norman Lamm:

I would like to open this final session with some words of Tora related to our discussions. There are two opposite tendencies in Judaism, which actually complement each other. There is an expression of a desire for peace and unity and at the same time, the encouragement of controversy. We find in the priestly benediction, and in other prayers a desire for peace. The Beit Yosef explains that we read in the daily morning prayers an excerpt from the Mishna in Zevahim, “eize hu mekoman” because it is the only chapter in the Mishna which does not contain a dispute. We begin the morning with prayers for peace. The rabbis explained that disputes multiplied in Israel as a result of exile. Controversy, therefore, is seen as something negative, something to overcome in order to achieve peace.

We learn the opposite idea from the Tractate of Avot where it is stated “Any controversy which is in the name of Heaven is destined to result in something permanent: any controversy which is not in the name of Heaven, will never result in anything permanent.” It then asks “Which controversy was in the name of Heaven? The controversy between Hillel and Shammai. And which was not in the name of Heaven? The controversy of Korah and all his company.”

How does this relate to our desire for peace? Rabenu Yona explains that controversies for the sake of G-d are long-lasting. One day it will be on this issue and tomorrow on something different. Controversies will continue for a long time and add years of life to those who are engaged on them. A controversy that is not for the sake of Heaven will burn itself out. It will die out like Korah and his company.

The controversies that result in something permanent we call pluralism. Pluralism is desirable and will lead to something per-

manent if it is for the sake of Heaven. If it is not for the sake of Heaven, it will lead nowhere. Our discussions here have been satisfying, and interesting. We have gotten to know each other, to understand each other's point of view. However, we have been locked into the same dispute for two years now, arguing over the authority of the halacha and whether we must act within the halacha or outside of it. I think that two years is enough. If we continue on this same track, we will not reap results. I am afraid it will be a controversy which will not lead to something permanent. Let us try to ensure that the controversy between us be for the sake of G-d, so that it can achieve something of permanence.

There are several possible alternatives for future conferences. We could continue the discussions we have had for the past two years, with a difference. We should confront the issues that divide us head-on, directly. We can discuss current problems facing the Jewish people and their halachic solutions. We can adopt Rabbi Jakobowitz's suggestion that we study in depth the values that are within the halacha, with the intent of increasing our understanding of them and to find ways to put them into practice. We could discuss the rights of man in Judaism or study topics in the Agada or Tanach as Rabbi Green suggested earlier.

Prof. Ariel Rosen-Zvi:

The public usually considers the "religious" community to be a monolith. From the discussions we had here, one thing that was clear was the differences of opinion between us. Recognizing the fact that these differences exist is the beginning of dialogue. It begins by recognizing that there is a conflict between the normative framework of the halacha and the lifestyles prevalent in our society.

This brings us to a central question. What are the educational responsibilities of the rabbis as spiritual leaders of the Jewish people? There is a public out there which is ignorant of Jewish sources, of the message of Judaism. There is a crying need for education, to reach out to the public. Instead we find that the rabbis have taken a harder line. They have preferred to isolate themselves from the people. It is important that the message of

dialogue that we have had here be transmitted outside so that the public can see that there is pluralism in Judaism. We should meet again soon, and not wait two years between conferences.

Prof. Hava Lazarus Yafeh:

I would like to discuss models of pluralism in Judaism which would explore what are the parameters of Judaism that we share and where are the limits beyond which a dialogue is impossible. The non-Orthodox are seeking fragments to hold on to from Judaism. They cannot accept the whole package as do the Orthodox. Can we find a common denominator that can unite us and allow dialogue? Are there historical models we can build upon to achieve co-existence?

Rabbi Arthur Green:

We should not continue discussing halacha. We should rather discuss a subject like *tzelem Elokim* or human rights and have five or six people present sessions based on the Bible, the Aggada, Kabbala, halacha, etc. It will be interesting to hear the different approaches and to engage in a dialogue through learning. However, it is important to expand our ranks and include more secular Jews, Reform, and Conservative and more women.

Rabbi Harold Schulweis:

I would like to suggest that each of us prepare for the next conference a statement and sources about those spiritual and cultural heroes that have influenced our thought and way of life. This could be published after the meeting. Second, I think that our meetings should be publicized. I am embarrassed that our meeting has been kept so quiet. The Jewish community deserves to know that we have met and what we have discussed.

Rabbi David Gordis:

I support the idea that we should study something together but we should also take on a practical project. For example, we could examine how Jewish sources and ideas of morality are taught in

the curriculum of one year of high school study in Israel. Perhaps we could develop some practical recommendations how to enrich their understanding and appreciation of Judaism. I don't think we need to continue discussing the relations between groups in Judaism. The very fact that we are sitting together and learning from each other is in itself the beginning of a new model of relations between the trends in Judaism.

Rabbi Jeffrey Dekro:

I think it is crucial that we broaden the base of participants. I would like to suggest that we discuss issues in public policy that affect both Israel and the Diaspora, e.g., Ethiopian Jewry, the resettlement of Soviet Jewry, etc.

Rabbi Louis Jacobs:

I would like to suggest that we discuss religious toleration or tolerance from the standpoint of Judaism.

