Ira Bedzow and Michael J. Broyde

The Role of Custom in the Jurisprudence of the *Mishna Berura*

Introduction

The predominant view regarding the legal methodology of the *Mishna Berura*[1] is that a custom can be justified only by the written literature; in and of itself, a custom cannot be legitimated by virtue of its own existence.[2] It is our contention that this view is incomplete. The manner in which the Hafetz Hayyim explains the existence of a custom and accepts its continuation demonstrates that the *Mishna Berura* does believe that customs have inherent legitimacy. However, a custom's legitimacy cannot stand alone by virtue of its own existence. Rather, consistent with its overall methodology, which attempts to promote maximum compliance when possible and provides the broadest range for acceptance when not, the existence of a custom is only one component, albeit an important one, of the *Mishna Berura*'s general approach of determining the normative law.

1 The *Mishna Berura* was written by Rabbi Yisrael Meir Kagan (b. Zhetl, Belarus, February 6, 1838, d. Radun, Poland, September 15, 1933), also known as the Hafetz Hayyim. Though Rabbi Kagan is the author of the *Mishna Berura*, this article is an analysis of the methodology of the book *Mishna Berura* and not the man. It is neither a social nor an intellectual biography of Rabbi Kagan, nor is it a study of specific questions in Jewish law. Rather, it is an examination of the methodological approach used to produce the *Mishna Berura*. The goal is to understand how the book addresses and analyzes questions of Jewish law and the practical approach that is taken to deal with legal ambiguity

2 For example, Dr. Haym Soloveitchik, in comparing the perspective of the *Mishna Berura* in this regard to that of the *Arukh ha-Shulhan*, writes, "The difference between his posture and that of his predecessor, the author of the *Arukh ha-Shulhan*, is that he surveys the entire literature and then shows that the practice is plausibly justifiable in terms of that literature. His interpretations, while not necessarily persuasive, always stay within the bounds of the reasonable. And the legal coordinates upon which the *Mishna Berura* plots the issue are the written literature and the written literature alone. With sufficient erudition and inclination, received practice can almost invariably be charted on these axes, but it is no longer inherently valid. It can stand on its own no more." See Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28, no. 4 (1994): 64–130.

https://doi.org/10.1515/9783110357523-010

While one of the *Mishna Berura*'s intentions in comprising its commentary was to collect the positions of the Rishonim[3] and the Aharonim,[4] thus making its reliance on texts primary, nevertheless, its reliance on texts does not imply that it rejects the legitimacy of established customs per se. Rather, the *Mishna Berura* cites texts in order to provide explanation in support of those customs it already perceives as legitimate or to show why it considers a particular custom to be erroneous. Its citations are not generally used to justify a custom the validity of which is held in abeyance. The difference between supporting a custom textually and justifying it textually can be demonstrated by a case where the *Mishna Berura* cannot find a text that explicitly discusses an established custom. If the custom has inherent legitimacy, lack of textual support alone would not be a reason to dismiss it; on the other hand, if a custom's legitimacy is subordinate to the written word, it would simply not endorse a custom without textual support.

Despite its reliance on customs as a legitimate source for justifying a given practice, the *Mishna Berura* will not endorse a custom that has developed if the custom contradicts or cannot be incorporated into its greater legal methodology. This is the case even if the custom is practiced by those considered to be scrupulous in fulfilling the commandments. On the other hand, even if a custom is erroneous, the *Mishna Berura* often first searches for a means to legitimate it and will only disallow it when it clearly has no support; it will also at times support the legitimacy of a custom with citations to minority views that, were it not for the custom's existence, it would not endorse. Yet even when the *Mishna Berura* cannot find a way to accept as legitimate a practice that has developed contrary to the law, in order to incorporate those who have such a practice into the realm of legal acceptability, it may still try to find some justification for their actions. In its attempt to justify a common practice, the *Mishna Berura* at times dissects a general practice into a number of possible variations in order to validate at least some of the permutations rather than be forced to reject the entire gamut.

In the following, we will examine a number of cases where the *Mishna Berura* examines the legitimacy of a custom which either does not have textual support or which actually conflicts with the normative written law. We will also give examples where the *Mishna Berura* makes suggestions that are contrary to a written norm because it recognizes changes that have occurred in society in general or within the Jewish community of Eastern Europe in particular. This demon-

3 The Rishonim were the leading rabbis who lived during approximately the eleventh to the fifteenth centuries, in the era before the writing of the *Shulhan Arukh*.

4 The Aharonim were the leading rabbis who lived from approximately the sixteenth century to the present.

strates that it recognizes the mimetic nature of legal observance and does not rely solely upon the written literature.

The empirical nature of this article, and the general methodology of the *Mishna Berura*, cannot be understood in a vacuum. This article is part of a comprehensive empirical study of this work, and we believe that it should be regarded with that in mind.[5]

Below are examples which show that the *Mishna Berura* divides its defense of custom into five categories:

1. Cases where the law is debated and a custom resolves the dispute
2. Cases where the custom is contrary to the written law
3. Cases where the custom can be called erroneous
4. Cases where the custom is contrary to the written law, but the law could be re-explained to justify the custom (*limud zekhut*)
5. Cases where the contemporary reality has changed to the point that that the old custom no longer applies

Each of these categories needs its own explanation; therefore, each of the following sections contains an explanation of these categories and provides appropriate examples.

