THE CODIFICATION OF JEWISH LAW AND AN INTRODUCTION TO THE JURISPRUDENCE OF THE *MISHNA BERURA*

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I. GENERAL METHODOLOGY OF CODIFICATION OF JEWISH LAW

Due to its exilic development since the beginning of the Common Era, Jewish law[1] lacks a clear method for resolving disputes. Talmudic,

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[1] "Jewish law," or *Halakha*, is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses; the Torah) is the touchstone document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the

medieval, and contemporary debates linger since direct, categorical rules of resolution, such as, for example, majority votes of the Supreme Court in the United States or Papal pronouncements in canon law, do not exist. The exact reason for this is beyond the scope of this introduction, yet some methodological explanation will allow the reader to have a better understanding of the relationship of the modern classical work of Jewish law, the *Mishna Berura*,[2] to other jurisprudential approaches to obedience to Jewish law.

Until about two thousand years ago, the Jewish community had a "supreme court" called the *Sanhedrin*,[3] a (parliamentary) joint legislative and

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other two parts of the Hebrew Bible, were written over the next seven hundred years, and the Jewish canon was closed around the year 200 before the Common Era (B.C.E.). The time from the close of the canon until 250 of the Common Era (C.E.) is referred to as the era of the *Tannaim*, the redactors of Jewish law, whose period closed with the editing of the *Mishna* by Rabbi Judah the Patriarch. The next five centuries were the epoch in which the two Talmuds (Babylonian and Jerusalem) were written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (1) the era of the *Geonim*, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the *Rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the *Aharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo (1488–1575), called the *Shulhan Arukh*, as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even Ha-Ezer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars—themselves as important as Rabbi Karo in status and authority—wrote annotations to his code, which solidified the place of the work and its surrounding comments as the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna: *Ha-Almanah veha-Ahim Rom*, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Aside from the law codes and commentaries, for the last twelve hundred years, Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in epistolary, question-and-answer form). Collections of such *responsa* have been published, providing guidance not only to later authorities but also to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions (*Piske Din*) deciding cases on a variety of matters.

[2] Though the *Mishna Berura* was written by Rabbi Israel Meir Kagan, and we provide a brief biography of the author, this article addresses the book and not the author. It is the methodology of the *Mishna Berura* as a book, not Rabbi Kagan as a jurist, that we seek to examine. *See infra* text accompanying notes 52–97 (providing more information on Rabbi Kagan, as well as on the book the *Mishna Berura*).

[3] From the Greek *Synedrion*, the Aramaic word is commonly thought to be a translation of the Hebrew term "members of the Great Assembly," a body which derives its authority from a set of biblical verses in Exodus.

judicial assembly that resolved disputes in matters of Jewish law by majority vote.[4] Following the destruction of the Second Temple in Jerusalem around 70 C.E., it ceased having undisputed juridical authority. Despite its temporary reconstitution in Yavneh and subsequent locations, the Sanhedrin could no longer impose uniformity of practice. The Mishna (c. 200 C.E.) bears witness to this phenomena and illustrates the devolution of the Court by recounting various conflicts among the Sages without attempting to resolve them.

From the time of the disbanding of the Sanhedrin, through the centuries following the redaction of the two Talmuds (c. 650–700 C.E.),[5] disputes as to what the Jewish law should be in any specific case were resolved by an informal, consensus-based voting process in which the ordained rabbis of the generation participated.[6] Not every dispute, however, reached a resolution, and since there was no consensus on what the normative practice should be, the law was left open.[7]

From about the year 700 C.E., until the modern time, the process for resolving disputes further deteriorated to the point that even informal consensus was no longer possible for various reasons, one of which being geography. Furthermore, varying *halakhic* opinions began to proliferate, which reflects either increased interest in Talmud study, or the diverse conditions of Jewish communal life. Regardless of the reason, disagreements on points of law became common, and the methods of dispute resolution became highly analytical. Support for one opinion over another rested upon which was seen to be more consistent with the accepted Talmudic sources. The opinion that was shown to be a more accurate interpretation of Talmudic intention, given the particular social context in which it was being applied, was accepted as superior.

In many cases, the tools to evaluate various positions were insufficient in and of themselves to resolve disputes in Jewish law. Indeed, many cases exist where post-Talmudic discourse reached an impasse and was unable to provide an intellectually honest determination of which view should be considered correct. For instance, regarding a Talmudic discussion of whether the daughter of a non-Jewish man and a Jewish woman is permitted to marry a *Kohen* ("Priest," a Jewish male patrilineally descended

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[4] MAIMONIDES, MISHNA TORAH, SEFER SHOFTIM, HILKHOT SANHEDRIN VEHAONASHIN HAMESURIN LAHEM (Laws of the Sanhedrin and the punishments they are authorized to administer) 1:1, 3.

[5] Indeed, though the Babylonian (c. 500 C.E.) and Palestinian (c. 350–400 C.E.) Talmuds are often in accord, the very notion of two Talmuds points to a decline in any ability to develop a unified consensus authority for Jewish law.

[6] Thus, for example, the Talmud sometimes concludes a dispute with the word "*vehilcheta*," which is generally understood to mean "and this is the proper practice," denoting the consensus that is mentioned above.

[7] In some instances a consensus developed, but uncertainty has since arisen as to what that consensus ruling actually was.

from Aaron, the Biblical High Priest),[8] three equally legitimate readings (and rulings) emerge among the post-Talmudic jurists. The variances depend on whether one considers the authority of the Talmudic statements in question to be of equal weight or not. The inability to draw a single, unequivocal ruling is partially the result of the open-textual nature of the Talmud,[9] which while allowing flexibility for adaptation, may also at times create ambiguity by permitting two or three positions to be seen as reasonable. Determining which of those reasonable positions ought, in fact, to be normatively followed cannot be done in many cases through the use of only first-tier principles of analytical jurisprudence.

For circumstances of this nature, commentators and codifiers developed *second*-order guidelines of decision-making, which would allow one to determine what to do when logical reasoning and close textual analysis alone cannot provide answers. These second-tier guidelines have never undergone a thorough analysis in English (and though they are quite central to Jewish law, it has never been done in Hebrew either). The second-order jurisprudential framework contains many nuanced and complex principles, prioritizing between matters of doubtful biblical or rabbinic obligation, between ritual and financial obligation, and so on.[10] For the purpose of demonstrating the interplay among various second-order guidelines, let me provide just one example.

Jewish law mandates that, when in doubt regarding a matter of biblical law, one should seek to be strict and fulfill it. Therefore, if people were not certain whether they had eaten *matzah* (the unleavened bread that must be eaten on the first night of Passover)[11] on the first night of Passover, they should eat again since it is a biblical obligation. On the other hand, Jewish law also states that, in matters of financial law, the plaintiff bears the burden of proof. The second-order framework would have to be applied when these two rules come into conflict. Consider, for example, a poor fellow who is not sure if he had stolen or not. Should he, due to the fact that stealing is a violation of biblical law, return that which he might have stolen, or may he decline, arguing that the potential returnee bears the burden of proof? Alternatively, consider the poor fellow who is uncertain as to whether he has already fulfilled his obligation to eat *matzah* on Passover, and sitting

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[8] BT, *Yevamot* 44a–45b. It is worth noting that conflicting conclusions may be reached in this case despite the appearance of the term *vehilcheta*; *see supra* note 6 (explaining the significance of the term *vehilcheta*).

[9] *See* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961) (describing the nature of open-textual nature of law); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (providing examples of what is meant by the "open-textual nature of laws").

