

## Chapter 6

# Confronting the Unknown: How to Deal with Halakhic Uncertainties

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### INTRODUCTION

According to *Midrash Peṭirat Moshe*, the dialogue between Moses and God regarding Moses' petition to enter the Promised Land concluded as follows:

אמר לו הקב"ה: "כלום אמרת לך שתהרוג את המצרי?" אמר לו משה: "ואתה הרגת כל בכורי מצרים, ואני אמות בשביל מצרי אחד?!" אמר לו הקב"ה: "ואתה דומה אלי, ממית ומחיה? כלום אתה יכול להחיות כמוני?"	Said the Holy One, Blessed Be He: "Did I tell you to kill the Egyptian?" Moses said to Him: "Inasmuch as You killed all the firstborn of Egypt, should I then die because of one Egyptian?" Said the Holy One, Blessed Be He: "Are you then like Me, who puts to death and grants life? Can you grant life as I do?"
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This midrashic dialogue starkly presents the paradox confronting finite human creatures thrust, usually without warning, into situations calling for decisions regarding life and death. On one hand, like Moses,

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one feels, “where there are no men, strive to be a man” (m. *Avot* 2:5),<sup>1</sup> willingly accepting the responsibility to resolve knotty moral dilemmas by following a strongly intuited sense of right and wrong. On the other hand, we are keenly aware that only God, who grants life, has the right to decree death upon innocent individuals, whereas human beings are enjoined to eschew attempting to determine that the blood of one person is redder than that of another.

Contemporary life confronts us with increasingly numerous cases where we are called upon to decide life-and-death issues. Advances in medical knowledge and techniques have enhanced our ability to sustain life while calling into question the criteria for determining when life has irrevocably ceased. Few situations are as emotionally fraught and morally bewildering as those involving decisions regarding withdrawal of life support from one patient in order to afford a new lease on life to another.

Innumerable families are confronted with these questions, generally without warning, when a family member suffers severe brainstem damage and doctors determine that the damage is irreparable and the loved one is – based on current medical norms – “brain dead.” The raw emotions and thorny intellectual challenges involved in addressing these questions, which demand immediate responses, are magnified by one’s human sense of inadequacy to decree death for one and life for another. But in these situations, one does not have the luxury of hiding behind his or her inadequacy, because failure to decide is also a decision – a decision that grants life, however temporary, to one and decrees likely death upon another.

It is not my purpose in this essay to contribute my own understanding regarding what the sources say, even though I do have a clear position on the issue, as perceptive readers no doubt will realize. The arguments on behalf of both sides of the question are well documented and well known. My aim, rather, is to step back a bit from the issue at hand

1. במקום שאין אנשים, השתדל להיות איש. The connection between Hillel’s dictum in m. *Avot* 2:5 and the words in Exodus 2:12 “he [i.e., Moses] saw there was no man” was drawn by Rabbi Zeev Wolf Einhorn (Maharzu), in his comment to Leviticus Rabba 32:4; see also Nehama Leibowitz, *Iyyunim Hādashim be-Sefer Shemot* (Jerusalem: World Zionist Organization, 1969), 38.

and provide a perspective on how one ought to approach hotly debated issues such as this. Given that the sources allow for different ways of being understood and applied, what kinds of assumptions and concerns may and ought to guide us in deciding which interpretation to adopt? I don't pretend to give an exhaustive list of "meta-issues" or to provide an in-depth analysis of them, but rather to introduce in orderly fashion some of the issues that I think deserve reflection when deciding how to approach a thorny halakhic issue.

These meta-questions are, of course, the kinds of issues with which *posqim*<sup>2</sup> grapple, with varying degrees of self-reflection, on a daily basis. The premise underlying this essay is that reflection upon these issues is important not only for *posqim*, but for the public at large. Familiarity with the range of possible approaches to these meta-questions can help guide lay people and communal rabbis in their selection of a *poseq*,<sup>3</sup> as well as empower them to pose their halakhic questions properly, in order to receive the best available response.

## I. "GREAT IN WISDOM"

### Attitude Toward *Gedolim*

One of the most basic rules for deciding among disputants in a halakhic controversy is to rule in favor of the scholar who is *gadol be-ḥokhma u-va-minyan* (b. *Avoda Zara* 7a).<sup>4</sup> As this rule is generally understood, there are two criteria for according one scholar greater authority than

2. In this essay, I will employ the term "*poseq*" – a term that does not admit of precise definition – to refer to a rabbi whose recognized halakhic expertise is such that people outside of his own community will refer halakhic issues to him and that he generally will rule even on challenging issues on his own, without referring to a higher authority. Of course, even among *posqim* there is a hierarchy, and someone generally recognized as a *poseq* may feel that only someone greater than he can rule on certain issues, much as even the greatest *posqim* may refrain from ruling on certain issues without consulting with their peers.
3. An interesting question in this matter is whether one needs to select one *poseq* to whom he or she addresses all halakhic questions, or he or she may select different *posqim* for different questions. See the instructive discussion by *mori ve-rabbi* Rabbi Aharon Lichtenstein, *Leaves of Faith* (Jersey City: KTAV, 2004), 2:299 ff.
4. See Moshe Isserles (Rema) to *Shulḥan Arukh* ח"מ 25:2.

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another – wisdom (*hokhma*) and public recognition (*minyán*),<sup>5</sup> both of which will be discussed below. There are numerous instances in halakhic literature of rendering decisions on the basis of the authoritative stature of a particular *poseq*.<sup>6</sup> What weight in deciding halakha should be accorded to the criterion of overriding personal stature?

Broadly speaking, there are two main schools of thought here that can be further subdivided into more nuanced approaches. The first school accords unique halakhic authority to those generally recognized as *gedolei ha-dor*. Within this school, there are those who argue that every generation has a *gedol ha-dor*, whose halakhic rulings are uniquely authoritative,<sup>7</sup> while others argue that there are a small number of generally recognized *Gedolim*, whose consensus should be decisive,<sup>8</sup> while leaving room for more open-ended discussion when the *Gedolim* have failed to achieve consensus. The authority of the *gedolei ha-dor* is rooted in the understanding that the authority conferred by the Torah (Deut. 17:10–11) upon the Sanhedrin applies as well to those scholars recognized

5. This understanding of *minyán* is found in most standard commentaries to m. *Eduyyot* 1:5, which conditions the right of a high court to cancel legislation by a previous court on the latter court's superiority in *hokhma* and *minyán*. This reading of the passage in *Eduyyot* follows Maimonides, MT Laws of Rebels 2:2 (as opposed to the opinion of the Raavad in his commentary to m. *Eduyyot*). See also the glosses of Rabbi Joshua Falk-Katz (Sema) on *Shulḥan Arukh* ҲМ 25:18. In the case discussed by these sources, public recognition has an objective standard of measurement – the number of disciples “sitting before” the court.
6. See, e.g., the frequent appearances in the halakhic literature of the phrase *kevar hora zaqen* (the elder has already ruled). Sometimes this phrase merely underscores the agreement of the later decisor with the reasoning of the earlier authority (see, e.g., Eliezer Waldenberg, *Tzitz Eliezer* 8:26), but in some cases this phrase is used to override the later decisor's own predilections (see, e.g., Shmuel Wosner, *Shevet ha-Levi* 3:32).
7. The recently deceased Rabbi Yosef Shalom Elyashiv, for example, was termed in *Haredi*-Lithuanian circles the *poseq ha-dor*. I discuss here claims of universal authority for a particular *poseq*, not the well-established practice that a community follows the rulings of its rabbi or a disciple follows the rulings of his or her teacher.
8. See, e.g., Avraham Sherman, “*Samkhut Gedolei ha-Dor be-Nose'ei Ishut ve-Geirut*,” *Tchumin* 30 (5770): 166–67. Rabbi Sherman limits the absolute authority of *gedolei ha-dor* to “questions that concern Jews as a whole (*kelal Yisrael*),” such as personal-status questions (e.g., marriage and conversion), but many extend it to include other areas of halakha as well.

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by the community as the *Gedolim* of their generation.<sup>9</sup> In certain circles it is further understood that *Gedolim* benefit in their rulings from divine assistance in the form of a holy spirit (*ru'ah ha-qodesh*).<sup>10</sup>

The second school is less hierarchical and more democratic in its orientation, allowing more leeway for halakhists of lesser stature to evaluate rulings of leading *posqim* based on the strength of their arguments rather than their personal stature. There are several lines of thought that can support such an approach. First, one may question whether in contemporary life there indeed are *Gedolim* who have attained such universal recognition. No doubt there are rabbinic figures of recent generations, such as Rabbi Moshe Feinstein and Rabbi Shlomo Zalman Auerbach, who are universally revered for their knowledge and acumen and whose rulings are always cited deferentially, but no one could reasonably argue that even their rulings have attained universal acceptance. Indeed, Rabbi Feinstein himself famously ruled that “in our time there is no principle of a *gadol* set above all others”<sup>11</sup> and that “there is no need to fear questioning and disputing the *Gedolim* of our generations, even the greatest of them.”<sup>12</sup>

Aside from the question of whether recent generations have produced universally accepted *Gedolim*, there is room to challenge the fundamental premise that towering personal stature automatically confers halakhic authority. Note, for example, the following passage from a responsum by Rabbi Haim Volozhiner, cited by Rabbi Shlomo Daichowsky among the sources supporting his claim that “it is forbidden for a lesser [rabbi] to relinquish his view in deference to a *gadol*”:

9. See Sherman, “*Samkhut Gedolei ha-Dor*,” 163–67, citing (among others) *Sefer ha-Hinnukh*, 495–96, and Elchanan Wasserman, *Quntres Divrei Soferim* 2:2–3.