Custom When the Law Is Debated

Although the *Mishna Berura*'s attempt to incorporate as many opinions as viable may result in advocating for a change of practice, it does not recommend a change if the law itself is debated. In such cases, it will accept and further support the current custom. The strength of an established custom may even supersede other legal methodological principles due to its social influence. The *Mishna Berura* will maintain an established custom while, at the same time, forbidding its introduction into a different community. The *Mishna Berura* also uses the existence of a custom to measure the validity of a written norm. When a legal dispute exists and there is no established custom in a particular area, the *Mishna Berura* considers the existence of a custom in the same way as the various textual opinions.[6]

5 For an in-depth analysis of how the *Mishna Berura* deals with the existence of customs as it pertains to its overall legal methodology, see Michael J. Broyde and Ira Bedzow, *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura* (Brighton, MA: Academic Studies Press, 2014).

6 For more examples of this category, as well as the others below, see ibid.

Example 1:

The *Shulhan Arukh*[7] writes that if during the time when a kohen is reciting the *shema* he is called to the Torah, there is an opinion that holds that he should interrupt his recital and there is an opinion which posits that he should not. Rabbi Joseph Caro then rules that the law is according to the latter opinion. The Aharonim, on the other hand, rule according to the first opinion, which tells a kohen to interrupt his recitation; they even extend this authorization to the case where the person is not a kohen or when another person could take his place for the *aliya*.

According to the opinion that allows the interruption, the reason for allowing a person to interrupt his recitation of the *shema* in order to have an *aliya* is for the sake of honoring and respecting the community, as well as to give honor to the Torah. According to the opinion that does not allow interruption, the reasoning is that continuing to recite the *shema* instead of having the *aliya* would not be considered a disparaging of the Torah, nor would it imply that the kohen is not fit for the *aliya*, since he is already engaged in another *mitzva*.

The *Mishna Berura* writes that the world has the custom to follow the former opinion, and that one should not change the custom since the ruling is subject to dispute. Therefore, with the exception of the situation in which a person is in the middle of reciting the first verse of the *shema* and "*barukh shem*,"[8] the *Mishna Berura* sides with the Aharonim, saying that their position has become common practice and we do not change a custom when there is a disagreement in the law. Despite accepting the legitimacy of the custom in opposition to a ruling in the *Shulhan Arukh*, the *Mishna Berura* is still compelled to find a position which can better accommodate the conflicting views. The *Mishna Berura* continues to say that when there is only one kohen in the synagogue, it is better for him to walk out before the first person is called to the Torah, yet if the Torah is already lying on the table and no one is able to read except for him, everyone would agree that he should interrupt his recitation for the sake of honoring the Torah. The *Mishna Berura*, still trying to refine its position so that it does not run into any opposition, adds that if the person can easily finish by a section break, he should do so before going up to read. In the end, however, the *Mishna Berura* ultimately advises that the person remove himself from any potential doubt of transgression as a consequence of complying with a contested opinion.[9]

7 The *Shulhan Arukh*, written by Rabbi Joseph Caro in 1563, is the most authoritative legal code of Judaism.

8 The sentence immediately following the *Shema*.

9 *Mishna Berura* 66:26.

Example 2:

The *Shulhan Arukh* writes that a left-handed person dons his phylactery on his right arm, and an ambidextrous person dons his phylactery on his left arm, like a right-handed person. In the case of a person who writes with one hand but does all other work with his other hand, there are those who say that he should don his phylactery upon the arm with which he writes; still others say that the arm with which he writes is considered the stronger arm and he should, therefore, don his phylactery on his other arm. The Rema,[10] on the other hand, writes that the custom is to follow the second opinion.[11]

After discussing the various opinions on the subject, the *Mishna Berura* writes that it appears that the current practice is in fact the law according to everyone and that the custom of Israel is Torah. The *Mishna Berura* does not defend this position by justifying the custom textually. Rather, it regards the custom as one of the sources, along with the other textual sources, to consider as part of its general approach of trying to incorporate as many positions as possible. In order to find overall coherence between the different opinions, the *Mishna Berura* writes that the first of the two opinions brought by Rabbi Caro refers to a situation in which a person's writing hand is unable to do anything else. If the person can also do other things with his writing hand but it is just easier to use his other one, then the *Mishna Berura* claims that it is obvious according to everyone that the writing arm is the stronger one. Disagreement exists only with respect to the situation in which a person cannot do anything else with the hand with which he writes and cannot write at all with his other hand. Since each hand demonstrates a superior capability, there is a doubt as to which is the stronger arm. Therefore, except for this situation in which a person's writing hand is incapable of doing anything else—an unlikely occurrence—he should unequivocally don his phylactery on the arm opposite the one with which he writes.[12]

10 Rabbi Moses Isserles (1520 – 1572) was an eminent Ashkenazi rabbi who wrote a commentary on the *Shulhan Arukh*.

11 *Shulhan Arukh*, *Orah Hayyim* 27:6.