Prof. Eliezer Berkovits:

The most important subject in Tora is the relationship between man and his fellow man. This we should study and teach to the public. Secondly, little attempt has been made to adapt the halacha to the new realities of the Jewish people after the Holocaust and after the establishment of the independent State of Israel. Adjustments undoubtedly need to be made. Halachot need to be adopted to the new situation. We cannot remain with the old applications and definitions in these new circumstances. This would be a good topic for our discussions.

Dr. Hanina Ben-Menachem:

Perhaps we should discuss the concept of disputation or controversy in Jewish tradition and in the halacha. This would relate to the whole question of pluralism and the legitimacy of differences of opinion. Often in our discussions, we have returned to this very basic question.

Prof. Ariel Rosen-Zvi:

We must expand our circle to include more Israeli poskim and Tora scholars. I also agree that the discussions we have had here should be publicized.

Rabbi Walter Wurzberger:

It would be useful to discuss the relationship between the State of Israel and Diaspora Jewry, i.e., the right of Diaspora Jewry to differ or to criticize Israeli policies.

Prof. Ariel Rosen-Zvi:

The steering committee will meet soon to consider your suggestions and comments. I firmly agree that we should not wait two years before we convene again. I hope that all of us here will continue to be committed to this dialogue process and to participate in future endeavors.

Conclusion

Prof. Ariel Rosen-Zvi

Everything leads to the texts.

Even when the debate is general, concerning the preference for one text (ancient or later) over another; and even when the disagreement is narrower, concentrating on the preference for one source over another, they pass through the texts.

The texts are never only a starting point. As in a silent movie, the texts are only a passing picture and an unheard voice. The perspective of the reader, the observer, the researcher adds the voice. He, in the end, adds depth, the relevant significance to the ancient source.

The direction proposed at the outset by our esteemed friend Justice Haim Cohn – to concentrate the discussion before us around the texts – lent a sense of cooperation, stability, consistency and common denominator to the discussions. There is a basic law of continuity here. The same, irreplaceable Jewish way of cooperative study, serves as the continuity factor, which in and of itself provides a common ground for discussion. The Gemorrah says, “Torah is only obtained in company.” As great as the diversity of opinions and approaches, as many contradictory conclusions as there may be, there is one common denominator, learning together. The common desire to obtain the Torah in one community.

The seventy faces of the Torah and the many faces and starting points of its study are united in the togetherness of learning so that they become one unit, despite the vast differences in texture.

When Jews of different shades and world vies study together, this process resembles a rainbow, which is composed of many shades but united into one whole, signifying the unity between the Creator with His creations, which is passed through the alliance of togetherness among the created. Studying an ancient text

together is the bridge that unites the Jew with his G-d and the Jew with his brother.

Our colloquium is this bridge.

We chose as a starting point normative texts spanning history. We sought to examine continuity over time. We preferred to deal with five fundamental concepts. There are purely halachic concepts. They form the nucleus around which different world views concentrate and the building materials used by the *posek* in his *psikot*.

The fundamental concepts themselves have a tradition of *psikot*. There are familiar methods of implementing the norms within these fundamental concepts, as has been done in the past in different situations under the changing conditions of time and place.

Yet, disputes constantly lurked behind these discussions. How should these fundamental concepts be implemented within the new reality of Jewish life? What are the legitimate borders of the normative use of these fundamental concepts? What are the limits of the ability to find solutions to new situations in light of these fundamental concepts and how can they be fulfilled? Here is an isolation of one face of the bridge as it separates into different shades. This is the location of basic views and world outlooks.

We did not deceive ourselves into believing that cooperative study can close the gaps. We were not so naive as to believe that the common texts would allow for a complete fusion of all the participants in the colloquium around one interpretation and normative implementation. Our choice of halachic fundamental concepts and cooperative study of the texts cannot overlook the power of feelings, the sense of isolation and strangeness, and the distance opened by different ideologies.

At the same time, in my view, the colloquium was a success. It proved that it is at least possible to reach the beginnings of an understanding on the possibility of accepting one another. It showed that we can unite around the texts, not only for cooperative study but also for granting certain characteristics that can serve as the beginning of a deeper understanding of our fundamental obligations as Jews of different streams in the renewed world of the Holy One in our time.

A dialogue can be held around the vitality of the common texts, attempting to overcome the barrier of slogans and the obstacle of mutual fears, to blunt insignificant misunderstandings, and to strive to get at the root of the disagreement through the desire to go beyond the bare minimum of understanding.

There were bitter arguments during the discussions, just as there were understandings. The arguments surprised no one, unlike the understandings. Occassionally, there were surprising agreements between people who would not be expected to reach agreements based on the external labels already pasted on each of them.

If this were the sole achievement of the colloquium I would be satisfied. But we also left this colloquium with a series of codified and edited texts on important fundamental concepts, which may enlighten many and help them reach to conclusions that they would not have thought of before the anthology was laid before them in its entirety. We also left the colloquium with a definite, unanimous decision to continue the dialogue on the basis of the common denominator of the texts.

This chronicle of the colloquium discussions is a welcome by-product. Publishing the discussions, along with the texts, for a broad audience will expand the dialogue and bring it to places that could not be reached directly.

Thus, the IDI is approaching a new, significant phase in its attempt to reach a common understanding and agreed upon framework for Jewish cooperation between the different streams. The continuation of this process will be determined not only by the results of the colloquium, but also by feedback on the discussions from different localities.

From modest beginnings come great achievements.

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