10. Perhaps the most famous contemporary source for this idea is *Iggerot Hazon Ish* (1:33), by Rabbi Avraham Yeshaya Karelitz.

11. IM OH 1:109.

12. IM YD 3:88. In this famous responsum, Rav Moshe rules that the rabbi of Benei Berak is entitled to diverge from the rulings of the *Hazon Ish*, arguing that the proper way to honor the *Hazon Ish* is to take full account of his arguments, including respectful disagreement.

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הלא אני הקטן שמשתי את הכהן  
הגדול נ"י בהיותו במדינתנו,  
ומחויבני בכבודו ומוראו כמורא  
שמים על אחת כמה וכמה, אבל  
אני שומר פי התלמוד הקדוש,  
שהורנו הדרך הזה... "כי אתי  
פיסקא דדינא דידי לקמייכו  
וחזיתו ביניה פירכא, אל תלמדו  
ממנו, כי אין לדיין אלא מה שעינו  
רואות".... וכבר הוזהרתי בזה מפי  
מודי קדוש ישראל, רבינו הגדול,  
הגאון, החסיד, מוה"ר א[ליהו] נ"ע  
מווילנא שלא לישא פנים בהוראה.

Although I served my master and teacher [Rabbi Eliyahu Kramer, better known as the Vilna Gaon], the high priest, and I am charged with his honor and reverence like the fear of Heaven, I observe the path taught by the holy Talmud: "...When a ruling comes before you and you see in it a difficulty, do not learn from it, for the judge has only what his eyes see" (b. *Bava Batra* 130b)... And I have already been adjured by my teacher, the Vilna Gaon, to show no partiality in issuing a ruling.<sup>13</sup>

Similarly, Rabbi Moshe Feinstein writes:

הנה מה שמתנצל כתר"ה במה  
שחלוק עלי בדבר הלכה הוא  
למותר, כי כן דרך התורה,  
שצריך לברר האמת, וח"ו  
מלשתוק מי שסובר שאינו כן,  
בין לקולא בין לחומרא.

Your apologies for disagreeing with me in a matter of halakha are superfluous, because this is the way of Torah, to ascertain the truth, and Heaven forbid that one who disagrees be silent, whether to be more lenient or more stringent.<sup>14</sup>

13. Haim Volozhiner, *Hut ha-Meshullash* 1:9, cited in Shlomo Daichowsky, "Da'at Torah' ba-Halakha," *Tchumin* 30 (5770): 183. Rabbi Daichowsky further argues that this principle is implicit in the law that deliberation among the judges always opens with the opinion of the lowest-ranking judge, in order to ensure that the lesser judges will not defer automatically to the opinion of more expert judges.

14. Moshe Feinstein, *IM OH* 1:109. See also Rabbi Feinstein's well-known introduction to this volume, and *IM YD* 4:38:1. An instructive source in this regard is Rabbi Naftali Tzvi Yehuda Berlin's (Netziv) claim in *Ha'ameq Davar* (to Deut. 17:11, based on a citation from the *She'iltot*) that following the destruction of the Temple, there is no authority to rulings of a High Court unless they are supported by reasons. A similar approach is advocated by Rabbi Moshe Soloveichik and cited by his son Rabbi Joseph B. Soloveitchik (see Lichtenstein, *Leaves* 2:293), who argues that in the absence of formal halakhic *semikha*, rabbis possess no binding halakhic authority and serve merely as teachers who can guide those who consult them to their own understanding of the sources; cf. *IM YD* 4:38:2.

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We have seen, broadly speaking, two schools of thought regarding how the rulings of *Gedolim* impact upon *peseq*. One school regards rulings of *Gedolim* as authoritative, while the second school vests the ultimate authority in the individual *poseq*, who is entitled – indeed, enjoined – to follow his own understanding when he feels he has compelling reasons to differ with the ruling of the *Gedolim*. It should be emphasized that by and large, *posqim* generally do not adopt either extreme position, of according absolute authority to *Gedolim* or of freely rejecting their rulings. Nevertheless, within the large middle ground in which views of *Gedolim* are accorded significant but not absolute weight, there can be significant differences of orientation between those for whom the views of *Gedolim* will be set aside only rarely and those who will feel considerably freer to follow their own understanding. In selecting an approach toward *peseq* and in submitting one's halakhic questions to a *poseq*, this is one of the important issues that ought to be considered.

### How Is Wisdom Assessed?

In assessing the kind of wisdom we seek in a *poseq*, undoubtedly we will accord preference to acumen in applying the sources to practical situations over knowledge and understanding of a more theoretical bent.<sup>15</sup> Nevertheless, within the world of practical *peseq* itself, there are different schools of thought regarding the way in which sources should be studied and applied to real-life situations. In a celebrated passage in b. *Horayot* 14a, the sages of Babylonia accept the ruling of the sages of Israel that “Sinai” (erudition) takes precedence over “*oqer harim*” (analytical acumen), indicating that breadth of knowledge is the key factor in *peseq*.

The advent of the printing press, however, led some modern halakhists to call into question whether this talmudic preference remained

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15. See, e.g., Berlin, *Qidmat Ha'ameq* (introduction to his *Ha'ameq She'ala* commentary to the *She'iltot*), par. 5, who differentiates between the Torah study of the tribe of Judah, whose analytical acumen established new halakhic principles, and that of the tribe of Levi, who were expert in applying already established halakhic principles to real-life cases. For further discussion, see Nehemia Taylor, “*Ha-Yahas le-Pisqei Halakha shel Gedolei ha-Dor*,” *Tchumin* 32 (5772): 282–90; Daniel Eidensohn, *Daas Torah* (Jerusalem and New York: Emunah Press, 2011), 286–365.

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in force,<sup>16</sup> and this question has been raised more sharply in the age when “Rabbi” Google, HebrewBooks.org, and various Torah databases have made ideas and sources accessible at the click of a mouse. The practice of *posqim* is far from uniform in this area. Any student of responsa literature can readily differentiate between respondents who assemble an encyclopedic array of authorities whom they weigh against one another, and respondents whose far less exhaustive lineup of later authorities is often deployed as basis and inspiration for reassessing the meaning of the primary sources.

Whether a *poseq* inclines toward Sinai or toward *oqer harim* depends to a great measure on issues discussed in other sections of this essay, including the degree of authority he accords to earlier *posqim* and to the weight of the majority. My concern here, however, is not with what underlies each of the two perspectives, but with their impact upon assessing the relative greatness of the *poseq*. Based on their perspectives on this issue, different questioners (and different *posqim*) will arrive at different evaluations regarding which scholar is “greater in wisdom” – the erudite scholar, proficient in marshaling a large array of sources, or the creative scholar, adept in raising new insights into the primary sources and applying them to the practical issues at hand.

Alongside acumen in interpreting halakhic sources, we should consider the Vilna Gaon’s famous dictum that any lack of wisdom in other areas results in a hundredfold lack of Torah wisdom.<sup>17</sup> Perhaps, for example, a scholar with legal or scientific training should be regarded as superior in wisdom, at least with regard to halakhic issues that relate to his area of expertise. The halakhic demand that a judge on the Sanhedrin be proficient in languages in order to understand witnesses without the mediation of a translator (b. *Menahot* 65a) may serve as a model for factoring into our evaluation the halakhist’s ability to comprehend a

16. See Rabbi Ovadia Yosef’s introduction to the first volume of *Yabi’a Omer*, par. 7, where he debates Rabbi Shlomo Kluger on this point. See further the objections to Rabbi Yosef’s proofs in Binyamin Lau, *Mi-maran ad Maran* (Tel Aviv: Yediot Aḥaronot, 2005), 412n2.

17. The Vilna Gaon is thus cited by his disciple Rabbi Barukh ben Ya’aqov Shik of Shklov in his introduction to the Hebrew translation of Euclid. Cf. Israel of Shklov, introduction to *Pe’at ha-Shulḥan*, s.v. “*u-mi-tzidda beior arokh*.”



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thorny technological or medical issue without consulting experts in the field.<sup>18</sup> Similarly, we might expect that a *poseq* knowledgeable regarding the history and philosophy of other religions would possess greater wisdom, at least in matters involving idolatry (such as wigs manufactured in India from human hair) than a *poseq* whose knowledge of these matters is second-hand.

Implicit in the above is the following question: Is “wisdom” an indivisible term, reflecting general expertise in the entire realm of halakha, or should the relative stature of a *poseq* be assessed independently in different areas, depending upon his external knowledge and training in each specific area?<sup>19</sup> A related question is the extent to which we expect a Torah scholar to be completely immersed within the four cubits of halakha, or inversely to be aware of and sensitive to the complexities of human psychology and sociology. If we assume – a question I shall address below – that human and social factors play an important role in *pesaq*, then it stands to reason that an important measure of a *poseq*’s wisdom is the depth of his understanding of human nature and social dynamics.