12 *Biur Halakha* 27: s.v. *v'hakhi nahug*.

Example 3:

The *Shulhan Arukh* rules that when saying *tahanun*[13] one should lean to the left. The Rema, on the other hand, writes that there are those who say that one should lean to the right. He further notes that the main practice is to lean to the right in the morning, since one is wearing his phylactery on his left arm, and to lean to the left in the afternoon.[14] The Taz[15] and the Magen Avraham[16] state that one should not change the custom. The Gra[17] holds that one should always lean to the left.

The *Mishna Berura* recommends to maintain the current custom and, in synagogues where the custom mentioned by the Rema is followed, it is prohibited to act differently so as not to create factions.[18] If the *Mishna Berura* were only to rely on textual justification, it would either have affirmed Rabbi Caro's ruling out of deference to the Gra or it would have at least suggested that a person should *ab initio* lean to the left but accept the Rema's position *ex post facto*. It might even have said that one should not protest against those who always lean to the left since they have legal support on which to rely. Its reason for supporting the established practice as described by the Rema, however, is not based upon its acceptance by the later legal decisors.[19] Even though the *Mishna Berura* often relies heavily on the rulings of the Gra as the basis for its own recommendations, it dismisses what it perceives to be the legally correct opinion for the purpose of maintaining social unity.

Custom Contrary to the Written Law

When a prevalent custom contradicts the *Shulhan Arukh*, the *Mishna Berura* still may defend the custom's acceptability as an *ab initio* manner of fulfillment. One way in which it supports such a custom is through applying or elevating legal

13 *Tahanun*, also called *nefillat apayim* (falling on the face), is part of the morning and afternoon services, and is said after the *amida*.

14 *Shulhan Arukh*, *Orah Hayyim* 131:1.

15 Rabbi David ha-Levi Segal (ca. 1586 – 1667), known as the Taz, was one of the greatest Polish rabbinical authorities.

16 Rabbi Abraham Abele Gombiner (ca. 1635 – 1682), the Magen Avraham, was a leading rabbinic authority in the Jewish community of Kalish, Poland during the seventeenth century.

17 Rabbi Elijah ben Shlomo Zalman Kremer (1720 – 1797), known as the Vilna Gaon or the Gra, was the foremost leader of non-Hasidic Jewry of his time.

18 *Mishna Berura* 131:6.

19 Ibid.

principles not previously attributed to it in order to bolster its legitimacy. The legal principle it uses to support a custom may sometimes simply be a reprioritization of conflicting values. When there is a common practice that explicitly contradicts the ruling of the legal decisors, and where the *Mishna Berura* cannot add other principles to tilt the scales definitively in the custom's favor, it will explain the rationale behind the custom and leave the final ruling open ended.

Example 4:

The *Shulhan Arukh* rules that neither a blind person nor one who is unable to read from the Torah may be called for an *aliya*. If a person who is unable to read from the Torah wants to be called, one must protest. However, if that person is a kohen or a levi, and there is no one else who can replace him, if he can recite along with the person reading the Torah word for word, he may be called to the Torah.[20] The Rema, on the other hand, rules that today we can call a blind person, as well as one who is unable to read, to the Torah for an *aliya*.[21]

The *Mishna Berura* writes that Rabbi Caro's leniency for giving an *aliya* to a kohen or a levi who is unable to read the Torah himself is due to the fact that he is still able to read the Torah along with the person reading the Torah for the congregation. Nevertheless, Rabbi Caro only permits this person to be called as a last resort; if there are other people who can be called to the Torah, one should not call a person unable to read.[22]

The *Mishna Berura*, however, legitimizes the contemporary custom of calling up a blind person and one unable to read, even when there are others who can be called in their place, by emphasizing the idea that reciting with the person reading the Torah is like reading the text oneself.[23] Moreover, the *Mishna Berura* supports the common practice of not checking to see if people can actually read with the person reading the Torah by emphasizing the notion that listening is equivalent to reading, and by saying that there is a general presumption that people are able to repeat the words.[24]

Although the *Mishna Berura* remarks that its position is in accord with various Aharonim, its acceptance of this lenient custom is not solely based on textual analysis. Rather it seeks to justify the common practice that has developed.

20 *Shulhan Arukh*, *Orah Hayyim* 135:4; 139:2–3.
21 Ibid., 139:3.
22 *Mishna Berura* 139:4.
23 Ibid., 139:12–13.
24 *Mishna Berura* 135:15.

This is evident from the fact that the *Mishna Berura* does not allow this leniency *ab initio* for *Parashat Para*[25] or *Parashat Zakhor*,[26] since some contend that *Parashat Para* is a Torah obligation and *Parashat Zakhor* is predominantly considered so.[27] Its disapproval of this custom when it comes to *Parashat Para* and *Parashat Zakhor* demonstrates that it recognizes that the prevalent custom is not ideally in accord with the law, yet it also shows its willingness to acquiesce to contemporary practice when it contradicts the codes.