[10] *See* SHULHAN ARUKH, YOREH DEAH 242, SHULHAN ARUKH, HOSHEN MISHPAT 25, and SHULHAN ARUKH, YOREH DEAH 110–11, each of which codifies many of these rules. For a one-volume review of these rules, see Hayyim Hezekiah Medini, *Sedei Hemed, Klalei Ha-Poskim.*

[11] *See Exodus* 12:14–20; *Deuteronomy* 16:1–8; BT *Pesahim* 120a.

in front of him are *matzoth* (plural for *matzah*), which might, or might not, belong to him. Should he eat them, or not?

In response to these challenges, Jewish law will often invoke principles that are not entirely rooted in legal doctrine, but rather in social policy, such as "for the needs of the community,"[12] "due to the fear of dire financial loss,"[13] or permitting certain conduct "for the sake of the ill."[14] In light of the first-order and second-order frameworks, for the purpose of analogy, Jewish law can be perceived as a box, instead of a point, whereby any action within the defined space would be deemed acceptable. The variability of life necessitates that Jewish law has the flexibility to allow people to serve God properly. Yet just because the whole of the interior of the box is acceptable does not mean that each choice is, in fact, equally preferred. Second-order values, as manifested in the second-order principles, are promoted by limiting the *preferred* realm of desired normative action.

II. HISTORY OF CODIFICATION

The ambiguity of legal decisions that the lack of a central organization engenders is a direct hindrance to the very purpose of Jewish law, namely, its adherence. Therefore, with the start of the medieval era, different approaches arose to negotiate between the first-order and second-order frameworks, so as to develop a consistent and feasible legal practice.

One school of thought, led by Rashi,[15] his disciples, and their descendants, focused on Talmudic super-commentary to explain the Talmud, page by page and issue by issue, in an attempt to harmonize its diverse strands of thought. Ironically, this approach gave rise to the opposite outcome, and instead of clarity, more confusion arose; while attempting to unify the Talmud, diverse theories and approaches to its harmonization developed. Writers of additional notes on the Talmud[16] created a style of legal discourse that flourished under diverse models of analytical thought with only the occasional narrowing of focus; frequently, they posited modes of analysis that, instead of contracting, vastly expanded many of the substantive disagreements in Jewish law into even greater (and irresolvable) disputes.

Coterminous with these commentaries, the movement to craft a Jewish law code developed primarily among Sefardic Jewry. Starting with

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[12] *See, e.g.*, SHULHAN ARUKH, ORAH HAYYIM 544:1; YOREH DEAH 228:21.

[13] *See, e.g.*, SHULHAN ARUKH, ORAH HAYYIM 467:11, 12; YOREH DEAH 23:2, 31:1.

[14] *See, e.g.*, SHULHAN ARUKH, ORAH HAYYIM 464:4.

[15] Rabbi Shlomo Itzhaki (1040–1105) of France was author of a comprehensive commentary on both the Hebrew Bible and the Talmud. Rashi's prominence and wide acceptance has made his work the point of departure for much of Talmudic scholarship over the last nine-hundred-plus years.

[16] The writers were referred to as *Baalei HaTosafot*, "Masters of the Additions," or Tosafists. Prominent among them were Rashi's descendants.

the Rif[17] (and continuing through, and finally culminating with, Rambam's[18] *Mishne Torah*[19]), the first attempt to craft a "code of Jewish law" was undertaken. Rif, by deleting all the sections of the Talmud he thought to be non-normative, and Rambam, by building on this structure and actively writing a Jewish code of law based on, but distinct from, the Talmud, sought to change the basic structure of *halakha* into an ordered, hierarchical system in which every question has one, and only one, correct answer. Had this approach alone taken hold, Jewish law would have developed into a law code similar, at some level, to many other legal systems.

Despite Rambam's influence, many of the great men who followed, such as Rosh,[20] Ritva,[21] Ramban,[22] Rashba,[23] and Meiri,[24] forsook Rambam's approach and adopted the model of the *Baalei HaTosafot*, reverting back to writing Talmudic novella or commentaries. They also frequently concluded that more than one approach was viable and, as a result, steadfastly refused to write definitive conclusions to Talmudic matters. One who wished to determine what "Jewish law" was on a given topic in the 1300s would have encountered the problem that there was not one definitive legal book to consult to answer that question. Rather, there was a compendium of opinions with which he would have to consider.

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[17] Rabbi Yitzchak Al-Fasi (1013–1103) of Morocco was best known for his legal code *Sefer Ha-halachot*, considered the first fundamental work in codified *halakhic* literature.

[18] Moses ben-Maimon (also known as Maimonides) (1135–1204) was born in Spain and died in Egypt, or Tiberias. Maimonides was a preeminent philosopher, jurist, and physician and is acknowledged as one of the foremost arbiters of rabbinic law in all of Jewish history.

[19] Literally "Repetition of the Torah," subtitled *Sefer Yad ha-Hazaka* "Book of the Strong Hand." Compiled between 1170 and 1180, *Mishne Torah* consists of fourteen books, subdivided into sections, chapters, and paragraphs. It is the only Medieval-era work that details *all* of Jewish observance, including those laws that are only applicable when the Holy Temple is in existence.

[20] Rabbi Asher ben Jehiel (Ashkenazi) was born in Germany (in either 1250 or 1259) and died in Spain (in 1327). His abstract of Talmudic law focuses only on the legal (non-aggadic) portions of the text and specifies the final, practical *Halakha*, leaving out the intermediate discussions and entirely omitting areas of law that are limited to the Land of Israel.

[21] Rabbi Yom Tov ben Avraham Asevilli (1250–1330) of Spain is known for his clarity of thought and his commentary on the Talmud, which is extremely concise and remains one of the most frequently referred to Talmudic works today.

[22] Rabbi Moses ben Nahman Girondi (also known as Nahmanides) was born in Gerona, Spain in 1194 and died in Israel in 1270. A leading medieval philosopher, physician, Kabbalist, and commentator, his commentary to the Talmud, *Chiddushei HaRamban*, often provides a different perspective on a variety of issues addressed by the *Baalei Tosafot*.

[23] Rabbi Shlomo ben Aderet (1235–1310) of Spain was the author of thousands of *responsa*, various *halakhic* works, and the *Chiddushei HaRashba* commentary on the Talmud.

[24] Rabbi Menachem Meiri (1249–1310) of Barcelona authored his commentary, the *Beit HaBechirah*, which is arranged in a manner similar to the Talmud, presenting first the Mishna and then the discussions and issues that arise from it. He focuses on the final upshot of the discussion and presents the differing views of that upshot and conclusion.

The son of Rosh, Rabbi Yaakov ben Asher,[25] recognized this lacuna and sought to fill it by writing another code of law. Unlike the *Mishne Torah*, which was much broader, in that it attempted to restate all of Jewish law, Rabbi Yaakov covered only those areas of *halakha* that were in force in his time; it was written to be a practical and convenient *halakhic* guide for people living outside of Israel in a time when there is no Temple. His four-volume work, the *Tur*, divided all of Jewish law into "four pillars" (*Arba Turim*) or areas; namely, daily life (including the laws of Shabbat and Yom Tov), family law, commercial law, and ritual law. Another major difference between the *Tur* and the *Mishne Torah* was that the *Tur* was not a definitive legal code in the same way the *Mishne Torah* was. While the *Rambam* approached legal questions with the assumption that there was only one right answer, Rabbi Yaakov wrote a compendium in which every legal question possessed a number of reasonable answers. As such, while the book is extremely useful, given the alternatives, the reader of the *Tur* is left with nothing but the time it would have taken to look up all the various answers and opinions for himself. Rabbi Yosef Karo's classic commentary on the *Tur*, the *Bet Yosef*, is an expansion of the *Tur*'s methodology. It adds the views of many of the *Rishonim* but rarely provides a mandate as to what the normative law should be.