We may further question the degree to which *halakhic* wisdom stands apart from acumen in other areas of Torah, and specifically Jewish philosophy. Many halakhic issues require adopting a position on issues of ethics and theology. For example, the discussion among *posqim* regarding the permissibility of cosmetic surgery includes a theological debate. Rabbi Eliezer Waldenberg argues that “there is no artist like our God, and He has imprinted upon every one of His creatures the image fit for him, and it is forbidden to contradict the decree of the King of the universe.”<sup>20</sup> Rabbi Ovadia Yosef counterposes the argument that

18. Here I am not addressing the controversial issue, which I will discuss below, of the extent to which Torah-grounded knowledge regarding scientific reality ought to be maintained in the face of changing scientific paradigms. My concern here is with the well-accepted principle that a *poseq* needs to understand the reality being addressed, often involving science, technology, and other fields of knowledge.

19. For the approach that the views of *Gedolim* should be weighted differently in different areas, in accordance with their expertise in each area, see Rosh to b. *Bava Qamma* 4:4, and see the discussion of this view in Lichtenstein, *Leaves* 2:281.

20. Waldenberg, *Tzitz Eliezer* 11:41 (cf. 12:43).

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the permission granted by the Torah to heal includes not only curing diseases and injuries, but also correcting serious aesthetic defects that render a person socially unacceptable.<sup>21</sup>

Clearly, the halakhic-interpretative debate regarding the extent of the permission granted by the words “and he shall surely heal” (Exod. 21:19) is influenced by theological concerns regarding the relationship between divine decree and human intervention, and it stands to reason that this theological issue cannot be detached from the ethical issue of the value of aesthetic concerns in general and in particular of presenting a socially acceptable physical appearance. Hence, in assessing the degree of wisdom that a *poseq* brings to bear on such an issue, we may well ponder whether the sole criteria are broad knowledge and analytical capabilities in the halakhic realm or rather, we ought to take account as well of the knowledge, training, and thinking skills that guide the halakhist in assessing issues of science, theology, psychology, sociology, and ethics.<sup>22</sup>

21. See Yosef, *Yabi'a Omer*, vol. 8 חמ 12. In this connection, it bears noting that permission to heal serious illnesses is itself not free of the theological problems involved in human meddling in divine decrees; see Rashi to b. *Berakhot* 60a, s.v. “*she-ein darkan*” and to b. *Bava Qamma* 85b, s.v. “*nittena reshut la-rofe'im lerapot*”; Maimonides to m. *Pesahim* 4:9; Nahmanides, Leviticus 26:11; and Elad Zamir, “*Nittu'him Kosmetiyim*,” in *Shut Ariel* (Jerusalem: Mosdot Ariel, 2011), 99–100. A related theological idea, *בהדי כבשי דרחמנא למה לך?* (What have you to do with these secrets of the All-Merciful?), is cited frequently in responsa, often in non-halakhic contexts, but occasionally in support of a halakhic ruling; see, e.g., *Afarqasta de-Anya* 1:169; *Avnei Nezer* Y D 454. Interestingly, however, it is not altogether clear from the source of this saying in b. *Berakhot* 10a that this principle is decisive; see discussion in David C. Flatto, “A Divine Compromise – Bringing Hezekiah and Isaiah Together,” in *Rav Shalom Banayikh* (ed. Hayyim Angel and Yitzchak Blau; Jersey City: כטאב, 2012), 144–45.

22. For a particularly forthright presentation of the first approach, which sees Torah wisdom as self-sufficient, see Feinstein, *IM EH* 2:11. Rabbi Feinstein asserts that his halakhic views regarding artificial insemination are more reliable than those of his interlocutor:

והערעור של כתר"ה על זה בא מהשקפות שבאים מידיעת דעות חיצוניות... ואני ב"ה, שאיני לא מהם ולא מהמונם וכל השקפתי הוא רק מידיעת התורה בלי שום תערובות מידיעות חיצוניות.

[Your] objection comes from viewpoints derived from knowledge of external opinions... [whereas] Hashem be blessed, I have no part of them or their multitude, and my viewpoint comes only from knowledge of Torah, without any admixture of external knowledge.

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Cosmetic surgery is but one instructive example of how halakhic issues may require the *poseq* to venture into fields such as theology, psychology, and ethics. Similar forays into these fields are involved in many life-and-death issues, such as birth control, the discussion among *posqim* of whether the mental anguish of a woman pregnant from an illegitimate sexual encounter is sufficient to justify abortion,<sup>23</sup> and whether the extreme physical suffering of a terminal patient justifies his refusing to accept treatment.<sup>24</sup> Regarding the halakhic topic discussed in this volume, it bears noting that the definition of death involves philosophical issues, and indeed, some writers on the topic have argued that philosophical considerations have impacted on the halakhic discussion.<sup>25</sup>

Even regarding issues such as the above, one might uphold the assessment of wisdom solely in terms of knowledge of the halakhic literature by noting that often the theological or psychological issues have been addressed by classic halakhic sources and that *posqim* whose expertise is in the halakhic realm frequently are conversant with some of the relevant non-halakhic sources as well. Nevertheless, one might argue that a *poseq* possessing more specialized knowledge and more profound understanding of fields outside halakha ought to be regarded as wiser than one whose purview is strictly within the four cubits of halakha.<sup>26</sup>

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- On the other side, a no less forceful exponent of a more positive attitude to external sources of knowledge was Rabbi Waldenberg, who frequently refers in his responsa to relevant scientific literature he has read; see, e.g., *Tzitz Eliezer* 1:20, p. 87. Additional sources and discussion of this topic may be found in David Golinkin, “*Ha-Shimmush ba-Madda'im be-Sifrut ha-Teshuvot ba-Me'a ha-Esrin*,” in *Tiferet le-Yisrael* (ed. Joel Roth et. al.; New York: Jewish Theological Seminary, 2010), 207–18; Eidensohn, *Daas Torah*, 366–84.
23. See Yosef Haim, *Rav Pe'alim*, vol. 1 EH 4, who bases his permission for a rape victim to abort on the disgrace of the woman and her family as well as the profanation of God's name involved. See also the extensive discussion of Rabbi Waldenberg in *Tzitz Eliezer* 9:51, *sha'ar* 3, ch. 3, especially sections 7–8 (p. 237).
  24. See discussion and sources in Avraham Steinberg, *Encyclopedia of Medical Halakha* (7 vols.; Jerusalem: Schlesinger Institute, 1987–88), 4:401–2 [Hebrew].
  25. See Naftali Moses, *Really Dead? The Israeli Brain Death Controversy 1967–1986* (Israel, 2011; <http://www.tragic-death.com/index.php/really-dead/>), esp. 257–86. Cf. my discussion below of essentialism versus realism.
  26. One may further differentiate among *posqim* in terms of the kind of knowledge or training that they possess in a non-halakhic area. For example, is the *poseq's* expertise in theological issues related to philosophical or qabbalistic sources?

## II. GREATER IN NUMBER

Frequently, one encounters in halakhic discussions determinations of halakha based upon the majority or the consensus of *posqim*.<sup>27</sup> Certainly, following the majority is a well-established principle of *pesaq*, rooted in the rule of judicial procedure to “incline after the majority” (Exod. 23:2), and statements in the Mishna and Talmud indicate that even outside of courtroom situations, the majority opinion is regarded as authoritative.<sup>28</sup> Nevertheless, there are places in which the Talmud

27. See, e.g., Rabbi Avi Shafran’s statement: “While there are halachic decisors who maintain that lack of brainstem function renders a patient dead, *in the judgment of a majority of major decisors*, ‘brain-dead’ human beings whose hearts are still beating must be maintained on life support” (<http://torahmusings.com/2011/02/symposium-on-the-ethics-of-brain-death-and-organ-donation-vii/>; emphasis added). More guardedly, David Shabtai, *Defining the Moment* (Shores Press: New York, 2012), 345, writes, “A substantial number – and possibly even a majority – of modern halakhic decisors reject the notion of ‘brain death’ as the death of the individual.” Regarding a different aspect of end-of-life issues, Rabbi Shabtai states that “the majority consensus is that removing life support [from a terminal, moribund, living patient] is tantamount to murder” and that “the general modern consensus is with the majority opinion” (342–43).

An interesting variation on the theme is provided by Rabbi Dr. Irving Yitzchok Breitowitz, “The Brain Death Controversy in Jewish Law,” *Jewish Action* 5752 (1992), 65 (<http://ebookbrowse.com/breitowitz-brain-death-controversy-pdf-d19156048>): “Most contemporary *poskim* in Eretz Yisroel (other than the Chief Rabbinate) have unequivocally repudiated the concept of death based on neurological or respiratory criteria.” The question arising implicitly from this statement is how one goes about calculating the majority – are the rabbis on the Chief Rabbinate excluded from Rabbi Breitowitz’s “majority” because they are less qualified or fewer in number? Conversely, should a calculation of majority perhaps include qualified *posqim* who do not serve on the Chief Rabbinate but accept its rulings (at least on certain issues) as authoritative?

28. See m. *Eduyyot* 5:7 and cf. m. *Eduyyot* 1:5–6, and see further sources assembled by Rabbi Dr. Yehuda Brandes, *The Beginnings of the Rules of Halachic Adjudication* (diss. Hebrew University, Jerusalem, 2002), 119–27, 316–22 [Hebrew]. Rabbi Brandes notes that in many cases where “majority” is evoked outside of a framework of a duly constituted court, it functions as a guideline or as a moral demand, rather than as a hard-and-fast halakhic principle. Another source that indicates that the majority, even not in a courtroom situation, carries authority is b. *Sanhedrin* 33a, where a ruling in accordance with a view that contradicts the accepted practice (*sugya di-shema’ta*) is termed a mistaken ruling.