Example 5:

The Rema writes that some say that a person must abide by the conditions of returning a pot to the stove only when it is removed before Shabbat. If the pot is removed after dark, it is permitted to return it even if placed on the ground.[28] He notes that this leniency is the practice for our type of ovens, but it is nevertheless good to be stringent in this respect.[29]

The *Mishna Berura* explains that the lenient opinion is that of the Ran,[30] yet many legal decisors disagree with him; even Rabbi Caro in his commentary *Beit Yosef* believes that the Ran refers only to returning a pot to the top of a stove and not inside an oven. Based on textual analysis alone, the *Mishna Berura* should therefore advise that a person not follow this practice. Yet the *Mishna Berura* writes that there is some merit to the custom, since the legal decisors do not prohibit returning the pot unless the oven is hot enough to cause the food to reboil. "Since this is not common with our ovens, one need not challenge the custom.[31]

25 *Parashat Para* (the Torah portion about the red heifer) is read on the week before *Parashat Hachodesh*, in preparation for Passover.

26 *Parashat Zakhor* (the Torah portion about remembering Amalek) is read on the Shabbat immediately preceding Purim.

27 *Sha'ar HaTziyun* 139:6. The *Sha'ar HaTziyun* is a reference section written by the Hafetz Hayyim to accompany the *Mishna Berura*.

28 The conditions that permit a person to return a pot to a stove that has a blech on it are enumerated as follows: (1) The food is boiling or at least hot, (2) The pot is still in one's hand, (3) The pot is not put on the ground, (4) One has the intention to return the pot when s/he removes it, and (5) The food in the pot must be fully cooked.

29 *Shulhan Arukh*, *Orah Hayyim* 253:2.

30 Nissim ben Reuven (1320 – 1376), the Ran, was a physician and an influential Talmudist and authority on Jewish law in Barcelona.

31 *Mishna Berura* 253:67.

One should note, however, that in the Sha'ar HaTziyun, it changes "reboil" to "yad soledet bo,"[32] making it more difficult to rely on the custom."

Example 6:

The *Shulhan Arukh* rules that it is permissible to give one's clothes to a Gentile to wash, or one's leather to tan, on Friday close to dark if the two have determined a fixed price for his services. However, if the work will be done publicly and it will be known that it is being done for a Jew, it is preferable to be stringent and prohibit it.[33]

The *Mishna Berura* explains that the ruling of the *Shulhan Arukh* would apply to a situation in which a Gentile publicly washes clothes that are distinctly Jewish,[34] yet it notes that the custom has arisen to give one's clothes to a Gentile on Friday close to dark even if the exact price is not stipulated beforehand.[35] The *Mishna Berura* supports the existence of this custom on two grounds. First, it cites the *Tosefet Shabbat*[36] which writes that since one does not know exactly whose clothes are being washed, one need not protest. Second, it cites the *Hayye Adam*[37] which gives another leniency, namely that today it is a known custom that washing clothes is done on a contract basis and not on a wage basis. Therefore, even when a Gentile publicly washes clothes on Shabbat, the suspicion that he is a day-wage earner would not arise.[38]

In the *Biur Halakha*,[39] the *Mishna Berura* remarks that all of the Rishonim write explicitly that if the Gentile does not know exactly how much he will be paid, it is as if he is working for a wage and thus his work would not be for his own benefit but rather for the Jew who employed him. However, it responds to this by saying that perhaps since the price to have clothes laundered is generally known, even when there is no mention of payment, the Gentile relies on an implied agreement based upon the known price and thus does the work on his

32 *Sha'ar HaTziyun* 253:59. *Yad soledet bo* (the degree of heat "from which the hand recoils") is the temperature at which Jewish law considers food to be cooked. It is between 110°F (43 °C) and 160°F (71 °C).

33 *Shulhan Arukh*, *Orah Hayyim* 252:2–3.

34 *Mishna Berura* 252:25.

35 Ibid., 252:14.

36 Written by Rabbi Raphael ben Hayyim Meisels.

37 Written by Rabbi Avraham Danzig (1748–1820).

38 *Mishna Berura* 252:25.

39 The *Biur Halakha*, a commentary tangential to the *Mishna Berura* and also written by the Hafetz Hayyim, is intended to be read in tandem with the *Mishna Berura*.

own accord. The *Mishna Berura* reserves final judgment, however, saying that further investigation is needed to find a resolution on which one can rely in practice, since full support of the custom would contradict its greater methodological priorities.[40]

An Erroneous Custom Does Not Uproot the Established Law

The *Mishna Berura* will not endorse a custom that has developed if the custom contradicts, or cannot be incorporated into, its greater legal methodology. This is the case even if the custom is practiced by those considered to be scrupulous in fulfilling the commandments. Even if a custom is erroneous, the *Mishna Berura* often first searches for a means to legitimate it and will only disallow it when it clearly has no support. One should not infer that this demonstrates that the *Mishna Berura* considers the legitimacy of custom to be subordinate to written texts; rather, it shows that it recognizes that not all customs are similar and that some practices develop outside of the four cubits of the law. In determining its level of opposition to a particular erroneous custom, the *Mishna Berura* also takes into account the reason for its development.

