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Book Reviews

MICHAEL J. BROYDE AND MARK GOLDFEDER

The Behavior of Jewish Judges: A Theoretical Study of Religious Decision-making

A Response to Richard Posner, Lee Epstein, William M. Landes. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013. 440 pages.)

Judge Richard Posner and Professors Lee Epstein and William Landes have asked a wonderfully insightful question in their new book,¹ about how and why federal judges make the decisions that they do. Their conclusion is essentially that different types of judges at different levels of the judiciary are subject to different kinds of pressures, motivations, outside influences, and concerns, both pecuniary and non-pecuniary in nature. They are neither robotic automatons, following syllogistic and mechanical rules, nor are they pure ideologues, or politicians in bathrobes. At any level of the judiciary, there is a delicate and contextual balance always at play, with factors ranging from the cerebral and maybe even acknowledged ones (i.e. a judge's personal aspirations or agenda and a court's historic influence), to such mundane and maybe unconscious matters as time constraints and the desire for conflict aversion in panel situations. They do note, however, that the higher up the court system one goes, the more likely it is that ideology will play some role in the decisions. A good, self-aware judge or Justice knows that this is not only true but expected, and that critical reflection is in fact an intrinsic part of the real job description. Different kinds of judges have different roles to play, and the best kind of judge or Justice is the one who can identify his or her own role and really make the best of it.

Reading this book carefully we were struck by the simplicity and elegance of the question and the answer, and while there may not be a direct analog in Jewish legal decision-making, we were inspired and motivated to ask ourselves a very similar question: when one looks at the behavior of Jewish law decisors, how and

1 Posner, Richard A. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Harvard University Press, 2013.

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why do they make the decisions that they do?²

Too often this question is dismissed outright or not even asked, because people, especially religious people, tend to make the same mistake that Posner attributes to traditional legalist theorists: they think that their religious decision-makers are just faithfully applying black and white rules that govern every situation. Even a cursory read through the *Shulchan Aruch* (the Code of Jewish Law), however, reveals that there are often gray areas left in purposefully for the decision-maker to assess in context, because every legal system needs that flexibility to work. While one would never label something non-kosher as kosher, for example, depending on the time of day on Friday before Shabbat, the expense and hardship involved, the financial situation or status of the person asking, and a hundred other variables, one may label something that is marginally kosher as permitted.³ Of course the common law flexibility derives from the fact that the judge can in theory prospectively change hitherto undisputed rules, while halachic (Jewish Law) flexibility derives from the fact that what may appear to a layman to be a black and white issue with a clearly defined rule was actually a disputed position in the Talmud and medieval decisors, oftentimes even in the Codes. Thus one-time reliance on a previously discarded or minority position in a situation of great need might, for example, be sometimes permitted when a competent authority deems it appropriate. This is not to say that these broad considerations are outside of the halachic framework; these are in fact intrinsically built into the very nature of the halachic system.

Going back to Posner, it is clear that the distinctions in decision-making are not driven only by the level of the Court; methodologies vary considerably even at the same level, and even on the same bench. The various positions seem to correlate better with the roles that the judges see themselves as filling, or hope to one day see themselves as filling. It appears to be based on mindset rather than necessarily on actual or perceived influence. With that in mind, we would like to suggest the following paradigm to answer the question from a Jewish perspective: much as there are different types of judges, there are also different types of Jewish legal decision-makers, and though, like 'judges,' they are also often all called by

2 This question of course assumes that for the purpose of many questions, Jewish law is not entirely syllogistic. Sometimes, there can be multiple right or multiple partially right answers, with a value-call difference in between. See, for instance, '*Eilu v' Eilu Shiur*' by Rav Herschel Schacter to YU alumni,' available online at: <http://www.aishdas.org/articles/rhsEilu.pdf>.

3 For examples of such considerations, see *Shulchan Aruch Yoreh Deah* 68:11, 69:6, 113:9.

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one generic name (rabbi), they do very different things and are subject to very different pressures.

Although rabbis also serve other important roles, both in a pastoral sense and in a community organizing setting, in regard to their *decision-making* styles we can identify at least four major categories that are worth noting. In Jewish law there are *morei hora'ah* (communal decisors), *poskim* (halachic adjudicators), *dayanim* (rabbinic court judges), and *gedolim* (lit. 'great ones,' by which we mean rabbinic community Jewish law and policy leaders. Sometimes, these are the most revered rabbis in a generation, presumed by many to have some measure of divine intuition in their decision-making that is not vouchsafed to others.). While there is definitely some overlap (*gedolim* are sometimes also great *poskim*, and *dayanim* might also serve as *morei hora'ah*, etc.) we note that in general these different forms of Jewish law adjudicators serve very different communal functions, and are subject to different kinds of motivations, outside influences, and concerns. And again, much like secular judges, there may be very different levels of these roles in practice; a shul rabbi might for instance be a local *posek*, as opposed to a nationally or internationally sought after decisor; he might also serve on a local *bet din* or branch to hear small claims but never serve on a panel for a recognized national court in more serious matters. There are *gedolim* for smaller groups, whether they are Chassidic sects or other streams of Orthodoxy, while there are some who become transcendent, *gedolim* for the entire Jewish people. Still, we feel that the differences in the approach to and the kind of decision-making are driven by role and mindest and not by level, so that a small time *posek* will think differently than a less influential *gadol*, who will think more along the lines of the greater *gedolim* even as he deals with less significant issues, and less like the *dayan* of any greater or more limited stature. We also note that these roles are sometimes amorphous, and that other roles or terminology could have also been chosen; we offer these reflections in the spirit of starting this conversation, not precluding other analysis.