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indicates that the superior cogency of an individual opinion may override the principle of following the majority,<sup>29</sup> and many important post-talmudic authorities have argued that following the majority is not a hard-and-fast rule.

Rabbi Solomon ben Adderet (Rashba) asserts:

אין הולכין אחר הרוב אלא כשרבו  
המזכין על המחייבין, או המחייבין  
על המזכין, מתוך משא ומתן של  
כלם. There is no majority anywhere  
except for a majority of a given  
group, whether in favor of conviction  
or acquittal, who all have deliberated  
together.<sup>30</sup>

Rabbi Levi ben Ḥaviv (Maharalbah), chief rabbi of Jerusalem (sixteenth century), echoed this view in rejecting the ordination conferred upon Rabbi Ya'akov Beirav by the rabbis of Tzefat. Rabbi Levi argued that the more numerous rabbis of Tzefat did not constitute a majority of the rabbis of *Eretz Yisrael* absent active participation in their deliberations by the less numerous rabbis of Jerusalem.<sup>31</sup>

29. See b. *Yevamot* 14a, which indicates that the minority opinion of Beit Shammai was not automatically overridden by the majority view of Beit Hillel inasmuch as Beit Shammai were “sharper.” See also Me’iri ad loc. Menachem Mendel Kasher, *Torah Shelema* (New York, 5718), 18:162, no. 37 and n. 37, cites several talmudic passages that entertain the thought – although it ultimately is rejected – that a given individual opinion should be accepted, *pace* the majority, because “his explanation is with him” or because “his reason is cogent.” Many of the sources cited here and in the ensuing discussion are cited in Nathaniel Helfgot, “Minority Opinions and Their Role in *Hora’ah*,” *Milín Ḥavivin* 4 (2008–10), 37–61.

30. *Responsa of Rashba* 2:104. Yaakov Blidstein argues that this idea is implied by Maimonides’ failure in the passage under discussion to invoke the principle of following the majority. See Blidstein, “Contemporary Halakhic Decision-Making: An Examination of Maimonides’ H. Mamrim 1, 5,” *Dine Israel* 20–21 (2001): 6 [Hebrew] (reprinted in Blidstein, *Authority and Dissent in Maimonidean Law* [Tel Aviv: Hakibbutz Hameuhad Publishing, 2002], 69 [Hebrew]). In n. 8, Blidstein cites further sources for this idea.

31. *Responsa of Maharalbah*, “*Quntres ha-Semikha*.”

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Rabbi Avraham Yeshaya Karelitz (*Hazon Ish*) argued forcefully against establishing halakha on the basis of a majority:

ידוע כי אין כח רוב אלא  
במושב ב[ית] ד[ין], אבל  
חכמים החולקים שהיו בדורות  
חלוקות או במדינות חלוקות -  
אין נפקותה בין רוב למיעוט...  
כל מקום שיש פלוגתא... היה  
הדבר מסוד להכרעה לכל חכם,  
או להחמיר או לבחור ביחידים  
ידועים לילך אחריהם...

It is known that there is no power of the majority except in a session of a court, but regarding disputes among scholars from different generations or different countries, there is no difference between the majority and the minority... Whenever there is a controversy... each scholar is authorized either to rule stringently or to follow known individuals...

ומלבד שאין כאן כח רוב, בעצם  
אין הרוב ידוע, כי הרבה חכמים  
היו שלא באו דבריהם על הספר  
והרבה שספריהם לא הגיעו  
לידינו.

Besides the lack of power of the majority in principle, the majority is not known, because there have been many scholars whose words have not been published and many whose books have not reached us.<sup>32</sup>

Nevertheless, it is clear that by and large, *posqim* will tend to regard rulings by the majority of recorded predecessors as carrying halakhic authority. Rabbi Karelitz (*ibid.*) relates to this incontrovertible reality, suggesting a reason for the prevalent practice of following the majority:

ובכל זאת, למיעוט הלבבות,  
להכריע בסברא, נוטלים  
לפעמים גם כח רוב המספרי  
לנטיה לצד זה.

Nevertheless, due to the diminution of the understanding necessary to determine [the law] based on reasoning, sometimes [*posqim*] will follow the numerical majority.

32. *Hazon Ish*, Laws of Forbidden Combinations 1:1. Identifying a majority may be further complicated by sociological factors, such as the pressure exerted by certain communities on their rabbis not to issue rulings that diverge from what the community regards as acceptable. The impact of this factor on *pesaq* is not generally appreciated, even though it may be considerable; see, e.g., *Kitvei R. Yehiel Ya'aqov Weinberg* (ed. Melekh Shapiro; Brooklyn: Mazel Typesetting and Printing, 5758), 1:7.

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For many leading *posqim*, from Rabbi Joseph Karo to Rabbi Ovadia Yosef, it would appear that following the majority is not in fact a fallback position, but the foundation of *pesaq*. However, other leading *posqim*, including Rabbi Shlomo Luria (Maharshal), Rabbi Eliyahu Kramer (the Vilna Gaon), and several contemporary luminaries, have advocated the primacy of the *poseq*'s own understanding over following the majority view. Interestingly, Rabbi Karelitz suggests that the division between these two schools of *pesaq* is less fundamental than it may appear (ibid.):

אין אנו נגשים להכריע בין  
הראשונים בהכרעה שכלית  
מוחלטת. מ[כל] מ[קום]  
מתלוחת תמיד בהכרעה עיון  
שכלי, והרבה פעמים מכריע  
מרן ז"ל כאחת הדעות מפני  
שדבריהם מחוורים ביותר  
ומתיישבות כל הקושיות.

We do not seek to decide among *Rishonim* based entirely on our own understanding. However, the decision is always accompanied by the conclusions of one's own rational analysis, and often *Maran* [i.e., Rabbi Joseph Karo], of blessed memory, will decide in accordance with one of the views because its arguments are very clear and resolve all the difficulties.<sup>33</sup>

I believe that perusal of the halakhic literature will readily confirm the cogency of Rabbi Karelitz's claim: neither do the advocates of the autonomy of the *poseq* decide entirely on their own understanding without taking full measure of the views advocated by earlier majorities, nor do advocates of following the majority slavishly adhere to the weight of numbers without taking the logical force of the opposing arguments into account. Even if we accept, however, that all *posqim* take account both of numbers and of their own logical convictions, it remains clear that they will differ, sometimes widely, in terms of how much weight they accord to each of these factors. Hence both in determining *pesaq* and in choosing a *poseq*, one of the most important considerations is

33. Cf. the discussion by Rabbi Yosef in his introduction to the first volume of *Yabi'a Omer*, which makes clear both his predilection for following the majority of his predecessors and his conviction that given strong enough reasons, a *poseq* may follow his own reasoning. See also Lichtenstein, *Leaves*, 1:171.

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what balance ought to be struck between the weight of the majority and the weight of logical conviction.<sup>34</sup>

### III. PHILOSOPHY OF DETERMINING HALAKHA

Many factors govern the way in which a *poseq* approaches a halakhic issue and seeks to determine the correct ruling.<sup>35</sup> I will focus on the following: the methodology utilized for reading and interpreting the sources; the *poseq*'s understanding of the nature of the halakhic system; and the way the *poseq* regards his relationship to the questioner and to the community at large.

#### Method of Learning

Throughout the generations there have been numerous methods and styles of learning the Talmud and its commentaries. Not all of these methods are oriented toward generating practical halakhic rulings, but even methods focused on theory rather than practice may be employed by a *poseq* to enable him to facilitate application of the sources to the case at hand.<sup>36</sup> Methods of study differ widely in terms of the relative weight they assign to precise understanding of language and of the intricacies of textual flow,<sup>37</sup> conceptual mapping of the views expressed in the talmudic give-and-take, and the questions and insights proposed by

34. A further factor that impacts on the weight that a *poseq* accords to his own reasoning is the concept of “diminishment of the generations” (*yeridat ha-dorot*). For sources for this concept and arguments against it, see Shlomo Fischer, *Derashot Beit Yishai* (Israel, 5764), no. 15, pp. 123–31.

35. I will not be discussing the predilection of a *poseq* to rule leniently or stringently or the preference of some *posqim* to sidestep controversy and fulfill all (or most) recorded opinions, as opposed to the willingness of others to decide among the opinions and act accordingly.

36. See Benjamin Brown, *The Hazon Ish: Halakhist, Believer, and Leader of the Haredi Revolution* (Jerusalem: Magnes Press, 2011), 320n99 [Hebrew].

37. Related to this issue is the role in *pesaq* of methodical investigation of textual variants and of questions of history and realia. As opposed to those who see methodical use of these tools as “academic” and unsuited for purposes of *pesaq* (or for Torah study), Rabbi Dr. Daniel Sperber has argued vigorously for the halakhic importance of utilizing these tools and cites many sources pro and con on this issue; see Sperber, *Netivot Pesiqat* (Jerusalem: Reuven Mass, 2008), 9–129.



medieval and later commentators. *Posqim* may differ as well regarding the degree to which their reading of sources for the purposes of *pesaq* will correspond to the way in which they would construe the sources in a theoretical beit midrash (study hall) setting.