Example 7:

The *Shulhan Arukh* rules that one cannot make an *eruv* (a ritual enclosure that a community constructs to permit Jewish residents or visitors to carry objects outside their own homes) that contains a public domain, except if the openings in the walls contain doors that actually close at night. He admits, however, that some say that if the doors are not closed at night, the *eruv* may still be valid on the condition that they are at least able to be closed at night.[41] To define what constitutes a public domain, Rabbi Caro writes that it is comprised of streets and markets that are sixteen cubits wide and which are not roofed or walled. He adds, however, that there are those who say that any place that does not contain 600,000 people in it every day is not considered a public domain.[42]

40 *Biur Halakha* 252: s.v. *im katzatz*.
41 *Shulhan Arukh*, *Orah Hayyim* 364:2.
42 Ibid., 345:7.

With respect to how to define a public domain, the *Mishna Berura* writes that it has researched all of the Rishonim who require 600,000 people, but it could not find the stipulation that the people must be present every day. Rather, it says that the stipulation is that there is a possibility that this number of people could be found there in general.[43] In the *Biur Halakha*, it notes that if the presence of 600,000 people were actually a necessary stipulation, the Talmud would not have omitted mentioning it.[44] Despite the lack of textual justification, the prevalent custom had, in fact, become to build a form of an entranceway across the open areas, rather than installing a gate, when constructing an *eruv* that includes streets that are very wide and open from one end of the city to the other, i. e., streets that might otherwise be public domains. The justification to use a form of an entranceway is grounded on the opinion that a public domain requires 600,000 people. Based on that requirement, the streets would not be public domains; therefore, a form of an entranceway would be effective in constructing an *eruv*.

The *Mishna Berura* writes that even though many Rishonim disagree with this opinion, one cannot protest against those who act leniently and use a form of an entranceway to make an *eruv*; nevertheless, a *ba'al nefesh*[45] should be stringent upon himself.[46] By stating that one cannot protest against those who follow the lenient custom, it demonstrates that it does not believe that it is the essential normative opinion. However, because some legal decisors have found it to have legal validity, and in order to spread the net of legal legitimacy as widely as possible so as to maintain a unified system of law, the *Mishna Berura* condones it. A *ba'al nefesh*, on the other hand, should follow what the *Mishna Berura* thinks is the proper legal position. In this example, the *Mishna Berura* utilizes the legal principles of being strict by advising a *ba'al nefesh* to act according to the stringent position, and also of being lenient in condoning the lenient practice.

43 *Mishna Berura* 345:24.

44 *Biur Halakha* 252: s.v. *she'ein shishim ribo*.

45 Literally, "a spiritual master." When a prevalent practice is more lenient than what the *Mishna Berura* believes is the essential ruling, yet foresees that the practice cannot be changed, the *Mishna Berura* writes that a *ba'al nefesh* will act stringently. See Broyde and Bedzow, *Codification of Jewish Law*.

46 *Mishna Berura* 345:23; 364:8.

Example 8:

The *Shulhan Arukh* writes that a person should not say "amen" after "*ga'al Israel*," the concluding words of the blessing after the recital of the morning *shema* said immediately before the recital of the *amida*, since it would be an interruption between "*geula*" (the blessing for redemption) and "*tefilla*" (prayer).[47] The Rema notes that some say one does answer "amen" after the person leading the prayers recites the blessing, and that such is the custom.[48] The Rema continues, however, that there are those who are of the opinion that the necessity of making the juxtaposition without interruption only applies to weekdays and holidays; on Shabbat, on the other hand, it is not required at all. Yet he concludes by saying that it is good to be stringent and not interrupt if it is not necessary to do so.[49] The Rema's advice to be strict may seem as if he is conceding to the opinion of Rabbi Caro; however, when one takes his suggestion in light of what he writes in his *Darkhe Moshe*, it becomes clear that he does not retract from his position that saying "amen" is permissible. In the *Darkhe Moshe*, the Rema's concern is that since Shabbat does not require "*tefilla*" to immediately follow "*geula*," one may think it permissible to engage in any type of interruption, even if it has nothing to do with the prayer service. Therefore, he specifically remarks that things not associated with the service would be considered a prohibited interruption. For necessary interruptions, such as responding for *kaddish*[50] or *kedusha*,[51] however, one may rely on the *Or Zarua*[52] and not consider the interjection to be prohibited.[53] The reason that the Rema does not consider "amen" to be an interruption is that it is part of the conclusion of the blessing. Rabbi Caro, on the other hand, bases his decision that "amen" is considered an interruption on the *Zohar*. The *Mishna Berura* notes that there are those who are scrupulous and try during the week to fulfill their obligation according to all opin-

47 *Shulhan Arukh*, *Orah Hayyim* 66:7–8; 111:1. In the Talmud, Rabbi Yohanan states, "Who inherits the world to come? The one who follows the *geula* immediately with the evening *tefilla*" (*b. Berakhot* 4b).