The differences between *poskim* and *morei hora'ah* usually revolve around the degree of difficulty of the questions asked and the creativity required in the crafting of the answer. While a *posek* and a *moreh hora'ah* both use the same basic framework and apply the same set of ancient principles to answer questions of Jewish law, *morei hora'ah* tend to so with familiar scenarios and with reference to well-grounded rules; there are only so many ways, for instance, to invalidate a chicken, or build a proper mikvah, or write a usable pair of phylacteries. The *posek*, on the other hand, often deals with issues of first impression. *Poskim*

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are tasked with taking the timeless principles and applying them to the timely realities they face. *Poskim* of recent generations, for instance, had to halachically categorize the modern State of Israel; define electricity in regard to Shabbat and other festivals; pinpoint the acceptability of testimony in light of telegraphs, telephones, pictures, videos, dental records, DNA, and much much more. When faced with an unprecedented question or challenge, a good *moreh hora'ah* will sometimes need to turn to his competent posek for guidance. In this way, the difference between *morei hora'ah* and *poskim* is not unlike the difference between the lowest level of trial judges entrusted to be doing what they believe the law is, and Appellate Judges reviewing, whose writing then becomes the law itself.

While there are many doctrinal distinctions between *poskim* and *dayanim*, the primary difference between a *posek/moreh hora'ah* and a *dayan* are the parties that 'stand' before them. In general, the *posek* and *moreh hora'ah* both answer questions that have to do with the relationship and ensuing obligations between the person asking, on the one hand (or whatever community, organization, faction etc. that they represent), and God on the other. A *dayan*, on the other hand, sitting in rabbinic court, adjudicates disputes between two human parties, with all of the difficulties, limitations, and frustrations that that activity entails, from fact-finding to forgetfulness and everything in between. It is important to understand that the same question can be asked in two different ways, once to a *posek* and once to a *dayan*, and receive two conflicting but both proper answers *because* of these very different roles. This is not unlike the crime of theft and the tort of conversion being tried both criminally and civilly. Take for example the case of a person who finds \$500 on the street. When one asks his rabbi if he is allowed to keep the money that is a question for a *posek* or a *moreh hora'ah* to decide. When another person shows up and demands his money *back*, that is a *din torah* (Jewish legal) dispute for a *dayan* to adjudicate. While the rabbi might tell the person to keep the unclaimed money, the *dayan* might require him to return it, and they both might be correctly explaining the Jewish Law in context.

Although it may seem counterintuitive at first, the *posek*, adjudicating between people and God, oftentimes has a lot more leeway to try and shape the outcome, within range and reason. The job of the *posek* is to provide answers when no one else is checking; this is sort of like seeking a reference opinion in areas that a) are often not black and white and b) whose outcomes are not likely to be questioned. More importantly for this equation, however, the *posek* has the luxury of having as one of the parties he is dealing with a merciful and benevolent God, who acknowledges the very act of love involved in diligently asking questions, and

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sometimes allows for leniency. Jewish law is acutely aware of the distinctions between the *lechatchilah* (the ideal, preferred action) and the *bedieved* (ex post facto reality), the *mehudar* (the beautified fulfillment) and the *ikkar hadin* (the letter of the law). Halacha has developed a flexible approach to dealing with God's rules in difficult or demanding situations; in addition to the above-mentioned categories the conversation includes considerations like super-*bedieveds*, 'places of great need' or 'great loss,' things done for the 'needs of guests,' or the 'needs of the many,' and a hundred other categories that we recognize as being not ideal but still baseline okay. A competent *moreh hora'ah* or *posek* must listen carefully for these cues, ask the right leading questions, and can end up giving what at first glance seems to be the exact same fact pattern a different answer the next time, based on his weighing of the context and the needs of the particular party and specific situation.