A further difference regarding the methodology of *pesaq* relates to the body of sources that the *poseq* will take into account. While the preponderance of sources cited in halakhic discussions are of a clearly halakhic nature, occasionally *posqim* will base their halakhic argumentation on sources derived from other branches of Torah literature, including aggada, Bible commentary, philosophy, and qabbala. Among *posqim*, one can find different views regarding the degree to which such sources carry halakhic weight, but even *posqim* who are generally averse to resorting to such sources may do so in the kinds of contemporary situations for which halakhic sources are lacking.

These are some of the central methodological questions over which *posqim* may differ, and the attitude of a *poseq* toward these issues is a factor that may be taken into account by one who is considering of whom to ask his or her halakhic questions.

### Philosophy of Halakha: Formalism vs. Realism

A critically important factor both in the way in which a *poseq* conceptualizes the issue before him and in the way he seeks guidance from the sources is his overall conception of the nature of the halakhic system. Many halakhists understand halakha to be formalistic or essentialist, i.e., a system of rules and concepts that follow their autonomous inner logic.<sup>38</sup> However, some recent writers have suggested that halakha is not

38. Here and in the ensuing discussion, my use of the term “formalism” is similar to that of H. L. A. Hart, *The Concept of Law* (Clarendon Law Series; Oxford: Oxford University Press, 1970), 126. It is beyond the scope of this essay to discuss the similarities and divergences among different models of formalism current in discussions of legal philosophy; see discussion and relevant literature in Brown, “Formalism va-Arakhim: Shelosha Deganim,” in *Iyyunim Hdashim ba-Philosophia shel ha-Halakha* (ed. Aviezer Ravitzky and Avinoam Rosenak; Jerusalem: Magnes Press, 2008), 233–57. My use of the term “essentialism” follows that of Moses, *Really Dead?* (240, 269ff), who argues that the divide between an essentialist conception of death and what might be termed a constructivist conception played a major role in the brain death controversy in Israel.

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purely formalistic and that many of its rules and concepts are derived from and responsive to the reality from which they emerge and the values that they are designed to serve.<sup>39</sup>

The ramifications of this philosophical question for deciding practical halakhic questions may be illustrated by examining two recent opposing presentations regarding the issue of brainstem death. Near the opening of a presentation that favors the approach that rejects brainstem death,<sup>40</sup> Rabbi Dr. David Shabtai writes:

The halakhist assumes that *halakha* contains the appropriate definitions, and often criteria, awaiting the relevant data so as to properly apply the *halakha* in question.<sup>41</sup>

39. Depending on how one defines formalism, there could be a variety of opposing positions. The term “realism,” often counterposed to “formalism,” has been applied to several schools of legal thought, which share the premise that law is not a strictly autonomous system, inasmuch as legal reasoning is influenced by extralegal realities and considerations.

40. While in the epilogue to his *Defining the Moment* (399–400), Rabbi Shabtai refrains from proposing a clear-cut conclusion to the debate, his discussion throughout the book displays a marked preference for the rejectionist school. For example, he opens his presentation of the rejectionist school by noting that this school includes “a substantial number – and possibly even a majority – of modern halakhic decisors” (345; emphasis added). At the conclusion of the chapter, he defends these decisors against the charge of fear of “that which is new,” arguing that “as a novel and modern concept, the burden of proof is most certainly on those who wish to assign ‘brain death’ halakhic meaning, and these decisors claim that the threshold has simply not been met” (396). That Rabbi Shabtai shares the belief that the “threshold” for supplying the burden of proof has not been met is indicated by his frequent peppering of the arguments supporting brainstem death with unanswered critiques (e.g., 295–98, 375), as opposed to the generally straightforward presentation of the arguments of those who reject brainstem death. Moreover, even when he does note criticisms of the rejectionist arguments, his rhetoric downplays the difficulties; see, e.g., the comment “R. Bleich’s suggested interpretation is not without difficulties” (358), followed by a lengthy discussion whose conclusion states that the difficulties “are (still) within the world of science fiction, unlikely to be relevant in the near future,” whereas “the application to current situations, R. Bleich argues, is most certainly clear” (362).

41. Shabtai, *Defining the Moment*, 43; a particularly stark essentialist formulation of how to define death is provided by Rabbi Yaakov Weiner (<http://torahmusings.com/2011/02/symposium-on-the-ethics-of-brain-death-and-organ-donation-iv/>):

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Compare this to one of the opening passages of Rabbi Prof. Avraham Steinberg's recent book on the topic:

מבחינה ביולוגית, המוות הוא בדרך כלל תהליך מתמשך, שבו תאים, קרמות ואיברים שונים מתים בשלבים שונים... קביעת רגע המוות המדויק של הפרט הוא מושג חברתי השקפתי-משפטי-דתי הקובע את מצב המוות של אדם לפי קני-מידה מוסכמים, למרות שכמעט לפי כל ההגדרות עדיין ישנם באותה עת חלקים חיים בגוף. קביעה משפטית זו מושתתת על נתונים רפואיים, כאשר למדע הרפואי כשלעצמו אין מעמד מכריע בהגדרת רגע המוות. הרפואה יכולה לתאר את מצב הגוף בכל רגע נתון, אך השאלה אם מצב זה נקרא מוות הינה שאלה הגותית.

From a biological point of view, death usually is a *prolonged* process in which various cells, tissues, and organs die at different stages.... The precise determination of the *moment of death* of the individual is a social ideological-legal-religious concept that determines the state of death of a person according to established criteria, despite the fact that according to virtually all definitions [of death], there still are parts of the body that remain alive. This *legal* definition is rooted in medical data, even though medical science in and of itself has no determinative standing in *defining* the moment of death. Medicine can describe the state of the body at any given moment, but the question of whether this state is considered death is a philosophical question.<sup>42</sup>

Although these two statements need not contradict one another,<sup>43</sup> both the language and the broader context of the two

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I submit that the definition of death is primarily a matter of metaphysical, and not physical, change. It is contingent upon the soul leaving the body, as we find in the Mishna (*Oholot* 1:6): "A human [body] does not cause impurity until the soul departs." No one can perceive the soul as it leaves the body; all that is available are signs of the event.

A lower-key statement of this idea may be found in the conclusion to Breitowitz, "Brain Death Controversy," 66.

42. Steinberg, *Mavet Mohi-Neshimati* (Jerusalem: Merhavim, 5772), 20. Cf. Professor Steinberg's earlier and fuller discussion in his *Encyclopedia of Medical Halakha* (Jerusalem: Schlesinger Institute, 1994), s.v. *Qevi'at Rega ha-Mavet*, 18.

43. The argument for reconciling these two statements is based on the fact that Dr. Shabtai is aware that "the *definition* of death is a value or judgment-based determination"

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passages indicate that the two authors are addressing the halakhic definition of death from different points of view. Dr. Shabtai assumes an essentialist position in which there is a given, immutable halakhic *definition* of death to be discovered, even as the *criteria* for determining whether the reality corresponds to this definition may change as science advances. Professor Steinberg, however, asserts that “legal definitions” are themselves “rooted in medical data,” thus allowing for the possibility that as medical science presents us with new realities and new understandings of their significance, not only will halakha be applied differently, but the halakhic definition itself may be modified in order to coordinate the principles underlying the classic halakhic definition with the changed reality confronting the contemporary *poseq*.<sup>44</sup>

While each of these halakhic outlooks will require the *poseq* to consider both the meaning of the sources and the ramifications of changes in medical science, the different philosophical starting points may impact significantly on the way in which these two factors will be understood and how they will be weighed against one another. The essentialist position will tend to be more rigid in interpreting and applying sources, demanding a higher standard of proof for creative interpretations or applications,<sup>45</sup> while the realist position will tend to be more open toward flexibility both in understanding the sources and in reassessing their applicability to changing realities.

To illustrate this point, let us consider the debate regarding the role of the hypothalamus in determining whole-brain death. In debating whether Rabbi Shlomo Zalman Auerbach’s insistence on whole-brain death can be satisfied by current medical testing, supporters and opponents of brainstem death have argued whether the hypothalamus, which may continue to function after brainstem death

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(*Defining the Moment*, 42); Rabbi Steinberg also acknowledges the authority of sources from the Talmud and *posqim* in guiding us to a definition of death. As I shall presently argue, however, Dr. Shabtai is operating with a more inflexible view of how halakha has defined death than is Rabbi Steinberg.

44. In a highly instructive discussion, my revered teacher Rabbi Aharon Lichtenstein, *Leaves*, 1:170ff, suggested a similar (though not identical) distinction between pluralism and monism in halakha.

45. See, e.g., Rabbi Shabtai’s discussion, referenced above, of the threshold of proof.

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has been established, is part of the brain. Whatever may be the merits of the arguments pro and con, it bears noting that the very debate is rooted in understanding Rabbi Auerbach's position in an essentialist fashion – if the halakha, as determined by this leading *poseq*, demands the death of all brain cells, whatever is defined as “brain” must have died in order to fulfill the requirements of the halakha. However, if one adopts a realist view regarding the way in which a *poseq* formulates brain death,<sup>46</sup> this affords greater flexibility in determining what vital functions controlled by the brain are understood to be irrevocably lost in brain death, thus bypassing the question of whether the hypothalamus is part of the brain.