48 Ibid., 66:7.

49 *Shulhan Arukh*, *Orah Hayyim* 111:1.

50 The *kaddish* is an Aramaic recitation of praises to God that is usually said by mourners.

51 The *kedusha* is said during the public repetition of the third section of the *amida* and is recited only when there is quorum of ten men (a *minyan*) present.

52 Rabbi Isaac ben Moses of Vienna (1200–1270), known as the *Or Zarua*, was one of the greatest rabbis of the Middle Ages.

53 *Darkhe Moshe*, *Orah Hayyim* 111.

ions by pausing at "*tzur Israel*"[54] or "*shira hadasha*,"[55] in order to answer "amen" after the person leading the prayers finishes the blessing.

The *Mishna Berura* interprets the Rema's statement that it is good to be stringent in a different way than the *Darkhe Moshe* indicates. Where the *Darkhe Moshe*'s stringency relates to superfluous interruptions, the *Mishna Berura* attributes it to a doubt regarding the justification for Shabbat's exclusion from the proscription. According to the *Mishna Berura*, the *Rema*'s comment refers to the fact that Rabbi Caro disagrees with making any distinction between Shabbat and other days, and due to the negative consequences of interrupting, "it is good to be stringent."[56] The *Mishna Berura* does, however, maintain that it is legitimate to be lenient regarding necessary interruptions on Shabbat, since the opinion is a legally valid one.[57] With respect to the practice of the scrupulous, the *Mishna Berura* disapproves of their strategy, writing that all the Aharonim agree that this is not a good practice, since one should not say an "amen" within the recital of a blessing, nor should a person refrain from starting the *amida* with the congregation. So, in order to correctly fulfill the obligation according to all opinions, the *Mishna Berura* gives different alternatives. A person should intend to finish the blessing at the same time as the person leading the prayers, whereby he would not have an obligation to say "amen." Likewise, he could say the introductory verse of the *amida* slightly before the person leading the prayers finishes, which would obviate the obligation to say "amen" yet it would still be considered as if he started the *amida* with the congregation.[58]

Example 9:

The *Shulhan Arukh* rules that it is prohibited to play with a ball on Shabbat and Yom Tov.[59] The Rema, however, writes that there are those who permit it, and that we have the custom to be lenient.[60] The Rashal[61] questions the validity of permitting it since it is not something that one needs to do at all. Moreover, it is child's play. Therefore, the Rashal writes that adults who have the custom to

54 An earlier part of the final blessing preceding the *amida*.
55 Ditto.
56 *Mishna Berura* 111:8.
57 Ibid., 111:9; *Biur Halakha* 111: s.v. *tov l'hahmir.*
58 *Mishna Berura* 66:35.
59 *Shulhan Arukh*, *Orah Hayyim* 308:45.
60 Ibid., 518:1.
61 Rabbi Solomon Luria (1510 – 1573), the Rashal, was one of the great Ashkenazi rabbis of his era.

play ball have a bad custom. The *Mishna Berura* cites the Rashal who says that it is a bad custom and also cites Rabbi Caro who prohibits it.[62]

Cases in Which the Custom Is Contrary to the Written Law, but the Law could Be Re-explained to Justify the Custom (*Limud Zekhut*)[63]

Even when the *Mishna Berura* cannot find a way to accept as legitimate a practice which has developed in a way that it perceives to be contrary to the law, in order to incorporate those who follow such a practice into the realm of legal acceptability, it still tries to find some justification for their actions. In its attempt to justify a common practice, the *Mishna Berura* at times tries to dissect a general practice into a number of possible variations in order to validate at least some of the permutations rather than be forced to reject the entire gamut. The *Mishna Berura* attempts to justify many practices this way, even if it does not support them. When the *Mishna Berura* cannot validate a customary practice at all, it attempts to give its adherents some other form of support.

Example 10:

The *Shulhan Arukh* rules simply that people may not eat or drink in the synagogue.[64] In the *Biur Halakha*, the *Mishna Berura* refers to the custom that has arisen of people eating and drinking in the synagogue. It writes that it is possible that they rely on the idea that synagogues in the Diaspora are built with the condition that if destroyed, the location may be used for any other purpose, and therefore they may likewise be used for any purpose even when they are intact. Recognizing the weakness of this justification, the *Mishna Berura* admits that this reasoning cannot apply universally and that there is no justification for eating and

62 *Mishna Berura* 518:9.

63 A *limud zekhut* is a method of defending a current practice that seems to be at odds with the normative law. One need not necessarily be convinced that the suggested defense is the correct reading of the classical sources; it is enough for one to be convinced that it is a *plausible* reading. This conviction can come from the individual's own insight into the texts, from a single precedent (*da'at yahid*), or from a collection of precedents, none of which represent the consensus.