These multi-layered factoring tests are not at all unusual, and actually come up all the time; from serious questions of legitimacy, and who can and cannot marry into the Jewish people, where a person's entire familial fate and estate might be hanging in the balance (these will usually go to a *posek*), to questions of using the wrong fork with the meat dish (these will usually go to your local rabbi acting as a *moreh hora'ah*), on any given day a rabbi may answer dozens of such delicate questions, where notions of need, and even charity, play an important role, and God's rules are lenient when there is need and room to be, regarding that which He might otherwise rightfully claim. A *posek* who wants to remain relevant needs to know his community inside and out, because the exigencies and concerns of one group, time, or place need not be the same as another.

The *dayan*, on the other hand, resolves hard and fast questions of rights between two competing parties. Often the *dayan* has a much heavier burden to bear because he does not have the luxury of being able to apply any leniencies. All are equal in the *dayan's* courtroom; the old and the young, the rich and the poor alike. A *dayan* has no right to waive claims or impose his view of equitable justice on any given matter, thereby diminishing the rights of one party in favor of another. However harsh the verdict may seem, unless he has the advance consent of both parties to broker a compromise, he needs to simply tell it like it is. Simply put, while Jewish law has developed room for situational and other leniencies, they cannot be applied in a case where a leniency for one results in a stricture for another. Hence the *dayan*, with his two opposing parties, is on a different plane. On the other hand, the *dayan* is similar to the *posek* in that he also needs to know his community well; as in most of US and international contract law, the

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expectations of the parties govern under Jewish law as well, and so the *dayan* must be well-versed in commercial practice, secular default rules, common usage, and even communal slang, in order to give validity and meaning to the understanding of the parties.

A *gadol* is a third and completely different model of Jewish leadership. *Gedolim* are not necessarily *poskim* (although they can be) and are rarely *dayanim* (the role of *dayan* tends to be somewhat divisive in nature because, by definition, *dayanim* usually end up ruling against half of their clientele). *Gedolim* are visionaries; they stand at the crest of waves and at the forefront of generations; they stem tides and guide ships, monitor the pulse of a people and find the pressure points and exact right times for change. Theirs is not the quick and real-time answer of the *posek* or the reasoned dry decision of the *dayan*; theirs is a social, contextual and reactionary reading of the world, and where it has been, and where it is heading. Overall, the *gedolim* are there to make sure that their community lives on, and moves forward, and that any transitions be handled properly, so that even if externals shift, the underlying values and core principles whose representation they have been entrusted with always remain the same. Theirs is a graceful web of protection, an interlocking sequence of attacking and defending, channeling and redirecting, strategizing and standing ground. They may form alliances that are unexpected but it is usually because they are the ones who are forced to make tough decisions, to think about the bigger picture and balance values in dialectic tension. When people ask questions of ‘their *gadol*,’ their expectation is that the *gadol* is not just looking at their narrow question but rather is discerning the direction of the wind. As expectations and right decisions and reputations grow, the demands can become superhuman; people sometimes believe in the *gadol*’s ability to heal the sick, or see the future, and despite the fact that *gedolim* deny these powers and often try to minimize their own importance from a place of real humility, because people rely so heavily on their word they always need to do the best that they can to fulfill expectations. *Gedolim* of the previous generations like the Chazon Ish in Israel were known to have read medical journals in their spare time so that they could give accurate and up to date advice when, as often happened, they were consulted regarding major medical decisions.

Gedolim become symbols of what a community deems to be important. The late Rabbi Dr. Joseph Soloveitchik led Modern Orthodoxy for half a century with his synthesizing philosophy of Western thought and religious moral and legal tradition, while the last Lubavitcher Rebbe was one of the most dynamic and charismatic men to ever lead a flock. Both of them were eminent halachic

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authorities but were never known as *poskim*, and certainly never thought of as *dayanim*. The recently deceased Rabbi Yosef Shalom Elyashiv, who spent years as a *dayan* and was then a *posek/gadol*, was the ultimate model of the Chareidi Yeshiva world, dedicated entirely to Torah learning. Note that while some *gedolim*, like these men, ended up being somewhat communally transcendent, even they are still a recognizable part of a particular subgroup. Most *gedolim* in fact usually remain clearly representative of a community, and sometimes the process involved in their decisions, while arguably broader than other rabbinic decision-makers, will focus on what is best and what makes sense for their particular constituents. Thus Chareidi *gedolim* in Israel may oppose a draft on Yeshiva students, while a Modern Orthodox *gadol* in the US may encourage young women to learn more Torah, positions which other *gedolim* of other creeds might strongly disagree with, even as they respect each other and come together to set general policies across the board in regard to less contentious or politically charged areas.⁴

Supreme Court Justices are often times the secular equivalent of ‘*gedolim*.’ They come to embody a certain way of looking at the environment around them and end up defending a particular viewpoint, position, or attitude (and along with it the entire community of those who espouse it) to the rest of the world. Antonin Scalia was a Justice of this kind. He was the idealized conservative whose pen was a rallying point for a sizeable portion of the population. Sometimes he surprised, but never because he had not thought carefully about what he was doing, and always because he had done the analysis and weighed the different factors, outcomes, and long term effects, in his head.⁵