To rectify this situation, Rabbi Karo undertook the responsibility of writing yet another legal code, the *Shulhan Arukh*, which was meant to follow the structure of the *Tur* and the methodology of *Rambam*, providing one—and only one—answer to questions of Jewish law in the areas that the *Tur* covered. In fact, the *Shulhan Arukh* derives most of its rules from *Rambam*'s code, though it does frequently deviate from *Rambam*'s rulings when a unanimous consensus from other authorities rejects the *Rambam*'s view. Calling it the *Shulhan Arukh*, or "Set Table,"[26] to suggest that

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[25] Rabbi Yaakov ben Asher, the third son of *Rosh*, was born in Germany in 1270 and died in Spain in 1340.

[26] A note on the titles of books in the Jewish legal tradition is needed, if for no other reason than to explain why the single most significant work of Jewish law written in the last 500 years, the *Shulhan Arukh*, should have a name which translates into English as "The Set Table." Unlike the tradition of most Western law, in which the titles to scholarly publications reflect the topics of the works (consider JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, RELIGIOUS FREEDOM: HISTORY, CASES AND OTHER MATERIAL ON THE INTERACTION OF RELIGION AND GOVERNMENT (3rd ed. 2011)), the tradition in Jewish legal literature is that a title rarely names the relevant subject. Instead, the title usually consists either of a pun based on the title of an earlier work on which the current writing comments, or of a literary phrase, into which the authors' names have been worked (sometimes in reliance on literary license).

A few examples demonstrate each phenomenon. Rabbi Jacob ben Asher's classical treatise on Jewish law was entitled *The Four Pillars* (*Arba Turim*) because it classified all of Jewish law into one of four areas. A major commentary on this work that, to a great extent, supersedes the work itself is called *The House of Joseph* (*Beit Yosef*), since it was written by Rabbi Joseph Karo. Once Karo's commentary (i.e., the house) was completed, one could hardly see *The Four Pillars* on which it was. A reply commentary by Rabbi Joel Sirkes, designed to defend *The Four Pillars* from Karo's criticisms, is called *The New House* (*Bayit*

everything was prepared for its user, he describes his decision to write the book as follows:

> I saw in my heart that it would be good to put the numerous statements [in the *Bet Yosef*] in a condensed form and in a precise language so that the Torah of Hashem will be continuous and fluent in the mouth of every Jew . . . so that any practical ruling about which he may question will be clear to him when this magnificent book which covers everything is fluent in his mouth. . . . Moreover, young students will study it continuously so that they memorize it. Its clear language regarding the practical *halakha* will be set on their young lips, so that when they get older they will not deviate from it. Also, scholars will take care of it as if it was

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Hadash). Sirkes proposed his work (i.e., the new house) as a replacement for Karo's prior house.

When Rabbi Karo wrote his own treatise on Jewish law, he called it "The Set Table" (*Shulhan Arukh*), which was based on (i.e., located in) *The House of Joseph*, his previous commentary on Jewish law. Rabbi Moses Isserles's glosses on "The Set Table"—which were really intended vastly to expand "The Set Table"—are called "The Tablecloth," because no matter how nice the table is, once the tablecloth is on it, one hardly notices the table. Rabbi David Halevi's commentary on the *Shulhan Arukh* was named the "Golden Pillars" (*Turai Zahav*), denoting an embellishment on the "legs" of the "Set Table." This type of humorous interaction continues to this day in terms of titles of commentaries on the classical Jewish law work, the *Shulhan Arukh*.

Additionally, there are book titles that are mixed literary puns and biblical verses. For example, Rabbi Shabtai ben Meir HaKohen wrote a very sharp critique on the above-mentioned *Turai Zahav* (Golden Pillars), which he entitled *Nekudat Hakesef*, "Spots of Silver," a veiled misquote of the verse in Song of Songs 1:11, which states "we will add bands of gold to your spots of silver" (*turai zahav al nekudat hakesef*, with the word *turia* misspelled.) Thus, HaKohen's work is really "The Silver Spots on the Golden Pillars," with the understanding that it is the silver that appears majestic when placed against an entirely gold background.

Other works follow the model of incorporating the name of the scholar into the work. For example, the above-mentioned Rabbi Shabtai ben Meir HaKohen's commentary on the *Shulhan Arukh* itself is entitled *Seftai Kohen*, "The Words of the Kohen," (a literary embellishment of "Shabtai HaKohen," the author's name). Rabbi Moses Feinstein's collection of *responsa* is called *Iggerot Moshe*, "Letters from Moses." Hundreds of normative works of Jewish law follow this model. Consider for example, the works of Rabbi Moshe Schreiber (Moses Sofer), whose primary work of Jewish law is an acronym of his name ChaTaM Sofer, (translated as *Seal of the Scribe* and acronym for ***Chidushei Toras Moshe Sofer***). His son, Rabbi Avrohom Shmuel Binyamin Sofer (born in 1815 and died in 1872) also wrote a volume of Jewish law, entitled *Ktav Sofer*, (translated as *Writing of the Scribe*), and a grandson named Rabbi Akiva Sofer authored writings titled *Daas Sofer*, "The Insights of the Scribe." Indeed, many of the descendents of Rabbi Sofer write in Jewish law using the word Sofer within their works.

Of course, a few leading works of Jewish law are entitled in a manner that informs the reader of their content. Thus, the Fourteenth Century Spanish sage Nahmanides (*Ramban*) wrote a work on issues in causation entitled "Indirect Causation in [Jewish] Tort Law" (*Grama Benezikin*), and the modern Jewish law scholar Eliav Schochatman's classical work on civil procedure in Jewish law is called "Arranging the Case," a modern Hebrew synonym for civil procedure.

> light from the Heavens easing them from their troubles, and their souls will be recreated when studying this book which contains all the sweet *halakhot*, decided without controversy.[27]

According to Rabbi Karo, those who would read the *Shulhan Arukh* would be able to discern the laws of daily living and would not need to consult other opinions. Yet, consistent with the historical development of Jewish law, immediately after the publication of the *Shulhan Arukh*, other *poskim* (decisors) began to write their comments on it, both to explain it and to contradict it. The codification, however, succeeded, in that the underlying assumption for its commentators was that it was in fact a "set table" and needed only a few minor adornments or adjustments.

The first to comment on the *Shulhan Arukh* and provide alternative views was Rabbi Moses Isserles.[28] Rabbi Isserles, in addition to writing his own commentary on the *Tur* and a legal work called *Torat Hatat*, wrote glosses on Rabbi Karo's code. His commentary incorporated Ashkenazic Jewry's practices into the predominantly Sefardic-oriented work. These glosses, however, revert back to the practice of accepting juridic ambiguity. *Rema* is inclined to cite more than one opinion as normative, both in theory and in practice, and frequently cites conflicting views without a clear manner to resolve contradiction.

Other commentaries to the *Shulhan Arukh* developed, and conflicts between them added to the uncertainty of how to determine the normative law. The most significant commentaries that are associated with the *Shulhan Arukh* include the *Taz*,[29] *Bet Shmuel*,[30] *Shakh*,[31] *Sema*,[32] and *Magen Avraham*.[33] In particular, the *Taz* and the *Magen Avraham* wrote detailed commentaries that incorporate a variety of positions found neither in the *Shulhan Arukh* nor in *Rema*'s glosses. These include citations from the *Zohar*,[34] other works of Jewish mysticism, and a detailed account of the sundry customs practiced in Central and Eastern Europe. The *Shulhan Arukh*,

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[27] Rabbi Karo, INTRODUCTION TO THE SHULHAN ARUKH.

[28] Rabbi Moses Isserles, also known as *Rema* or Moshe Isserlis, was born in Krakow, Poland and lived from 1520 to 1572.