64 *Shulhan Arukh*, *Orah Hayyim* 151:1.

drinking in synagogues in the land of Israel, where such stipulations do not take effect.[65]

Example 11:

The *Mishna Berura* notes that it saw in the *Sefer Ma'amar Mordekhai*[66] that "the customary practice which is done at large meals, where one tears the fish from its back and removes the spine in the middle, seems to be a transgression the prohibition of separating on Shabbat, and one should be careful not to do it, since it is removing refuse from food, which is prohibited even if done for immediate consumption. Rather, one should leave the spine and not throw it away. Also, people should not remove meat bones unless it is through the normal eating process, meaning that one chews on the bone to remove the meat on it and then throws it away after finishing with it. Bones that do not have meat on them should not be touched, rather they should be left on the plate and only afterwards thrown away if desired." The *Mishna Berura* responds to this opinion by saying that the world is not careful to be scrupulous about this at all, neither during nor before meals, and when people prepare food and remove the bones from the meat they are stumbling in a prohibition.

Nevertheless, the *Mishna Berura* attempts to salvage the custom of the people by saying that one should not protest if people separate bones from meat when eating since there are opinions which permit one to do so. Also, one should not protest against people who are lenient and remove bones from the meat when preparing food before the meal, since the Rema and the Rashal consider this to be like eating if their intention is to eat immediately thereafter. The *Mishna Berura* adds that one can further support this decision with the opinion of those Rishonim who hold that one is permitted to remove refuse from food if it is for immediate consumption. Even though many prohibit this and the *Shulhan Arukh* rules against it, in this case where there are many lenient opinions one cannot protest against those who are lenient. The *Mishna Berura* warns, however, that a person must be careful not to prepare food long before eating as is done for large meals. Moreover, it limits its leniency to bones that have meat on them. For those bones that do not have meat on them one must be careful not to separate them from the rest of the food and remove them from one's plate before eating, since it would constitute separating in violation of the law even if for im-

65 *Biur Halakha* 151: s.v. *v'ein okhlin v'shotin ba'hem.*

66 Written by Rabbi Shem Tov Melamed.

mediate consumption. The *Mishna Berura* offers that one should instead take the meat and leave the bones on the plate, yet if it is difficult to be scrupulous about this, he should suck on the bones before removing them since sucking on them would demonstrate that they are not considered refuse.[67]

Example 12:

The *Shulhan Arukh* rules that it is prohibited to eat *hadash*[68] even today, whether it is bread, parched grain, or roasted grain until the night of the 18th of Nissan, and in the land of Israel until the night of the 17th of Nissan.[69] The Rema qualifies Rabbi Caro's ruling, however, and writes that all unmarked grain is permitted after Passover by virtue of a twofold doubt. The first doubt is with respect to whether the grain was from the previous year or not; the second is that even if you want to say that the grain is from the current year, nevertheless, it may still have taken root before the 16th of Nissan.[70] On the other hand, there are Aharonim who write that in Poland a person can only be lenient with wheat and rye since most of it is planted in Heshvan (the second month in the Jewish calendar) so *hadash* does not apply to it. On the other hand, the great majority of barley, oats, and spelt is planted after Passover; therefore, where it is not normal to import it from elsewhere, one cannot be lenient.

Despite the legal requirement, even if to a reduced degree, the majority of people are not careful at all regarding *hadash*. Since it is so difficult to be careful, people rely on those few Rishonim who hold that *hadash* outside the land of Israel is only a rabbinic obligation and only for those lands close to Israel, such as Egypt and what was once Babylonia. They also rely on the fact that there are some legal decisors who hold that *hadash* only applies to grain owned by Jews at the time of growing but not to grain owned by Gentiles.

The *Mishna Berura* states that we are unable to protest against those who are lenient; nevertheless, a *ba'al nefesh* will not rely on these leniencies and will be as stringent upon himself as possible.[71] In the *Biur Halakha*, the *Mishna Berura* repeats that we should not protest against those who are lenient regarding *ha-*

67 *Biur Halakha* 319: s.v. *mitokh okhel*.

68 The Torah prohibits a person from eating from a new grain harvest that was planted close to, during, or after Passover until the following Passover. This grain is called *hadash*, meaning "new."

69 *Shulhan Arukh*, *Orah Hayyim* 489:10.

70 *Shulhan Arukh*, *Yoreh Deah* 293:3.

71 *Mishna Berura* 489:45.

dash. Nevertheless, it continues, saying that it seems that those who are careful to avoid the suspicion of transgression regarding other prohibitions yet are lenient with respect to *hadash* make the exception because they think that if a person wants to be careful he must do so regarding all stringencies of a particular matter. Therefore, they rely on the custom to be lenient completely. The *Mishna Berura* writes, however, that it is not correct to be lenient regarding all aspects of *hadash* when it is easy to fulfill one's obligation properly at least in some respects. It concludes that in certain instances it is quite easy not to rely on leniency and that people should at least make a distinction between certain and doubtful *hadash*. It assures those who are willing to be more stringent that they will be able to acquire *yashan*[72] in the winter as well.[73]

Cases in Which the Contemporary Reality Has Changed Enough so that the Old Custom Does not Apply Anymore

The *Mishna Berura* considers social changes in order to adapt practices so that they concur with the principle of the law given the new circumstances. The *Mishna Berura* does not always broaden the scope of acceptability when a general trend of laxity in observance develops; there are times when it takes a hard line in order to uphold what it thinks is the correct practice.