- 4 It is interesting to note that while in the olden days the questions of who was a person’s *moreh hora’ah*, *posek*, *dayan*, or even *gadol*, were basically determined at birth, what was once an accident of geography and location has now, with the tremendous advances in communication and connection in the last century, become an ideological choice. And so while the original Gerrer Chassidim, for instance, might have remained Gerrer Chassidim because that was where they lived in pre-war Poland, and if they had to relocate might have chosen to join a different, local Chassidic court, nowadays a person can be a Gerrer Chassid anywhere in the world; Ger has huge communities in Israel in Ashdod, Bnei Brak, Jerusalem, and Tel Aviv, as well as in New York, Lakewood, New Jersey, Los Angeles, London, Antwerp, Zurich and Toronto. All of them are under the leadership of Grand Rabbi Yakov Aryeh Alter, but even the lonely Ger chassid on assignment in Iowa can tune in to shiurim broadcast via satellite, or ask questions and receive guidance and support in instantaneous realtime.
- 5 And much like the traditional Orthodox *gedolim* have responded to modern liberal approaches to halacha, Scalia (1936-2016) also opposed the idea of an ‘evolving Constitution’ and preferred original intent.

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Not all Justices of the Court fit this mold however; historically, even some Justices who had what it takes to be *gedolim*, like Justice Arthur Goldberg (served three years, then retired to become Ambassador to the United Nations) or Justice James Byrnes (who resigned from the Court after only fifteen months to head up President Roosevelt's Office of Economic Stabilization), and who *wanted* to be *gedolim*-type leaders in the sense of doing something they felt would help mold and shape society, failed to see that their position on the Court could be a vehicle for that purpose. Instead, they thought of their role on the bench as being of the localized and issue-specific *dayan*-type variety, and so they quit after only a short time to do "bigger and broader" things.

There are also individuals like Judge Learned Hand, indisputably one of the greatest legal minds of the previous century, who never made it onto the Court. His famous and best-selling critique of the Warren Court's unanimous decision in *Brown v. Board of Education*, which ended segregation and was one of the most fundamental and groundbreaking Supreme Court decisions ever, highlighted the fact that while he was an absolutely top-notch *dayan*, he did not have the mentality of a *gadol*. Others, like Justice Felix Frankfurter, did make it onto the Court, but never realized their full potential on the bench because they too were excellent *dayanim* and top-notch legal thinkers, but not *gedolim* in their outlook. These are the kinds of judges who are always accurate but sometimes miss the forest for the trees; while Frankfurter never got the law wrong, he couldn't always see where the law needed to be going. In his dissent to *West Virginia Board of Education v. Barnette* (a famous opinion that overturned an earlier Frankfurt decision dismissing the claim that First Amendment rights should be protected by law) Frankfurter famously rejected the notion that as a Jew he ought "to particularly protect minorities." Instead, he explicitly reiterated his view that:

As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our

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own even looking in that direction that is material is our opinion whether legislators could, in reason, have enacted such a law.

This narrow view defined the rigid restraint that he was known for, and is important because it tells us how he thought of himself when he made decisions. His dissent in *Barnette* was just another attempt to keep the constrained *dayanic* power he felt he possessed firmly in check, and within the boxes. Like it or not, as he explained in the opinion, those were the limits within which he felt he worked for the people.

Gedolim, both Jewish and secular, are subject to much different kinds of pressure than *dayanim* and *poskim*, who, despite the fact they must know their own community, deal mostly with the quiet and pristine ivory tower of the law, mitigated only by the relevant concerns and understandings of people who are coming to *them* to ask their opinion because they are *like* them (usually at least in some ways of their own ilk) and care what they think. *Gedolim* lead whole communities at once, sometimes by logic, sometimes by dint of their personality, and sometimes by consensus peer pressure which carries along even those who are not quite in the camp, and who tend to grumble and complain.

In a sense, the position of a *gadol* is twofold. On the one hand they must know and care about what *their* community thinks of them and their decisions, or else they stand to lose the hard-earned trust and confidence of their followers and base. They must be careful because often they will deal with the important social issues of the day, areas where people tend to feel that they know all the factors themselves and will voice dissent if they disagree, even with a *gadol*. On the other hand, they must also look *outside* of their own communities, to the other and the different, to make sure that they are still considered relevant in the greater community of communities. Sometimes, they have to preemptively address uncomfortable questions that are brewing under the surface or just outside the fence, but are not even being asked, or at least not yet. Their decisions are therefore broad horizontally – in that they look to other communities on their right and left to gauge distance or bridge support – but narrow vertically, in that they live in the here and now and are less concerned about what people a hundred years later will think. Their job is to carry the community from point A in time to point B, at which moment the next generation's *gedolim* will take over. What happens at Point C and D is not their burden to carry, and later *gedolim* also know that even when they look at what happened historically, the real concerns, the complexities of the day, can never be put down fully or expressed two-dimensionally on paper. In that sense they know not to bother trying to judge or see what they would have

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done if they had been there.