I do not wish to overdraw the difference between these two halakhic outlooks. It is arguable that no legal thinker is a pure formalist or realist and that these terms should be viewed as useful abstractions that help to conceptualize the factors involved in legal thought and the different roles and emphases that legal thinkers assign to each factor.<sup>47</sup> Moreover, there is good reason to assume that in the halakhic system, formalistic considerations predominate, and a halakhist has considerably less leeway than a secular jurist to take realistic

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46. The realist perspective regarding Rabbi Auerbach's *pesaq* may be further subdivided.

The first, and more fundamental, issue is whether the ruling of a *poseq* needs to be applied exactly as formulated or else the reasons and rationales for the *pesaq* may be understood by later (and perhaps even by lesser) authorities as enabling flexible application. In the case at hand, I believe there is room to raise the issue of intent as well – did Rabbi Auerbach in fact believe that whole-brain death is a fundamental halakhic requirement, or did this demand rather reflect his hesitations regarding the reliability of contemporary medical science and its practitioners?

47. See, e.g. Lynn Sharp-Paine, “Instrumentalism v. Formalism: Dissolving the Dichotomy,” *Wisconsin Law Review* 4 (1978): 997–1028; Hamish Stewart, “Contingency and Coherence: The Interdependence of Formalism and Realism in Legal Theory,” *Valparaiso University Law Review* 30 (1995): 1–50 (<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1878&context=vulr>). Interestingly, as this essay was being edited, Israeli Supreme Court Justice Noam Solberg delivered a lecture in which he argued that it was time for the court to move away from excessive willingness to rule on the basis of the judges' value system and to adopt a more formalistic attitude, as reported by Yehuda Yifrah, “*Hagana min ha-Tzedeq*,” in the *Tzedeq* supplement to *Makor Rishon*, October 26, 2012, 1–2.

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considerations into account.<sup>48</sup> Nevertheless, the debate between Drs. Shabtai and Steinberg illustrates that some halakhists are more open than others to conceptualizing halakha in realistic terms, and halakhic discussions regarding many other issues – especially those discussed below in section IV – will often reflect the division between formalistic and realistic orientations toward understanding the nature of halakha.<sup>49</sup>

It should further be noted that the different points of departure of formalistic and realistic orientations do not automatically predetermine the halakhic result. Referring once again to the example at hand, it is entirely possible to oppose brainstem death on realistic grounds or inversely to accept it as halakhically valid on formalistic grounds.<sup>50</sup> Nevertheless, the orientation adopted by the *poseq* remains a significant factor in determining how he conceptualizes the issue, how he approaches the sources, and what weight he assigns to various arguments pro and con.

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48. In contradistinction to several contemporary authors (cited by Brown) who have overemphasized the role of non-formalistic considerations in halakhic decision-making, Brown (“*Formalism*,” 242–57) argues vigorously that the formalism of the halakhic system differs from the models employed in contemporary legal thought, and he accordingly suggests a new model of formalism. Although he does not deny the existence of non-formalistic reasoning in halakha, Brown suggests that the reason for the predominance of formalism in halakha is its antiquity (244), but a reason at least equally important is the divine authority in which halakha is rooted.

49. A somewhat surprising exponent of realistic considerations in determining halakha, according to Brown, is Rabbi Karelitz. See discussion in Brown, *Hazon Ish*, 497–535.

50. Many of the *posqim* who have accepted brainstem death have done so on purely formalistic grounds. Inversely, opposition to brainstem death may be mounted on realistic arguments, as evidenced by the debate on philosophical grounds among contemporary ethicists regarding the definition of death (see Shabtai, *Defining the Moment*, 45–66). A further interesting illustration of an argument of a realistic nature on behalf of the rejection of brainstem death is Rabbi Bleich’s claim that several halakhic sources are grounded on the “unstated assumption that motion is always a sign of life, positing that the ultimate (and only) indication of life is ‘vital motion’” (presentation of Rabbi Bleich’s position by Shabtai, *Defining the Moment*, 110).

### The Role of Human and Social Factors

The title of this section is taken from a chapter in Rabbi Aharon Lichtenstein's book *Leaves of Faith*, which cites talmudic sources in which we find overriding values "preempting the 'normal' Halakhah" (164), followed by a discussion of whether contemporary *posqim* are authorized to reason halakhically in a similar fashion:

The cogency and legitimacy of a "human" approach to *psak* appears, to many, problematic. ... On this reading, the process of *pesikah*, properly conceived and executed ... entails, rather, the application of text to problem, the coupling of code and situation. This conception does not necessarily preclude reckoning with the specific circumstances of the question and the questioner, as these may very well be part of the relevant objective data. The prevailing tendency, however, would be to dwarf this factor. (166)

Arguing vigorously against this view, which he terms a "caricature," Rabbi Lichtenstein asserts:

As anyone who has been privileged to observe *gedolim* at close hand can readily attest, they approach *psak* doubly animated by responsibility to Halakhah and sensitivity to human concerns. (166)<sup>51</sup>

It is arguable whether the view that Rabbi Lichtenstein caricatures is indeed absent from those sectors within Orthodoxy that favor

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51. Cf. pp. 247–50, regarding Rabbi Auerbach. On p. 172, Rabbi Lichtenstein notes that "it is sometimes thought that the Rav was opposed to this approach," based primarily on the Rav's well-known rejection of factoring psychosocial elements into the halakhic process. However, Rabbi Lichtenstein argues both that the thrust of this passage should not be understood in such a light and that in practice the Rav's approach to *pesaq* certainly included human and social concerns. Cf. David Berger, "Texts, Values, and Historical Change: Reflection on the Dynamics of Jewish Law," in *Radical Responsibility* (ed. Michal J. Harris, Daniel Rynhold, and Tamra Wright; Jerusalem: Maggid, 2012), 201–16.

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*humra* over *qula* and that revere *posqim* whose single-minded devotion to Torah study reduces to a bare minimum their contact with the world outside the study hall.<sup>52</sup> Nevertheless, Rabbi Lichtenstein's summary retains its validity:

The balance between norm and need may be variously struck. There certainly are ideological differences among *poskim* over how much weight to assign the human factor. (166)

There are different ways and different kinds of halakhic mechanisms by means of which *posqim* can take account of human and social concerns. In some cases, such as *hefsed merubbeh*, it involves relying upon flexibility contained within the system, in the form of opinions or options that are normally not accepted but a *poseq* may decide to follow when dictated by circumstances. In other cases, the halakha allows room for “broad axiological”<sup>53</sup> considerations (175), such as *kevod ha-briyot*, to suspend prohibitions that are insurmountable in terms of technical halakhic reasoning.

Both of these types of cases test the degree to which different *posqim* are prepared to consider human needs as modifying technical halakha, but Rabbi Lichtenstein argues that the challenge presented by the latter case is particularly acute. Noting the paucity of references to *kevod ha-briyot* in contemporary responsa, Rabbi Lichtenstein suggests

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52. These two characteristics of the *Haredi* community contrast with two of the factors that Rabbi Lichtenstein cites as militating in favor of human concerns within *pesaq*: the preference of inquirers to turn to more lenient *posqim* and the view of *pesaq* as an “existential encounter between seeker and respondent” (p. 166). The existential encounter is further diminished by the growing tendency of community rabbis to defer, in matters of *pesaq*, to the rulings of *rashei yeshiva*.
53. The term seems to be equivalent to “overriding values” (cited above). An interesting formulation of this concept is found in a celebrated passage of Rabbi Kook's *Orot ha-Qodesh* (3:11; p. 27):

Fear of Heaven should not be allowed to set aside the natural morality of a person, because then his fear of Heaven is no longer pure.

See also Rabbi Lichtenstein's famous essay “Does Judaism Recognize an Ethic Independent of the Halakhah?” in *Leaves*, 2:33–56.



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that *posqim* are reluctant to invoke a principle that if taken as a precedent can potentially “be understood as granting wholesale license to do away with halakhic prohibitions.”<sup>54</sup> Hence even when the motivating force for a particular *pesaq* is *kevod ha-briyot*, the *poseq* generally will explain it as rooted in technical halakhic considerations.<sup>55</sup> On the other hand, Rabbi Lichtenstein fears:

Such reserve may exact a practical and educational toll, as awareness of certain values and their place within Halakhah may become jaded. (175)

Recent discussion of issues such as allowing greater room for women’s participation in liturgical roles illustrates the dramatic differences among different rabbis regarding the proper balance to be struck between these opposing concerns, underscoring how central this issue may be to the way in which a *poseq* approaches and decides a question.

### Attitude Toward Contemporary Society

One of the most important questions influencing the approach of a *poseq* is his attitude toward contemporary society. This question divides into two distinct but interrelated issues. The first issue is the extent to which society at large is regarded by the *poseq* as embodying worthwhile values that can and ought to be integrated into a halakhic framework.<sup>56</sup> The second issue is whether the halakhically observant community is viewed as a self-contained micro-society or as inextricably bound up with the broader social environment.

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54. The quote is taken from a summary of a lecture by Rabbi Lichtenstein, “Kevod ha-Beriyot: Human Dignity in Halakha,” by Aviad Hacoen (trans. David Silverberg), available at <http://tinyurl.com/35gedm>. Cf. the comment by Rabbi Lichtenstein, *Leaves*, 1:248, regarding the “potentially radical implications” of Rabbi Auerbach’s conception of the application of *lifnei iver* (placing a stumbling block before the blind).