[29] Rabbi David ha-Levi Segal of Poland (1586–1667) authored the *Taz*.

[30] Rabbi Shmuel ben Uri Shraga Faivish of Poland, who lived during the second-half of 17th century, wrote the *Bet Shmuel*.

[31] Rabbi Shabbatai ben Meir ha-Kohen was born in Lithuania in 1621, died in Moravia in 1662, and wrote the *Shakh*.

[32] Rabbi Joshua ben Alexander HaCohen Falk of Poland (1555–1614) authored the *Sema*.

[33] Rabbi Avraham Avli ben Chaim HaLevi of Poland (1633–1683) wrote the *Magen Avraham*.

[34] Literally "Splendor," the *Zohar* is the foundational work in Kabbalistic literature. The *Zohar* first appeared in Spain in the 13th century and was published by a Jewish writer named Moses de Leon. De Leon ascribed the work to Rabbi Shimon bar Yochai, a 2nd century *Tanna*, who hid in a cave for thirteen years studying the Torah to escape Roman persecution and, according to legend, was inspired by the Prophet Elijah to write the *Zohar*.

along with its codes, was transformed over a relatively short period of time, from a set table to a crowded one, in which the right answer is no longer clear.

By 1830, three detailed additions to the *Shulhan Arukh*, *Orah Hayyim* were added, namely the writings of the *Gra*,[35] the *Griz*,[36] and Rabbi Akiva Eiger.[37] The methodological gap between the three works is wide. The *Gra* focuses on Talmudic texts, including the Jerusalem Talmud. The *Griz*, written by the third Lubavitcher Rebbe, is a classic synthesis of prior codes (albeit with a Hassidic slant), and Rabbi Akiva Eiger brought the sharp insights and the methodology of the *Tosafot* back into the legal discussion. On complex and nuanced questions, they rarely agree. The *Pri Megadim*,[38] who wrote the *Mishbetzot Zahav* and *Eshel Avraham* as super-commentaries on the *Taz* and *Magen Avraham*, respectively, was yet another prominent figure who reanalyzed and elaborated on many areas of daily living.

In the mid-1800s, two additional short, but important, self-standing legal codes were written—the *Hayye Adam*[39] and the *Kitzur Shulhan Arukh*[40]—which attempted to resolve all disputes and provide a single view for easy comprehension by laypeople. While both of these books were written by eminent Jewish scholars, each has a totally different style and approach to codification. The *Kitzur Shulhan Arukh* is both simple to use and practically strict, whereas the *Hayye Adam*, who was a disciple of the *Gra*, is deeply analytical in his approach.

This approximately 250-year period of crowding the table also saw the rejuvenation and development of responsa literature, which were separate from the commentaries. The responsa, which were questions and answers on matters of *Halakha* collected into volumes, formed an alternative to the European model of discerning normative law. While the genre had been dormant for many years, by the 1700s the *responsa* literature was the primary vehicle for some rabbinic authorities. Both the *Noda b'Yehuda*[41] and the *Hatam Sofer*,[42] as well as many major Eastern European *poskim*, chose to write *responsa*, adding a whole other set of literature to the melting pot of Jewish law.

By the year 1880, Jewish law in Eastern Europe was anything but clear. There were more than a dozen significant codes, commentaries, and other texts illuminating a myriad of topics, from minor customs and practices

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35 Rabbi Elijah ben Shlomo Zalman Kramer, known as the Vilna Gaon, was born in 1720, died in1797, and lived in Vilna, Lithuania.

36 Rabbi Menachem Mendel Schneersohn (1789–1866) lived in Liozna.

37 Rabbi Akiva Eiger was born in Hungary in 1761 and died in Posen in 1837.

38 Rabbi Joseph ben Meir Teomim (1727–1792) lived in Lemberg, Ukraine.

39 Rabbi Avraham ben Yechial Michel of Danzig, Poland was born in 1748 and died in 1820.

40 Rabbi Solomon ben Joseph Ganzfried (1804–1886) lived in Hungary.

41 Rabbi Yechezkel ben Yehuda Landau (1713–1793) lived in Poland.

42 Rabbi Moshe Schreiber was born in 1762 and died in 1839; he lived in Germany, Austria, Bratislava.

to major matters of Torah law. It was difficult for a legal scholar, let alone a layperson, to discern what was normative *halakhic* practice on even simple matters. Needless to say, it was much harder to find where to turn when deciding on complicated issues.

Painting with a broad brush, one can say that until the late 1800s, works of *Halakha* generally fell into one of four distinct categories. The first category comprises works such as the *Arba Turim* and the *Bet Yosef*, collections of *halakhic* opinions with the occasional conclusive decision.[43] The second category, exemplified by the *Shulhan Arukh* and the *Mishne Torah*, consists of works which clearly delineate the laws without commentary or explanation. The intention of these works is to provide an easy guidebook for proper action. Some, like the *Mishne Torah*, are meant to stand independent of any other work; others, such as the *Shulhan Arukh*, are meant for younger students and for quick review, yet presuppose that its audience will look elsewhere for greater in-depth analysis.[44] The third category, in which the *Rema*'s glosses on the *Shulhan Arukh* and the *Raavad*'s[45] glosses on the *Mishne Torah* are included, contains primarily editorial-like super-commentaries, which add or correct information.[46] The fourth category contains works, such as the *Yam Shel Shlomo*,[47] which attempt to collect all relevant information on a topic, from the Talmud to contemporary times, in order to evaluate the subject properly and determine the correct decision.

Into this arena at the end of the 1800s entered two *halakhic* giants. The first, Rabbi Yehiel Epstein,[48] was the author of the *Arukh HaShulhan* and the *Arukh HaShulhan HeAtid*, a nearly twenty-volume code of Jewish law. Rabbi Epstein's work is recognized by all to be amazing—it is novel and innovative, grounded in the Talmud and classical post-Talmudic codes, and well written. It follows a simple organizational structure, where every topic starts with a summary of the passages in the Bible, Talmud, and the codes that are relevant to the topic. Legal decisions almost always revolve around two points of reference—what is the best explanation of the Talmudic precedents and what is the best defense of the Lithuanian practice. When the two results coincide, the decision is obvious. When they do not, he struggles to find a balanced approach that best protects both goals. Like the Gra, Rabbi

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[43] For Rabbi Yaakov ben Asher, the final decision is that of his father Rabbi Asher ben Yehiel; for Rabbi Karo, the decision is determined by the majority opinion cited.

[44] Whether such is the actual case or not is irrelevant to the author's intention (referring to the *Mishne Torah* standing independent of any other work).

[45] Rabbi Avraham ben David (1125–1198) lived in Provence, France.

[46] In the *Rema*'s case, additions are meant to include the local practices of Ashkenaz, which are omitted in the *Shulhan Arukh*. In the *Raavad*'s case, additions are meant to correct what are seen as errors.

[47] Solomon Luria, also known as Maharshal lived in Lithuania. He was born in 1510 and died in 1573.

[48] Rabbi Yehiel Epstein was born in 1829. He served as a Rabbi in Lithuania and died in 1908.

Epstein was comfortable with the full gamut of Talmudic literature, and like Rambam, he wrote on—and had a unified understanding of—all of Jewish law. Indeed, in testament to his awesome breadth, he and Rambam are the only two writers in the last two thousand years who undertook to provide a comprehensive code of Jewish law, one which would encompass both contemporary *halakhic* issues as well as those that will arise in the Messianic Age. On the methodological level, however, the *Arukh HaShulhan* is a simple work. It has only two principles, Talmudic correctness and contemporary practice. Other opinions are rejected simply as "wrong."