Poskim and *dayanim* on the other hand care much less about what their constituents think – people tend to listen if they bothered asking, and usually they ask because they don't know the law for themselves – and much more about their posterity, what other *poskim*, now and in later generations, think and will think about their decisions vis-a-vis the integrity and structure of the law. They want to know whether or not they are likely to be reversed. Unlike the *gadol*, who sometimes deals with important matters purposely in quiet, so as not to embarrass, or so as not to call attention, these rabbis tend to record all of the steps in their thought-process in order to be both above-board and convincing when they share their views with others. In case some factors are different, by explicitly outlining their steps they can also make sure that parts of a decision remain relevant even if other aspects or even the final outcome do not.

Unlike the *gadol*, *poskim* and *dayanim* don't necessarily try and formulate policies to eliminate sin, to make life easier, or encourage good behavior; they are less likely to bend rules to foster outreach, or make themselves and their communities appear more compatible with modern Western thought. Their goal is a little more distant; it is calculated to maintain a pure and logically coherent system. The danger, though, is obvious. Like a surgeon who performs well but still loses a patient, a *dayan* or *posek* or judge in that mold might sometimes get the law right but fail to see where the greater unspoken needs of the parties, or the greater collective, are not being met. A *gadol* is one who recognizes those needs and finds a good way through. Without passing judgment on which approach was right or wrong in this particular situation, just as an example of the contrast between how a *posek* and a *gadol* approach the same issue in a characteristically different way, we point out that when the Reform movement began innovating in 1830, the Chatam Sofer, the pre-eminent European *gadol* of the time who also acted as a well-renowned *posek*, was fierce in his opposition to any and all change, famously writing (employing, in his customary style, a rabbinic play on words) that '*chadash*' (lit. new things; in the Mishnaic quote referring to new grain before Passover) is forbidden by the Torah. At the same time, Rabbi Akiva Eiger, the eminent *posek*, looked at each innovative question one at a time, and while he said no to most, concluded that some were in fact permissible. The *gadol* looks to provide a grand analysis of the meta trend, while the *posek* seeks to give a detailed explanation of the situation at hand. Here, the *gadol* clearly feared that the *posek* was going to miss the forest for the trees, and whether or not the Chatam Sofer, wearing his *gadol* hat, really felt that all the changes were actually

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impossible under Jewish law, sometimes *gedolim*, as advocates of what they think society should look like, 'prohibit' things that they themselves as *poskim* would not rule to be technical violations of halacha.

Sometimes, the conflict is internal; the late Rabbi Soloveitchik as a Modern Orthodox *gadol* was open about his opinion that women's prayer groups were a bad idea, and that he did not approve, but when pushed on the issue, the Rav as a *posek* refused to say that the practice was forbidden. This might be thought of as the religious equivalent of the Supreme Court saying that something is constitutional, but still a bad idea from a policy perspective, which reflects the fact that *gedolim*, like the court, do also have a very real if sometimes understated legislative role. As Chief Justice John Roberts noted in his Senate confirmation hearing, "Simply because you have a problem that needs addressing, it's not necessarily the case that Federal legislation is the best way to address it... [T]he constitutional limitation doesn't turn on whether it's a good idea. There is not a 'good idea' clause in the Constitution. It can be a bad idea, but certainly still satisfy the constitutional requirements." The same is true for *gedolim* and their tendency to issue broad public policy opinions, versus *poskim* who do understand the issues in tension but still feel constrained by the very nature of their technical legal role and more legalistic rulings. This is also not a modern phenomena; Maimonides, for instance, the Sephardic *gadol* and great halachic decisor, notes that certain practices are 'silly,' but cannot go against his own grain as *posek* and write that they are really forbidden.

Occasionally you come across an individual who can be both a *posek* and a *gadol*. These people tend to be gifted and brilliant thinkers and doers, who bring to their decision-making tables not only a critical mass of knowledge and creative, usually new and unusually innovative systems of application, but also a sensitivity to the realities of daily existence, nuanced and calibrated finely with practical details of mundane life as well as the theoretical descriptions of it. Rav Yosef Shalom Elyashiv spent forty years, an entire career's worth of time, serving as a *dayan* in the Israeli Rabbinical Court System. He then retired and transitioned to spend the next forty years as a Chareidi *Gadol*. Rabbi Ovadiah Yosef had a similar trajectory, starting out as a *dayan* and then becoming recognized as one of the most premier *poskim* of the last hundred years. What is particularly interesting about Rabbi Yosef is that he defined his sphere of influence somewhat differently than most *gedolim*. While, as noted, many *gedolim* and *poskim* are firmly situated in and associated with one or another streams of Judaism, Rabbi Yosef expressly saw all Jews as his brothers, and himself as a *gadol* for all of them. The strength

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of his conviction actually managed to convince others that they *should* listen, and led him to have great influence far beyond the width and breadth of his own traditional Sephardic community; driving down the highway during Israeli election season 2013, one could see many posters from the Shas political party depicting Rabbi Yosef with the following message: “Our Master rules that you should vote Shas.” At his funeral, the Sephardic and the Ashkenazic, the religious and the non-religious alike, all came forward to bid farewell to their teacher.