55. Rabbi Lichtenstein, *Leaves*, reports that the Rav adopted such a policy, and he surmises that other *posqim* as well have done so.

56. For an approach that sharply differentiates *da’at benei adam* (the human view) from *Da’at Torah* (the Torah view), see Elyashiv, *Qovetz Teshuvot*, vol. 1, no. 180 (Jerusalem, 5760).

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Together these two issues will exert influence on the thinking of a *poseq* in terms both of his desire to coordinate Torah values in certain ways with those of contemporary society and of his need to formulate his rulings and his reasoning in language and categories accessible to a non-Torah audience. Any reader familiar with the rabbinic world presumably will have little difficulty in identifying differences among rabbis regarding each of these two issues, although there may be different perspectives as to the degree to which these issues influence the substance of *pesaq* as well as the style.

An important corollary of the attitude of a *poseq* toward society at large is the question of the way in which he perceives his function as a halakhic authority. One significant trend in contemporary society is the decline of paternalism and expansion of individual autonomy. In many areas, such as medical ethics, experts in the field no longer see themselves as deciding issues on the basis of their superior knowledge and dictating policy to the non-experts, but rather as advisors providing their clientele with information, evaluation, and informed prognoses, while leaving the ultimate decision in the hands of the individual or the community.<sup>57</sup>

Both regarding issues of halakhic medical ethics and regarding the nature of *pesaq* in general, the extent to which the halakhic decision-making process remains paternalistic may be debated.<sup>58</sup> It may be argued that unlike the *rights* orientation of democratic society, the halakha is grounded in an ethos of *duties*, thus mandating a far greater degree of paternalism in the halakhic realm than in other disciplines.<sup>59</sup>

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57. For the sake of simplicity, I have noted a general trend, which needs greater elaboration and differentiation. The decline in paternalism to which I refer is true regarding “hard paternalism” (Joel Feinberg, *Harm to Self*; Oxford: Oxford University Press, 1986), in which experts decide on behalf of everyone, but society has not abandoned “soft paternalism,” in which experts decide on behalf of those incapable of informed consent. The trend away from hard paternalism is also not universally true, as evidenced by laws requiring seat belts or helmets.

58. Alongside the general issue of the nature of halakhic authority, the question of paternalism in the field of medical ethics depends upon the degree of control that halakha accords to a person regarding his or her rights to body and life, which are regarded as belonging to God.

59. See, e.g., Fred Rosner, *Encyclopedia of Jewish Medical Ethics*, 384, who differentiates between secular medical ethics, which negates “personal paternalism,” and the

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However, models exist in the halakhic sources for viewing a *poseq* more as a teacher than as an authoritative decisor, and it is arguable that both the ready accessibility of knowledge and the democratic ethos characteristic of contemporary society mandate viewing the role of a *poseq* in less paternalistic terms.<sup>60</sup>

The degree of paternalism in *pesaq* can influence the process of rendering a halakhic decision in different ways. A *poseq* who sees himself as rendering an authoritative and unequivocal ruling may conduct his investigation and decision-making in a different manner from a *poseq* who sees himself as clarifying and evaluating the options in order to enable an informed decision on the part of the questioner. The intention of a *poseq* to share his considerations with the questioner may lead him to understand and evaluate his sources somewhat differently from how he might have done so had he known that his reading of the sources would be shared only with his rabbinic colleagues.

These points should be of interest to a questioner as well. Does the questioner prefer to be a party to the deliberations and ultimately to the decision as well, or – as is often the case – does he or she prefer to receive an authoritative ruling, removing from himself or herself the burden of deciding things that may feel beyond his or her ken?<sup>61</sup>

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“religious paternalistic” approach that he ascribes to halakha. In a more nuanced fashion, Steinberg, “Medical Ethics in an Interreligious Comparison: Judaism” ([http://www.medizin-ethik.ch/publik/medical\\_ethics.htm](http://www.medizin-ethik.ch/publik/medical_ethics.htm)), maintains that halakha favors those contemporary approaches that argue against radical rejection of paternalism.

60. See Yuval Cherlow, “On Attuning the Halakha in the Post-Modern Era in the Spirit of Rabbi Shagar’s Thought,” *Netuim* 17 (2011): 257–70 [262–66; Hebrew]. See also discussion in Samuel Hain, ed., *The Next Generation of Modern Orthodoxy* (Jersey City: Yeshiva University Press, 2012), especially Shayna Goldberg and Judah Goldberg, “Ba’al Ha-Bayit-Centered Halakhic Consultation,” 53–73, and Tully Harcsztark, “Authority and Autonomy: An Ethical Perspective,” 74–85.

61. See Cherlow, “On Attuning,” 265–66, who strongly advocates a “dialogic” model of *pesaq*. Rabbi Cherlow notes that part of the responsiveness of the *poseq* is his ability to sense when his questioners desire and need to receive from him an unequivocal and authoritative *pesaq* leaving them without room for independent deliberation.

#### IV. ATTITUDE TOWARD CONTEMPORARY FIELDS OF KNOWLEDGE

Many of the thorniest issues that confront a contemporary *poseq* – including the issues to which this volume is devoted – involve apparent clashes between the reality described in halakha and the reality posited by contemporary science. The problem is not a new one, and medieval scholars coined the phrase *nishtana ha-ṭeva* (nature has changed)<sup>62</sup> to explain why in some cases the perceived reality in post-talmudic times fails to correspond to the reality portrayed by the Talmud.

The classic sources of *pesaq* addressed cases where the gap between the talmudic sources and current reality were readily perceptible to any observer. The more controversial clashes involve gaps between the sources and the reality as construed by regnant scientific paradigms. Such a case was discussed in a well-known passage in Rabbi Isaac Lampronti's *Paḥad Yitzḥaq* (Italy, eighteenth century) under the entry “*tzeida*,” in which he debates with one of his teachers the question of killing lice on Shabbat. Inasmuch as the Talmud permits killing lice on Shabbat because they are produced by spontaneous generation from sweat rather than by sexual reproduction, Rabbi Lampronti argues:

דבזמננו, שחכמי התולדות הביטו וראו וידעו וכתבו דכל בעל חי, יהיה מי שיהיה, הוה מן הביצים, וכל זה הוכיחו בראיות ברורות, א[ם] כ[ן], שומר נפשו ידחק מהם ולא יהרוג לא פרעוש ולא כינה.	Now that biologists have researched, ascertained, and written that every animal without exception comes from an egg and have demonstrated this with clear proofs, one who guards his soul should distance himself from [lice on Shabbat] and kill neither flea nor louse. <sup>63</sup>
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62. This formulation, utilized frequently by later authorities, appears in *Tosefot ha-Rosh* to b. *Avoda Zara* 24b, s.v. “*bat shalosh*.” Other *Rishonim* express the same idea with other terms, such as *nishtana ha-eit* (times have changed), in the *Tosafot* to b. *Avoda Zara* 24b, s.v. “*para*.” See further medieval sources listed by Rabbi Neria Gutel, *Hishtanut ha-Ṭeva'im ba-Halakha* (Jerusalem: Machon Yachdav, 5758): 21–31.

63. The translation is based on Rabbi Natan Slifkin's exhaustive list of sources on this topic at <http://torahandscience.blogspot.co.il/2006/04/iii-1.html>. The dispute between Rabbi Lampronti and Rabbi Brill is discussed in Gutel, *Hishtanut ha-Ṭeva'im*, 182–85.

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This view is roundly rejected by Rabbi Lampronti's teacher, Rabbi Yehuda Brill, who argues (ibid.):

שאינן לשנות הדינים המיוסדים  
על קבלת קדמונינו בשביל  
חקירת חכמי אומות העולם...  
ואין צורך למאמין לבקש ממקום  
אחר ראיות וטענות... כי תספיק  
קבלת רבותינו.

One may not change the laws that are based on the tradition of our early sages because of the investigations of gentile scholars... and there is no need for the believer to seek proofs and arguments elsewhere... because the tradition of our rabbis is sufficient.

The question of whether one should maintain talmudic halakhot in the face of advances in scientific knowledge involves two separate though interrelated issues. First, how much faith does one have in the practitioners of modern scientific methods and in their conclusions? Second, are the sages' halakhic rulings rooted in the science of their time, which may be superseded by later advances, or are they the immutable expression of the unique wisdom and divine inspiration possessed by ancient Torah authorities? These two questions play a major role in the debate surrounding brainstem death.

Worthy of note is the fact that the classic responsum of Rabbi Moshe Sofer (*Hatam Sofer* YD 338) – different interpretations of which lie at the heart of the debate – allows room for two opposing schools of thought regarding the second question. In the course of arguing emphatically that determination of death based on cessation of respiration is completely reliable, Rabbi Sofer suggests, without deciding among them, three possible sources for this ruling: they relied on the scientists of their time – as they did, he notes, in many matters of Torah – or they had a tradition given to Moses at Sinai, or they relied on the words “all in whose nostrils was the breath of life” (Gen. 7:22).

Interestingly, Rabbi Sofer seems to have no fundamental difficulty in allowing that the sages relied on the scientists of their time. Nevertheless, this does not in his view allow room for halakhic change in the matter, both because he is not certain that this indeed was the source for this particular halakha and because he appears not to have very much

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faith in the judgment of the doctors of his time.<sup>64</sup> (What Rabbi Sofer would have said about contemporary medical science remains moot.)