The second giant, and the methodological opposite to Rabbi Epstein, is Rabbi Israel Meir Kagan of Radin,[49] the author of the *Mishna Berura*. At the foundational level, the *Mishna Berura* assumes that virtually all disputes of Jewish law and Talmudic understanding are irresolvable, in the sense that Rabbi Epstein considers them exactly to be resolvable. "Correct" practice is therefore difficult to discern, and the defense of custom is not the sole justification for Jewish law. Moreover, according to Rabbi Kagan, even the *Shulhan Arukh* alone, the supposed "set table of easily understood rulings for daily practice," and even without the multitude of commentaries and associate codes, is not really as clear-cut as Rabbi Karo asserted. As the primary reason for writing his commentary, the *Mishna Berura* writes:

> The *Shulhan Arukh* also with learning the *Tur* along with it, is an obscure book, since when the *Bet Yosef* ordered the *Shulhan Arukh* his intention was that one would first learn the essential laws and their sources from the *Tur* and the *Bet Yosef*, in order to understand the ruling, each one according to its reasoning. Since the *Tur* and the *Bet Yosef* bring numerous differing opinions for each law, he thus decided to write the *Shulhan Arukh* to make known the ruling in practice for each law. It was not his intention, however, that we would learn it alone, since the law is not able to sit well with a person unless he understands the reasoning behind it.[50]

The *Mishna Berura* is, thus, Rabbi Kagan's attempt to elucidate for the layperson, and not only for the legal scholar, both what *should* be the normative *halakhic* practice and *why* it should be so, for complicated *halakhic* matters and for simple daily life alike.

By reframing Rabbi Karo's *The Set Table* as an obscure work that cannot be studied on its own, the *Mishna Berura* establishes two essential premises upon which his methodology rests. The first is that any seeming contradiction in the *Shulhan Arukh* is based upon a lack of understanding, for many times "the *Shulhan Arukh* will write one ruling in terms of an *ab initio*

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[49] Rabbi Israel Meir Kagan was born in 1838 and died in 1933. He lived in a section of Poland that is currently part of Belarus.

[50] INTRODUCTION TO THE MISHNA BERURA.

perspective and another in terms of an *ex post facto* perspective,"[51] and if one would read the book, along with the *Tur* and the *Bet Yosef*, he would recognize that the *Shulhan Arukh*, in fact, does *not* contradict itself. The second premise is that since most people do not read the *Shulhan Arukh* along with the *Tur* and the *Bet Yosef*, the *Mishna Berura*'s commentary, along with its explanations and interpretations, is essential to understanding the coherence of the *Shulhan Arukh*. By creating a scenario where he can justify that his commentary is necessary to understand the *Shulhan Arukh*, the *Mishna Berura* is essentially able to recreate the *Shulhan Arukh*, in accord with his own *halakhic* methodology and views. It is that exact methodology that this article seeks to understand.

III. INTRODUCTION TO RABBI ISRAEL MEIR KAGAN AND THE *MISHNA BERURA*

Little is known about the early life and influences of the *Chafetz Chaim,* Rabbi Yisrael Meir Kagan, and how he came to be viewed as both a leader of the Jewish community in Eastern Europe and the most significant *halakhic* authority of the first half of the twentieth century.[52] These accolades are above and beyond his otherwise well-known reputation as a pious and righteous man about whom legendary stories are told—he seems to have lived the life of a truly ethical and upright human being. From the vast and varied literature that he penned, however, one can catch a glimpse of who he was and how he perceived the world around him, an understanding that would lead him to become one of the greatest sages of late 19th and early 20th century *Ashkenazic* Jewry.

Of the many tomes he wrote, the *Mishnah Berura*[53] is, without a doubt, Rabbi Kagan's greatest contribution to the canon of Orthodox Jewish Law and the most complex; it is a singular work that synthesizes Jewish traditions, laws, and mores into a practical *halakhic* guide to daily religious life. What is also clear is that for all of his traditionalism, Rabbi Kagan was an iconoclast, and the *Mishnah Berurah* broke from many of the traditional approaches of deciding *halakhic* directives, such as the *Shulhan Arukh's*

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[51] INTRODUCTION TO THE MISHNA BERURA.

[52] Rabbi Kagan was born in Zhetl, Belarus on February 6, 1838 and died in Radun, Poland on September 15, 1933. We are not writing a biography of Rabbi Israel Meir Kagan, although such is sorely needed. Nor are we writing a survey of his general intellectual approach. Rather, this work is an analysis of the methodology of the book *Mishna Berura*. It is neither a social, nor is it an intellectual, biography of Rabbi Kagan. Nor is this 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.

[53] *Mishnah Berura* was written as a six-volume work, published intermittently from 1884 to 1907. *See* MORDECAI SCHREIBER, ALVIN SCHIFF, & LEON KLENICKI, THE SHENGOLD JEWISH ENCYCLOPEDIA 117 (3d ed. 2003).

"Majority Rule," the Gra's "Rule of Correctness," or even from other normative Orthodox approaches like Rabbenu Tam's[54] dependence on local Jewish custom (*Minhag Yisrael*). Instead, he favored studying, engaging, and asserting decisions in a nuanced, almost natural approach to how ethical people should live their daily lives consistent with Jewish law. The specific answers as to how moral people should interact with their world while governed by Jewish law were often to be understood not in simple definitions of "right and wrong," but rather, in terms of the question: "How could one please his Creator and be his most authentic self, in any given situation?" As the terms and turns of life shift like the vagaries of a kaleidoscope, Rabbi Kagan's responses to these realities are equally as nimble, subtle, and variegated, yet remain at once clear and defined. His perspective is not about observations of strictness versus leniency, as much as about evaluating a spectrum of options; the same question could get a different answer depending on the situation. Through his singularly humane prism and holistic analysis of individual cases, he guides the common Jew toward an observant and meaningful life.

It is that very unique approach to comprehending and disseminating Jewish Law that makes the *Mishnah Berura* such a groundbreaking work. It seems to be an editorial, since it is written as a commentary, but it also shares a similarity to those works in the first category mentioned above, since it cites sources encyclopedically. At times, it even analyzes information in a manner similar to that of the *Yam Shel Shlomo*, probing the depths of the *halakhic* development. Yet, despite its resemblance to these other forms, its overall *halakhic* methodology is wholly unique, compared to both its predecessors and its successors.

As major world events and subsequent transitions in Jewish history[55] swirled around the enclave of Eastern European Jewry, the *Mishna Berura* served a role as a law book trying to preserve the strength of a faith in an often volatile world, a daunting task. Yet, as time has shown, the *Mishna Berura* does manage to live up to the task. Indeed, much of the work deals with the inherent conflicts of a Jewish person's attempt to maintain his traditions and integrity in a chaotic and unyielding society. The consummate juggler, the *Chafetz Chaim* (as Rabbi Kagan is known, a reference to another of his works) often addresses the reality of complex situations and steadfastly refuses to limit his *halakhic* tools to only a few principles; he balances numerous central propositions when resolving uncertainty, all at the same time. For him, the best outcome is the one that is most consistent with the *totality* of the picture—which makes the methodology of the *Mishna Berura*

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[54] Rabbi Jacob ben Meir (1100–c. 1171), grandson of Rashi, was a renowned French Tosafist and the foremost *halakhic* authority of his generation.

[55] The transitions in Eastern Europe from 1860 to 1910 were profound and paradigm-shifting, including the rise of the Reform Movement, the Mussar Movement, and Conservative Judaism, among others.

so hard to grasp and the work so incredibly sophisticated.[56] Rabbi Kagan also manages to do all this while keeping the work extremely simple and easy to use, so that the reader who simply wants to know the answer to a question can find it without difficulty.