Sometimes, we witness disagreements between authorities as to whether *gedolim* or *dayanim* ought to be the ones to decide a case. Witness for example the recent case of the *get* issued for the man who was in a permanent vegetative state by the Rabbinical Court in Safed. The Safed Beth Din, acting largely on their own, issued a decision that was somewhat revolutionary, and highly controversial. Rabbi Moshe Mordechai Farberstein of Yeshivat Chevron criticized this decision with the following claim:

It appears that you did not understand the purpose of my public statement on this matter. The intent was not to discuss the halachic details with you but to express my anguish and protest on the great wrong of the three rabbinical court judges who are not among the greatest Torah scholars [=gedolim] of our generation and arrogantly decided to rely on their own judgment to permit a married woman [to marry another man] in a way that none of our great rabbis have ever done, and to publicize the matter only after the fact.⁶

His comment is that this type of innovative decision is not one for *dayanim*, since *gedolim* are needed. Others clearly do not agree with this approach. Rabbi Moshe Feinstein in a *teshuva* written when he was a young and virtually unknown *mara de'atra* of a small community in Russia, observes to the contrary: after noting that in theory one is allowed to argue even with *rishonim* when he has excellent proofs, Rabbi Feinstein states:

in cases of great need, and certainly in serious matters regarding the ending of marriages as this case, we are certainly obligated to rule [leniently], even if we merely deem it plausible to be lenient, and it is forbidden for us to be among the “humble” and [thereby be silent] causing Jewish women to remain unable to marry.

6 For more on this, see Michael J. Broyde, *Plonit v. Ploni: The Get from the Man in a Permanent Vegetative State*, *Hakirah: The Flatbush Journal of Jewish Law and Thought* 18:59-90 (2014) at pages 88-89.

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The full text of this paragraph of a very young Rabbi Feinstein reflects his views as *posek* and not *gadol*, we suspect.⁷ Sometimes it is less than certain what is the domain of *poskim*, *dayanim* or *gedolim*.

- 7 Rabbi Moshe Feinstein, Responsa Iggerot Moshe, Yoreh Deah 1:101 *sv uma shekatav* responds to his uncle who questions why anyone ought to listen to Rabbi Feinstein's view on this matter with the following very powerful recitation of his basic methodology:

And that which my dear correspondent wrote asking how we are permitted to rely in practice on such innovative insights as those I have presented, particularly when such a view contradicts the position of some latter-day authorities, I say: Has there already been an end or boundary set for Torah study, God forbid, that we should only rule according to what is found in existing works, but when questions arise that have not been posed in our traditional works we will not decisively resolve them even when we are able?! Certainly, in my humble opinion, it is forbidden to say this, as certainly Torah study will continue to flourish now in our time; therefore, everyone who is able must rule decisively on each halachic question posed to him, to the best of his ability, with diligent investigation in the Talmudic sources and the works of halachic decisors, with a clear understanding and valid proof, even if it is a new application of the halacha which has not been discussed in our Jewish law works. And even for a halacha which has been discussed in our Jewish law works, the one issuing a ruling must certainly understand the issue, too, and reach a conclusion in his own mind before issuing a ruling, and not rule solely based on a ruling that can be found on the topic in other halachic works, as that is considered as one who decides points of law merely from reading law books, about which it is said, "Those who merely recite the Mishnah bring destruction upon the world, for they decide points of law from their recitation of the texts" (Sotah 22a; see commentary of Rashi there). And even if one's decisions sometimes go against those of eminent latter-day rabbinic authorities (*acharonim*), so what? We are certainly permitted to disagree with latter-day authorities, and sometimes even with medieval authorities (*rishonim*) when one has valid proofs, correct reasoning in particular – on matters like this, our sages stated, "A judge has but only what his eyes see [before him]" (as explained in Bava Batra 131a; see Rashbam there) – so long as one does not contradict the undisputed opinion of the Shulchan Aruch and commentaries which have been widely accepted in our community; on these types of matters it has been said, "[our predecessors] left room [for us] to distinguish ourselves." Most of the responsa of the latter-day authorities indeed utilize innovative insights to decide numerous questions of practical import. However, one ought not be haughty in one's instructive rulings – this should be avoided whenever possible, but in cases of great need, and certainly in serious matters regarding the ending of marriages as this case, we are certainly obligated to rule [leniently], even if we merely deem it plausible to be lenient, and it is forbidden for us to be among the "humble" and [thereby] cause Jewish women to remain unable to marry, or cause fellow Jews to stumble in prohibited activities, or even simply cause a Jew's financial loss – See Gittin 56 which states, "Because of the humility of Rabbi Zecharya ben Avkulas, the Beit Hamikdash was destroyed;" why does it say "his humility" and what does that incident have to do with humility? See the comments of Maharatz Chayot there for a correct interpretation – This indeed is what results [from these types of failures to act], and we are compelled to rule [leniently] even for practical application when we deem it appropriate with evidence and clear understanding, and particularly in a serious matter of leaving a woman without a husband or avoiding a severe temptation.