These issues continue to be hotly debated,<sup>65</sup> and they impact on many areas of halakha, including the laws of Shabbat (killing lice), establishing parenthood (DNA testing),<sup>66</sup> the laws of circumcision (the need for and value of *metzitza*, what conditions of a baby preclude circumcision on the eighth day), the *kashrut* of piscatorial parasites,<sup>67</sup> and many other areas. Hence the attitude of a *poseq* regarding how to deal with apparent clashes between the science of the rabbis and contemporary science is an important factor in his approach to *pesaq*.

64. This is indicated by his comment that the doctors of his time apparently “have forgotten” the knowledge available to the scientists of the time of the sages (cf. *Ĥatam Sofer* EH 1:8 at end). It is worth noting further that different sides of the brainstem death debate sometimes will cite Rabbi Sofer as though he unequivocally advocated one or another of the three possible sources for the sages’ scientific judgment.

65. See the Slifkin debate at <http://torahandscience.blogspot.co.il/2006/04/sources-indicating-that-chazal-did-not.html> and <http://torahandscience.blogspot.co.il/2006/04/purpose-of-this-compilation.html>. It bears noting that Rabbi Aharon Feldman (cited on Slifkin’s website, *ibid.*) acknowledges that Rabbi Slifkin’s view that the sages were not infallible in matters of science indeed has been “stated by giants of previous generations,” but he nevertheless justifies the ban on Slifkin’s work by arguing that this is “a minority opinion which has been rejected by most authorities since then.” We thus see an instructive instance of how the *pesaq* considerations we have been examining can interact: based on a supposed majority, the view that the sages’ science cannot be questioned is enshrined as authoritative – indeed, so authoritative that the opposing viewpoint is banned from dissemination. For an interesting example of a modern-day dispute – in a non-halakhic setting – regarding a clash between science and sources, see the disagreement between Rabbi Yaakov Kaminetzky and the sons of Rabbi Yitzhak Ze’ev Soloveitchik (Griz) about whether the landing of Neil Armstrong on the moon disproves Maimonides’ characterization of the moon as a heavenly body possessing a soul, referenced in Eli Cohen’s article, “Why did the Great R. Yaakov Kaminetzky z”l Watch טו,” *Bechadrei Chadarim* (9/9/2012) [Hebrew], (<http://www.bhol.co.il/Article.aspx?id=44417>). See further Eidensohn, *Daas Torah*, 389–99.

66. See discussion in Moses, *Really Dead*, 258–66, and sources at 278–83.

67. See, *inter alia*, J. David Bleich, “Survey of Recent Halakhic Periodical Literature – Piscatorial Parasites,” *Tradition* 44, no. 1 (2011): 65–101 [88–92]; Natan Slifkin’s letter to the editor in *Tradition* 44, no. 4 (2011): 79–81; Bleich’s response, “Survey of Recent Halakhic Periodical Literature – Spontaneous Generation and Halakhic Inerrancy,” *Tradition* 44, no. 4 (2011): 55–75; Yehonatan Simha Blass, “*Tappilim bi-Besar Dagim: Shiṭot Madda’iyyot bi-Qeviat ‘Shem Sheretz,’*” *Tchumin* 32 (5772): 393–402.

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Moving on from the natural sciences, halakhists have grappled as well with the impact of changes in the realm of human behavior. Should a widowed nursing mother have to wait twenty-four months before remarrying, in light of radical changes in infant care?<sup>68</sup> Should halakha still operate under the assumption that women generally will prefer a marriage to an undesirable man over singlehood (or divorce), or should halakhot grounded in that assumption be reexamined in light of attitudes of contemporary women to marriage and singlehood?<sup>69</sup> Are women immutably precluded from being called up to the Torah, or should the notion of *kevod ha-tzibbur* be revised to conform to contemporary mores? Each of these three questions raises different but overlapping issues regarding the nature of the halakhic system.<sup>70</sup>

Like other issues that have been examined in this essay, the degree of halakha's openness to change due to sociological factors will not be

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68. See sources and discussion in Gutel, *Hishtanut*, 109–13.

69. The Rav famously asserted the first of these two understandings in sharply dissenting from Rabbi Emanuel Rackman's suggestion that the talmudic principle that a woman "prefers to dwell as two rather than to dwell as one" (*tav le-meitav tan du mi-le-meitav armelu*; b. *Bava Qamma* 110b–111a) is no longer applicable under contemporary socio-economic conditions. This proclamation by the Rav, in a November 1975 address to the RCA entitled "Surrendering to the Almighty," has been widely cited and debated; see, inter alia, discussion and sources in Ruth Halperin-Kadari, "Tav Lemeitav Tan Du M-Lemeitav Armalu – An Analysis of the Presumption," *Edah Journal* 4, no. 1 (2004; [http://www.edah.org/backend/JournalArticle/4\\_1\\_kaddari.pdf](http://www.edah.org/backend/JournalArticle/4_1_kaddari.pdf)), and see further discussion in Natan Slifkin, "The Rav and the Immutability of Halachah" (<http://www.rationalistjudaism.com/2011/07/rav-and-immutability-of-halachah.html>).

70. In all three questions, the argument for adapting the halakha to conform to contemporary mores is rooted in understanding the halakhot in question as conditioned by the sociological realities of the time of the sages. The opposing viewpoint hinges on different considerations in the three cases (in that of nursing mothers, whether the framers of the *taqqana* included the underlying reason as one of its defining features; women preferring marriage to an undesirable partner – whether the sages' assessments of human nature are metaphysical or sociological in character; women's *aliyyot* – whether the sages' value judgments, such as *kevod ha-tzibbur*, are conditioned by sociological realities or rest entirely on an immutable value system). Each of these questions arises in several other areas of halakha. A *poseq* who accepts the adaptability of halakha regarding one case will not automatically accept this idea elsewhere (Gutel, *Hishtanut*, 13).

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regarded by *posqim* as a black-and-white issue. On one hand, Orthodox halakha – unlike its counterparts in other movements of Judaism – tends toward less willingness to view sociological changes favorably and greater hesitation to modify halakha. On the other hand, no *poseq* would deny that some halakhot no longer apply due to changes in societal norms.<sup>71</sup> Where and how to draw the boundary between holding steadfastly to codified halakha and ratifying changes in halakha due to changing societal norms remains an important and complex issue about which *posqim* differ.

### CONCLUSION

The issue to which this volume is devoted is both highly challenging and fraught with dramatic life-and-death consequences. The *poseq* seeking to rule on situations of brainstem death and potential transplants needs to adopt a well-thought-out position on myriad issues:

- How does one weigh the conflicting opinions of different *Gedolim* against one another (stature, following)?
- What methodology should be employed in defining and conceptualizing the issue and in seeking guidance from the sources (formalism, values, creativity)?
- What weight ought to be assigned to human and social factors when they pull in a different direction from that in which the sources appear to?
- How should one relate to the findings and the ideas of contemporary science and to the values and mores of contemporary society?

Although each of these issues may be discussed independently, as I have done in this essay, it is readily discernible that several of them bear a relationship to one another.

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71. One clear example of a halakha no longer practiced is the ruling in *Shulhan Arukh* EH 22:20 that women and unmarried men should not be schoolteachers; see *Otzar ha-Posqim* EH, vol. 9–10, 79 ff. For how changing mores affect halakhot regarding social interactions among men and women more generally, see Nachum Rabinovitch, *Si'ah Nahum*, no. 112 (Ma'aleh Adumim: Ma'aliyot Publishing, 5768).



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For example, attitudes toward modern science and toward contemporary society will often be correlated – a *poseq* suspicious of modernity will tend to be negative toward both, while a *poseq* who values scientific advancement generally will not reject wholesale the societal norms that enabled these advances. The attitude toward democratic values will tend to impact in turn on the degree to which *pesaq* is viewed as a function of authority, measured by stature and/or majority, or alternatively taken as a function of rational conviction. These interactions are not mechanical, and the complexity of each of these issues allows room for many shades and creative combinations.

In presenting the meta-issues that concern a *poseq* and the approaches that may be found regarding each issue, I have cast a wide net. No doubt there will be readers who feel discomfort with one or another of the approaches that have been described in this essay, whether because it appears obscurantist and removed from the reality in which we live or because it appears to stretch the bounds of halakhic thinking beyond the confines of Orthodoxy.

In writing this essay, I not infrequently experienced each of the two kinds of discomfort, but to my mind, stretching the limits of the reader's comfort zone is an important part of giving full and searching consideration to the kinds of issues discussed here. Each of the approaches described in the essay has a place in contemporary Orthodox halakhic thinking, even if a given reader (like the writer) will see some of these approaches as extreme viewpoints that need to be rejected or utilized sparingly.

The challenges of developing an approach to *pesaq* on all levels – intellectual, emotional, spiritual – reach a particularly high register when confronted by situations of brainstem death and organ transplants. In such situations, it is vitally important to turn to a *poseq* informed not only by halakhic knowledge and interpretative acumen, but by the kind of approach and outlook that the questioner finds congenial and persuasive, and whose *pesaq* will reasonably dovetail with his or her convictions and outlook. It is my fervent hope and prayer that this essay will be of help in this endeavor.