Despite, or perhaps because of, its unique approach, the *Mishna Berura* has gained widespread recognition and is considered authoritative by essentially all of contemporary Orthodox Jewry, a measure of greatness that few works of *Halakha* have attained. For scholar and layman alike, it exerts widespread normative influence on the daily life of an observant Jew. As Aharon Feldman, editor of the English translation of the *Mishna Berura*, writes in its Introduction:

> The Mishnah Berurah has undergone countless printings. It is studied and restudied by all rabbis, students, and scholars; it can be found—and is consulted—in the home of every learned Jew. The statement, "The Mishnah Berurah says . . ." is enough to settle nearly any halachic question.[57]

Similarly, Israeli Supreme Court Justice Eliyakim Rubenstein calls the *Mishna Berura* "the standard commentary on the *Shulhan Arukh* for all of Torah Jewry."[58] Given the *Mishna Berura*'s widespread acceptance as a *halakhic* authority, it is a wonder how little his *halakhic* methodology has been critically examined. However, Benjamin Brown, the great scholar of Jewish law and practice, has given an alternative account of the *Mishna Berura*'s methodology.[59]

IV. MISHNA BERURA'S PHILOSOPHY OF JEWISH LAW

When attempting to describe an interpretive *halakhic* methodology in terms of contemporary theories of legal interpretation, it is important to recognize that Jewish law contains certain presumptions that render several theories immediately inapplicable. One example of an approach that must be discarded due to the fact that Jewish law is grounded on incompatible premises is that of intentionalism. The theory of intentionalism is that judges should attempt to ascertain the meaning of a particular provision by determining how its author understood it at the time it was established. Without discussing the various nuances of the different proponents of this theory, in general what is normative is the subjective intent of the author. Critics of intentionalism claim that even if the author had a specific intent, it

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[56] The Gra, too, was creative in his approach to defining Jewish law, though his thoughts, inspiration and analysis tend to center around one central question: right or wrong?

[57] AHARON FELDMAN, INTRODUCTION TO MISHNA BERURA, xii.

[58] Eliyakim Rubenstin, *Halakha and Mussar for Everyone: On the Life and Works of the Hafetz Hayyim*, Berakha l'Avraham, *in* A COLLECTION OF ARTICLES IN HONOR OF RABBI PROFESSOR AVRAHAM STEINBERG'S SIXTIETH BIRTHDAY, 462 (Old City Press 2008).

[59] *See infra* note 97 for a summary and critique of Benjamin Brown's description of the *Mishna Berura*'s methodology.

cannot be identified. While those who defend the theory argue that inherent in the idea of legislative authority are the notions that the author both intends, and has the expertise to articulate, certain legal norms, most recognize that the ability to identify and acknowledge the applicability of that intention is inversely proportional to the amount of time that has lapsed since the law's enactment. As one proponent of intentionalism remarks, "[T]he more ancient a law is the more suspicious one has to be of the relevance of the legislators' intentions."[60]

Jewish law further complicates the matter since, except with respect to particular rabbinic enactments, all legal works are themselves interpretative commentaries on legislation that is believed to have begun with Moses at Sinai. Therefore, jurists who try to interpret a legal work such as the *Shulhan Arukh* must recognize that Rabbi Karo did not have the authority to enact legislation himself. Rather, they rely on the belief that he simply had the competence to correctly understand the intent of previous legislation and to accurately reveal it. Moreover, the theological assertion that knowledge of God can only be within the framework of *via negativa*[61] makes the assumption of access to the intention of the author of Jewish law impossible.

Intentionalism stands in contradistinction with the theory of originalism, which seeks to base normativity on the understanding of the *recipients* of the law at the time that it was enacted. Originalism fares no better in its connection to Jewish law, since the whole reason that *halakhic* works began to be written down in the first place is based upon the admission that there had been a significant deterioration in the accurate transmission of the oral law.

Though scripturalism is a popular a way to classify orthodox religious adherence from a sociological perspective, textualism, as an interpretative method, is another approach that is, in fact, incongruous with Jewish law. In the most general terms, the belief that a primary text has a meaning of its own, without its authorized and lawful explanation, contradicts the belief in the necessity and the primacy of the Oral Torah. With respect to older versions of textualism, those who have written legal corpora, with the exception of Rambam, have admitted in their introductions that their work is not a complete elucidation of the law and can only be used properly if it is approached in conjunction with a greater understanding of the complexity of Jewish law. Even if the particular legal code can give general instructions, the standard of competency to understand the plain meaning of the law, as penned by the author of the code, for every situation is much higher than a reasonable reader. With respect to newer versions of

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[60] ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 182, (Tony Honoré & Joseph Raz eds., 1992).

[61] Negative theology is the idea that since God is not a universe or an object in a universe, one can really speak of Him only in terms of what He is not, as opposed to what He is.

textualism (paralleling the intentionalism/originalism distinction), which claims that the reasonable reader is seeking the meaning of the legal text as understood by its *readers* when first enacted, the history of debate over this issue includes those polemics against both the Karaites and the Sadducees which put them firmly outside of the rabbinic camp of Judaism.[62]

If one were, however, to attempt to classify the interpretive methodology of the *Mishna Berura*, one could find similarities between the *Mishna Berura*'s approach and that of "purposive interpretation," as described by Israeli Supreme Court Justice Aharon Barak. According to his view, jurists must first seek to find the *purpose* of the law, not the subjective intention of the legislator, or the objective intent of the ruling as it arises from the language of the text. Purpose combines both subjective and objective components in searching for the expected goal of a piece of legislation and in examining whether the language of the ruling accurately conveys that goal, given the context of the greater legal framework and the legal community in which it is embedded. "The main task of interpretation," according to Barak, "is to balance the different presumptions when they conflict. Indeed, presumptions of purpose are the foundation of purposive interpretation. They replace rigid interpretive rules with flexible interpretive presumptions."[63] The methodology of purposive interpretation allows the jurist to reinterpret rulings that he finds contradictory or incoherent, given the priorities of the legal system, and still claim he is accurately understanding both the law's meaning and its author's intention, via the medium of expounding its purpose.

The *Mishna Berura* interprets the *Shulhan Arukh* in a manner that seeks to resolve potential contradiction between particular rulings of Rabbi Karo, as well as between the positions of the *Shulhan Arukh* and other legal authorities. As we will see, his jurisprudential priorities reveal his overall desire to create a coherent presentation of the *Halakha*. Whether by negotiating between positions or interpreting the language of rulings in a way that justifies what he believes should be the law, given the greater *halakhic* discussion (and the greater *halakhic* purpose or goal), the *Mishna Berura*'s *halakhic* methodology revolves around more than just the two axes of the *Arukh HaShulhan*. On the contrary, the *Mishna Berura* is a complex, nuanced attempt to transform the laws of daily conduct into a comprehensive, consistent, and unified system which accords to Rabbi Kagan's own perspective.

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[62] The Sadducees and later the Karaites are sects of Judaism that reject the Oral Law. In favor of a religious life based entirely on the Written Torah, as Josephus writes of the Sadduccees in his Antiquities, "the Pharisees [Rabbinic Jews] have delivered to the people a great many observances by succession from their father, which are not written in the law of Moses, and for that reason it is that the Sadducees reject them and say that we are to esteem those observance to be obligatory which are in the written word, but are not to observe what are derived from the tradition of our forefathers." ANTIQUITIES 13.10.6.

[63] AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 91 (2005).

V. MISHNA BERURA'S JURISPRUDENCE

Given the volatile world in which the *Mishna Berura* was composed, it is obvious that much of Rabbi Kagan's work must address the inherent conflict of the modern Jew's attempt to maintain his tradition in an oftentimes chaotic and unyielding society. Because of his success in doing so, the *Mishna Berura* is still the practical *halakhic* guide to which most observant Jews refer today.