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Indeed, Rabbi Feinstein, who became perhaps the greatest *posek* ever in the United States of America, was somehow able to also be one of the *gedolei hador* (the greatest ones of the generation), at the very same time. He presents an excellent example of someone who had the incredibly rare ability to look at his community honestly and reflectively in deciding when and where to be more lenient on a crucial halachic point, and when and where to be more strict. Part of his genius was knowing how to use the rules of the *posek* on a meta-level of halachic analysis; to recognize when an entire community was in a *shaas hadchak* (an urgent situation), or to know when to equate new forms of public knowledge with testimony.

One example of his genius in practice concerns his rulings on milk consumption in the US (the first is recorded in Iggerot Moshe Yoreh Deah 1:47 [Sivan 5714, June 1954]). In his decision, he allows people to rely on governmental monitoring of commercial manufacturers and their assertion that the milk in question is from cows, in lieu of traditional kosher supervision. This ruling was written as a *posek*, in clear halachic terms and in response to a technical legal query; but the underlying reasoning, which clearly factored in what at that time was the great added expense of having to purchase only kosher supervised milk, was the reasoning of a *gadol*, someone who looked at their community, and the time and place they were living, and understood the concerns of the people who were turning to him for guidance. Like any excellent *gadol*, he gave his ruling in tiers; he noted those who wanted could and should strive to be more stringent *if* they could afford to, but they did not have to; he instructed those who did accept this ruling and drink regular milk to not mock those who were trying not to do so as being self-righteous or arrogant, but should instead respect their level of devoted religious commitment. For other examples of Rabbi Feinstein acting as a *gadol*, see his rulings on the delegitimization of Reform and Conservative marriages. Doing so might at first glance seem the dismissive act of a *posek*, and yet the truth is that Rav Moshe the *gadol* thereby preserved the children of those marriages, negating any instances of technical adultery, in order to avoid any questions of *mamzerut* and remove any taint of illegitimacy from their offspring. (Truth be told, he also thereby preserved the concept of marriageability across denominational lines, a subtle but gigantically important move in preserving the unity of the Jewish nation as a whole.) For similar views of Rav Moshe acting as a *gadol* in the guise of a *posek*, see his staunch affirmation of the validity of secular law in American society; his firm stance against feminist movements in halacha; and his quiet unbending strength and determination in freeing the *agunot* of the Holocaust.

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Perhaps most striking about the responsa of Rav Moshe however is what is missing from their pages; in Rabbi Feinstein's lifetime, the single issue that was perhaps most divisive of American Orthodoxy was the struggle between the Agudath Israel of America and the Zionist Mizrahi Party. Rabbi Feinstein was clearly a member of Agudah in great standing, and yet one could read through his entire written legacy, thousands and thousands of pages, and never know that fact about him. Rabbi Feinstein is silent about the debate because he knows that taking a public stand here will render him a *gadol* for only half the population.

Again, especially on questions of interpretation, some of the pressures that the *gadol* and the *posek* must balance are very similar. Much like the Supreme Court Justices weighing in on a thorny issue of constitutionality, for a *posek* or a *gadol*, there is often times no right answer and no wrong answer, just a variety of different options all partially right and partially wrong and partially somewhere in between. At the highest levels of law we tend to deal in gray, balancing such factors as:

- a) the seriousness of the need (whether it is desegregation, or re-thinking the rules of secondary violations of rabbinic prohibitions to allow Jewish people to walk in the street on Shabbat when they know that there are motion detecting cameras that they are setting off);
- b) ideology (these are conscience claims, broadly, whether based on moral or religious factors or convictions);
- c) the severity of the stakes (legal and halachic rulings on abortion both fit the bill);
- d) public opinion and the determination of the decisor that the public can handle a change (look at debates on marriage and family in the US, or the role of women in the clergy in Orthodoxy); or, to be honest, in cases where a Justice, or a *gadol*, or a *gadol* acting as a *posek*, feels that the right thing to do is to radically reinterpret;
- e) the susceptibility and defensibility from a technical, textual standpoint of such a new interpretation or deviation from a classical position or understanding.