Example 13:

The *Shulhan Arukh* rules that the ability for one person to exempt another through his blessing over foods other than bread only applies to preceding blessings. For the blessing said after people eat, each person must recite the blessing for himself. They cannot become a group in order to make a collective blessing on food such as fruit, for example.[74] The *Mishna Berura* writes that *ex post facto* if the person reciting the blessing intends to exempt the others and they intend to become exempt through his blessing, then it is effective. If a person does not know how to recite the blessing for himself, then even *ab initio* he may be ex-

72 *Yashan* is "old" grain, meaning that the grain is no longer *hadash*.
73 *Biur Halakha* 489: s.v. *af bazman ha'zeh*.
74 *Shulhan Arukh*, *Orah Hayyim* 213:1.

empted through another. The *Mishna Berura* concludes by citing the Taz and other Aharonim who write that today the masses are disrespectful towards reciting concluding blessings; therefore, a person may exempt others even *ab initio* by having one person recite the blessing aloud so that the others, even those who can recite themselves, may be exempt through it. This is especially true regarding the "three-faceted blessing"[75] since few can properly recite it by memory. Nevertheless, it concludes, consistent with his greater methodology, it is better if each says the blessing along with the one reciting it aloud.[76]

Example 14:

The *Shulhan Arukh* rules that it is prohibited for a person to rent or to lend his animal to a Gentile in order for it to perform prohibited activity on Shabbat, since he is commanded to allow his animals to rest.[77] In the *Biur Halakha*, the *Mishna Berura* explains that the *Shulhan Arukh* is discussing a large animal. A small animal, on the other hand, which does not usually perform work, does not fall under this prohibition. The *Mishna Berura* also explains that the distinction that the Rambam makes between selling horses and selling other large animals to a Gentile is due to the custom that horses were only used for riding, whereas other animals were used to carry things, and the rabbinic prohibition to not sell the animals to a Gentile is in order to prevent lending or renting them to perform prohibited actions on Shabbat. Therefore, notes the *Mishna Berura*, today, since horses are specifically used to carry things, it is certainly obvious that one may not rent out his horse.[78]

Example 15:

The *Shulhan Arukh* rules that on Yom Kippur, if a doctor who is an expert, even if he is a Gentile, says that if a sick person does not eat it is possible that his illness will get worse and he will be in danger, he should be fed, and it is not necessary for the doctor to say that he may die if he does not eat. Even if the sick person

75 The "three-faceted blessing" is said after eating a minimum quantity of either: (1) foods made from one of the five grains (wheat, barley, spelt, oats, rye), (2) wine or grape juice, or (3) the five fruits, namely, olives, dates, grapes, figs or pomegranates.

76 *Mishna Berura* 213:9.

77 *Shulhan Arukh*, *Orah Hayyim* 246:3.

78 *Biur Halakha* 246: s.v. *behemto l'aino yehudi*.

says he does not need to eat, one must still listen to the doctor.[79] In the *Biur Halakha*, the *Mishna Berura* cites the *Sefer Tiferet Israel*,[80] which states that today it seems that we should not be as trusting of Gentile doctors in this matter, since they always say that if a sick person would fast, even if he has only a minor illness, it will be dangerous for him. The *Mishna Berura* also cites the Responsa *Ruah Hayyim*,[81] which expands the suspicion to include Jewish doctors who are suspected of transgressing the Torah and profaning the Shabbat and who do not fast out of contempt for the Torah. The *Mishna Berura*, however, recognizes that it cannot make a comprehensive legal judgment due to the fact that the social context is so variable and so it writes that in truth the matter rests on how the local judge perceives it.[82]

Conclusion

The perception that contemporary Orthodoxy is grounded in a scripturalist legal methodology is based upon the idea that, beginning with the *Mishna Berura*, the existence of a custom lost its normative influence in determining the law. In this view, the *Mishna Berura* was greatly influential in transforming the law from being a lived tradition to becoming an ossified guide based on texts. However, we have begun to show that this view of the *Mishna Berura* is incomplete. It did not dismiss a widespread custom due to the lack of a textual source nor did it try to dismiss popular customs that it thought were contrary to the law. The existence of a custom was one of the factors in its overall methodology. Its approval or dismissal was based on how it fared compared to the other determining factors, but its existence was nevertheless a valid legal force with which to be reckoned.

Bibliography

Broyde, Michael J., and Ira Bedzow. *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura*. Brighton, MA: Academic Studies Press, 2014.

Soloveitchik, Haym. "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy." *Tradition* 28, no. 4 (Summer 1994): 64–130.

79 *Shulhan Arukh*, *Orah Hayyim* 618:1.

80 Written by Rabbi Israel Lifschitz (1782–1860).

81 Written by Rabbi Haim Palaggi (1788–1869).

82 *Biur Halakha* 618: s.v. *holeh she'tzarikh l'ekhol*.