In order to balance opposing forces of tradition and modernity, the *Mishna Berura* attempts to provide definitive *halakhic* guidance to every question of Jewish law based on four central questions:

1. What is the common *halakhic* practice of the community in a given situation? Does more than one *minhag* (custom) exist?
2. What is the spectrum of answers provided by the *poskim* to the question at hand?
3. What are the minimum *halakhic* requirements one should try to fulfill?
4. How can one maximize observance in order to enhance his relationship with God?

Clearly, the *Mishna Berura* was successful in the seemingly impossible endeavor of incorporating so many variables into one cohesive structure. As a result, the book is the hallmark of legal harmony—consensus is reached from disparate (and often conflicting) sources, and all Ashkenazim accept the work today. Even more significantly, it is precisely *because* the *Mishna Berura* recognizes the complexity of life and gives a spectrum of reasonable answers to difficult *halakhic* questions that it has stood the test of time and is authoritative more than a century after its publication. It is a rare occasion when a book is both so timely and so timeless.

The approach of the *Mishna Berura* has never been well understood; certainly it has never been ably replicated by any other *poskim*. It is unique, and as such, it is impossible to understand and systematically decipher without specific keys to guide its student through the process of its legal deliberation. Consequently, this article is meant for the serious student who desires to understand the mechanics of the *Mishna Berura* and, in particular, how the *Mishna Berura* finds consensus among the disparate *halakhic* opinions and conflicting sources and customs.

To answer his four central questions, the *Mishna Berura*'s methodology utilizes ten main *halakhic* principles. They are, in no particular order:

1. Relevance—to interpret rules in ways that are relevant to contemporary society.
2. More or Less—to provide a framework which allows one to follow minimal requirements in times of stress so that at least the basic framework of *halakhic* life is maintained, yet

to demand more stringent requirements when possible, in order to have a more holistic approach to the *Halakha*.

3. Both Right—to demand adherence that is consistent with more than one position if both are reasonable.
4. Avoidance—to avoid situations that result in trying to negotiate between conflicting priorities.
5. Be Strict (*mahmir*)—to be strict when Jewish law authorities are stringent, even if lenient customs have developed.
6. Be Lenient (*meikel*)—to not protest against well-established lenient customs, even if the individual may personally lean toward stringency as a matter of belief or interpretation.
7. Unsupported Customs—to protest against following customs that are not based on Jewish tradition, are not recorded, or are erroneous.
8. Explanation—to explain why unsupported customs might be permissible. This is usually done as a "*limud zekhut*," an attempt to judge favorably those who appear to be acting in the wrong, undertaken in order to create harmony and respect among different groups, even when he disagrees with their approach.
9. Mysticism and *Halakha*—to minimize the inherent tensions between Kabbala and Talmud, even if such interpretations may seem somewhat forced. However, when faced with no alternative, the Talmud does take precedence.
10. Tension—to incorporate the positions of the Gra, despite the fact that the Gra's "True vs. False" approach is diametrically opposed to the *Mishna Berura*'s inclusive and holistic priorities in which alternative views are rarely fully wrong.[64]

VI. THREE EXAMPLES OF THE MISHNA BERURA'S METHODOLOGY

As the above points show, the *Mishna Berura* juggles a number of variables to define proper *halakhic* practice in any given case, as opposed to the traditional models of creating a legal guide. How the *Mishna Berura* approaches a final decision on any given matter of Jewish law becomes an exercise in what we at first might suspect to be judicial caprice since there are so many variables at play; as his students, it is hard at first to imagine that he could possibly have a systematic approach. We hope, however, in

[64] Today it is a common, almost unconscious, automatism in yeshiva circles to defer to the Gra's *halakhic* rulings; however, despite his great influence on the manner of Talmud study and in contrast to his majestic reputation, before the *Mishna Berura*, the Gra's rulings were generally not influential in shaping *halakhic* practice, even in Vilna. The uniqueness of the *Mishna Berura*'s deep reliance on the Gra is unmistakable when juxtaposed with the Gra's status in the *Arukh HaShulhan* as just one of a number of commentators.

providing the three in-depth examples below (and two hundred and fifty other examples in a separate section of our forthcoming book), to demonstrate that the *Mishna Berura*'s wondrous achievement is so much more astounding with the added realization that he did, in fact, have a systematic approach, one that negotiated between these ten principles and did so with such skill that his work has become the coherent unified code of *halakha* that he intended it to be.

A. Example 1—Androginos *and* Tumtum*: Intersex and Jewish Law*

In the following example, the *Mishna Berura* utilizes the following *halakhic* principles: Avoidance, More or Less, and Explanation.

Under Jewish law, at certain prescribed times, males that are patrilineally descended from Aaron, the Biblical High Priest (called *Kohanim*, or "Priests") are ritually required to bless the nation. The process is called *Birkat Kohanim* (the "Priestly Blessings"). On the *Rema*'s ruling that someone who is not a male Kohen should not recite the *Birkat Kohanim*,[65] the *Mishna Berura* writes that an "*androginos*" or a "*tumtum*" should not recite the Blessings. Rather, they should leave the synagogue before the *Hazan* (cantor) recites "*Retzei*," the prayer directly preceding the Blessings during which the *Kohanim* are supposed to walk to the front of the synagogue in preparation.[66]

Before discussing the ruling of the *Mishna Berura*, we will first provide a bit of background information to give it context. An *androginos* is a person who has both male and female genitalia. A *tumtum* is a person with no visible genitalia. There is a disagreement among the *poskim* whether an *androginos* should be considered as of neither gender, but rather as a category unto itself, or whether it should be considered as one whose gender is in doubt. If the *androginos* is a wholly different gender, then the *androginos* should not recite the *Birkat Kohanim*, since he would not be a male Kohen. If there is a doubt that the *androginos* may be male, then the *androginos* would have an obligation to recite the *Birkat Kohanim* since, as we noted above, in the context of *matzah* on Passover, the *halakha* inclines toward obligation rather than exemption in the case of doubt regarding a Torah obligation.[67] (*Birkat Kohanim* is a Torah obligation.) Furthermore, there is a disagreement among the *Aharonim* as to whether there is a prohibition for someone who is not a Kohen to recite the *Birkat Kohanim* or not. Therefore, since there may be a possible obligation and potentially no prohibition, it would seem that an *adroginos* should, in fact, recite the *Birkat Kohanim*.

With respect to a *tumtum*, on the other hand, all consider such a person to be a case of doubtful gender; it is definitely either a male or a

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[65] SHULHAN ARUKH, ORAH HAYYIM 128:1.

[66] BIUR HALAKHA 128: *sub voce v'ein l'zar*.

[67] *See supra* text accompanying note 11.

female. Therefore, the obligation, or prohibition, for a *tumtum* to recite the *Birkat Kohanim* rests solely on the disagreement among the *Aharonim* over whether or not there is a prohibition for someone who is not a Kohen to recite the *Birkat Kohanim*. Despite the categorical distinction between the two, the *Mishna Berura* nevertheless advises indiscriminately that both the *androginos* and the *tumtum* should preemptively leave the synagogue.

The assiduousness of the *Mishna Berura*'s recommendation becomes clear in light of a different ruling in the *Shulhan Arukh*. Just a few paragraphs later, the *Shulhan Arukh* states that if a regular Kohen, for whatever reason, does not move when the *Hazan* recites "*Retzei,*" he is no longer allowed to go up to recite the *Birkat Kohanim*;[68] however, even if a Kohen did not move, he is not in violation of a prohibition—he can simply rely on the rabbinic precept of "*shev v'al taaseh*" (literally: "sit and do not act"). By doing nothing, the *Kohen* in question is doing nothing *wrong*; he is just passively not performing a positive commandment. Nevertheless, the *Mishna Berura* recommends that this *Kohen* too should actively leave the synagogue.