It is important again to stop here and reiterate that while *gedolim* and *poskim* often need to think of broader concerns outside the narrow textual discourse, they are still very much within the greater box; the broader concerns are not *outside* the system of halacha. A classic example of *gedolim* exercising great power include the Tosafists extending the use of the halachic principle of 'avoiding causing enmity

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from non-Jews' to allow for certain business practices that might otherwise have been questionable; or the practical removal of the category of 'heretic' in modern halachic discourse based on the Chareidi *gadol* the Chazon Ish's (Rabbi Avraham Yeshayahu Karelitz's) argument that because of the absence of evident divine providence in our day, all non-observant people fall into the Talmudic category of 'children that were captured amongst the gentiles,' and therefore cannot be blamed for their actions; or the reliance of many Zionist rabbis on the *heter mechira*, a formal sale of land that allows Jews in Israel to continue working it during the sabbatical year, a legal loophole whose validity had been an open debate until history and the practical necessity of allowing Jews to live provided additional weight for the lenient ruling. While a simple reading of the issues might lead an observer to one conclusion, it is the job of the great ones to recall and reapply all of the competing values in dialectic tension, values that *are themselves ineliminably religious*, and whose consideration is therefore legitimate. While you cannot change the law just because you want to ideologically, it is plausible to sometimes preference or choose one constitutional or religious value over another also important one, especially in situations that call for responding to people in critical need.

It should not, however, be assumed that the license to reexamine hard cases in hard times means that the answers to all of these questions were in fact foregone conclusions; when asked about a similar topic, Rabbi Soloveitchik once remarked that the atom bomb was not discovered until circumstances made it necessary to feverishly work out the principles that had been in existence since the dawn of time. So too, he claimed, circumstances sometimes force the *gedolim* and *poskim* to move heaven and earth to find the principles, but in truth they could not ever find them if they did not already exist in *potentia*. In dealing with the question of whether or not one could invite non-observant Jews to events on Shabbat that they would surely drive to get to, Rabbi Feinstein felt that despite the great need to bring people back into the fold and show them the beauty of Shabbat, he could not condone the practice. Others, like Rabbi Shlomo Zalman Auerbach, were comfortable affirming that the observing of multiple Shabbatot (maybe, eventually) in the future justified the violation of one Shabbat now, yet another halachic principle drawn from a very different context but applied by a master *posek* and *gadol* assigning different weights to the various values in the same balancing test.

Of course, being great in any area opens one up to the potential for criticism. Sometimes, federal judges are accused of being radicals, iconoclasts who subvert

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the system in order to further their own agenda, to abolish the constitution, to ruin freedom, to destroy America, etc. etc. And *gedolim* are subject to the same danger of accusations and criticism as well, along with the possibility of being labeled as left- or right-wing zealots willing to sell out tradition for conformity, or power, or fill-in-the-blank. At the end of the day though, Justices take an oath of loyalty to dutifully uphold the laws of the land, and, as a nation, even if we disagree with their particular outcomes we believe in the sincerity of their process. If any one of them actually overstepped the law, they would in fact be immediately removed. The implied oath of the *posek* or of the *gadol*, i.e. belief in the divine origins and authority of the Torah and the halachic system, functions in much the same way, providing the outer limits and lines that cannot be crossed in pursuit of any goal, no matter how honorable or worthy.

Unlike the book we are reflecting on, this piece is not meant to be an empirical analysis; we greatly admire Judge Posner who not only put forth a theory but also did the tremendous statistical legwork to demonstrate its truth. We have not done so, at least not yet, but our claim remains that as far as the decision-makers of the Jewish people, these four models of judges; the *dayanim*, focusing on regulating interpersonal relationships; the *poskim* and *morei hora'ah*, focusing on regulating our relationship with God by interpreting His will; and the *gedolim*, stabilizing, integrating, restructuring and providing both checkpoints and points of departure for our community, are all subject to competing claims of religious importance. When setting out to evaluate a rabbinic answer and to try and figure out why it was given, aside from the obvious Jewish legal reasoning, any and all analyses should first begin by identifying the rabbi on this rabbinic decision-making spectrum, and noting:

- what it was that he saw as his rabbinic job to do, and
- what pressures he saw himself as facing.

Posner et al. have done a real service to the legal community by pushing back the curtain just a little bit more in order to help the outsider understand the complicated equation involved in the decision-making balance of a federal judge. They have also made the point that federal judges know exactly what they are doing when they are doing it and why; that the various pressures do not operate subconsciously, at least not always. We feel that this is a conversation worth having in many different contexts, and we hope that our comparison to Jewish judges only furthers this exploratory process.