The *Mishna Berura*'s reasons not to rely on this principle of "*shev v'al taaseh*" in the case of a regular Kohen are twofold. First, ab initio a person should not rely on this rabbinic principle if he can help it[69] (the case in the *Shulhan Arukh* is clearly referring to a male Kohen who did not move or was unable to move for some other reason during *Retzei* and now wants to know what to do, which is different from someone like an *androginos* or *tumtum*, who initially did not know what to do). Additionally, the *Mishna Berura* thinks that the *Kohen* should leave because otherwise, people who do not know the reason why he did not move his feet and see him standing there when all of the other *Kohanim* are getting ready to recite the Blessings, may erroneously think that the reason this particular *Kohen* is not up there is because he has a blemish that makes him unfit to recite the Blessings,[70] casting aspersions and creating a scenario which we would like to avoid. Getting back to our original case, since an *androginos* or a *tumtum* need not worry about the second reason, as their condition *does* in fact render them unfit, the *Mishna Berura*'s suggestion that they leave the synagogue rests solely on his discomfort in relying on a valid rabbinic principle in a situation when it is not essential to do so. His decision here is therefore based on his *halakhic* principle of avoidance.

On a related note, the *Shulhan Arukh* rules that an *androginos* should only make a *zimun* (a ritual invitation by a member of a group of three or more men, or three or more women, to the others, who, having partaken of a meal together, wish to recite the Grace After Meals as a unit) for other *androgini*, and not for other men or other women.[71] A *tumtum* should not

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68 SHULHAN ARUKH, ORAH HAYYIM 128:8.

69 SHA'AR HATZIYON 128:14.

70 MISHNA BERURA 128:9.

71 SHULHAN ARUKH, ORAH HAYYIM 199:8.

make a *zimun* at all.[72] In his commentary on the *Shulhan Arukh*'s rulings, the *Mishna Berura* first explains the reason to be that *androgini* make up their own category,[73] yet he also includes the second reason, i.e., the opinion that there is a doubt that they may actually be of the opposite gender than the other participants.[74] Though the two opinions are contradictory on their face, the *Mishna Berura* brings both of them. Based on the opinion that they are of doubtful gender, *androgini* cannot join with men, for fear that they may be women, nor can they join with women, for fear that they may be men.

In the *Sha'ar HaTziyon*, Rabbi Kagan's footnotes to the *Mishna Berura*, he writes that when three *androgini* eat together, but not to satiety, one may voluntarily make a *zimun* with them. This is permissible because the obligation to make a *zimun* when people eat, but not to satiety, is of a rabbinic and not a biblical level. As noted, when dealing with a rabbinic law, the traditional *halakhic* principle is to be lenient in cases of doubt. The doubt as to what to consider an *androginos* can therefore be dealt with leniently in this case, and we can assume that they are of the same gender as the new participant. If, however, they have eaten to satiety, ideally one should not join in a *zimun* with them, since the obligation upon men to make a *zimun* is not the same as for women, and the varying levels of obligation (which in our case are in doubt) preclude them from joining together. Nevertheless, ex post facto it may be permissible.[75] In contradistinction, the *Mishna Berura* writes that even if three *tumtumim* eat together, they cannot make a *zimun* since for each one there is a doubt as to its gender. The same distinctions are made with respect to blowing the *Shofar* for others on Rosh HaShana[76] and for reading the *Megilla* for others on Purim.[77] Moreover, the *Mishna Berura* explains that an *androginos* may not be circumcised on Shabbat since there is a doubt if it is a male, and one does not suspend the laws of Shabbat (Biblical in nature) due to doubtful fulfillment.[78] In his explanation of the *Shulhan Arukh* and in his decisions, the *Mishna Berura* utilizes the *halakhic* principles of "more or less," in showing in which situations *androgini* may partake in rituals ab initio, ex post facto, or not at all.

Just as a comparison, the *Arukh HaShulhan* writes with respect to an *androginos* and a *tumtum*, that an *androginos* may make a *zimun* for other *androgini* but cannot make a *zimun* for men or for women. Rather than detailing all of the various positions and situations, he writes simply that the reason for this is that *androgini* are all the same, i.e., they are a category unto

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72 SHULHAN ARUKH, ORAH HAYYIM 199:9.
73 MISHNA BERURA 199:20.
74 MISHNA BERURA 199:21.
75 SHA'AR HATZIYON 199:11.
76 MISHNA BERURA 589:5–6.
77 MISHNA BERURA 689:9–12.
78 MISHNA BERURA 331:1–8.

themselves. A *tumtum*, on the other hand, may be either a man or a woman; therefore, they cannot join even with other *tumtums*.[79]

B. Example 2—Eruv and Public Domains

In the following example the *Mishna Berura* utilizes the following *halakhic* principles: Be Strict, and Be Lenient.

An *Eruv* is a ritual enclosure around a community which allows Jews to carry objects on Shabbat when they would otherwise be forbidden to do so. It is meant to symbolize a wall around the community in order to turn it into one unified domain for the purpose of carrying on Shabbat. The *Shulhan Arukh* rules that one cannot make an *Eruv* 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 if they 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.)[80]

To define what constitutes a public domain, Rabbi Karo, in the *Shulhan Arukh*, writes that a public domain is defined as streets and markets that are sixteen cubits wide and which are not roofed or walled. If the area were enwalled yet its gates were not closed at night, it would still be considered a public domain. He adds that there are those who say that any place that does not contain six hundred thousand people in it every day is not considered a public domain.[81]

With respect to how to define a public domain, the *Mishna Berura* writes that he has searched through all of the *Rishonim* who require six hundred thousand people, but he could not find the stipulation that the people must be present every day. Rather, they mean that there is a possibility that they would be found there in general.[82] In the *Biur Halakha* (Rabbi Kagan's gloss on the Mishna Berura), he notes that if the presence of six hundred thousand people were actually a necessary stipulation, the Talmud would not have omitted mentioning it.[83] However, despite the lack of textual justification, the prevalent custom had, in fact, become to build a *Tzurat HaPetah* (the form of a doorway opening, with two doorposts and an overhead lintel, which, in Jewish law, is enough of a structure to maintain the continuity required of a wall—that is, unless it cuts across a public domain) across the open areas when constructing an *Eruv,* which 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 *Tzurat HaPetah* is grounded on the opinion that a public domain requires six

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79 ARUKH HASHULHAN, ORAH HAYYIM, HILKHOT BIRKAT HAMAZON, 199:3; HILKHOT MEGILLA 689:6; ROSH HASHANA 589:7.

80 SHULKHAN ARUKH, ORAH HAYYIM 364:2.

81 SHULHAN ARUKH, ORAH HAYYIM 345:7.

82 MISHNA BERURA 345:24.

83 BIUR HALAKHA 252: *sub voce she'ein shishim ribo.*

hundred thousand people. Based on that requirement, the streets would not be public domains; therefore, a *Tzurat HaPetah* 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 *Tzurat HaPetah* to make an *Eruv*; nevertheless, a *Ba'al Nefesh* (a conscientious person) should be stringent upon himself.[84] By stating that one cannot protest against those who follow the lenient custom, he demonstrates that he does not believe that it is the essential normative opinion. However, because some *poskim* have found it to have legal worth, and in order to spread the net of *halakhic* legitimacy as widely as possible, so as to maintain a unified system of *Halakha*, the *Mishna Berura* condones it. A *Ba'al Nefesh*, on the other hand, should follow what he thinks is the proper *halakhic* position. As will be shown in greater detail elsewhere in the examples section of the forthcoming book, when a prevalent practice is more lenient than what the *Mishna Berura* believes is the essential ruling, yet he foresees that the practice cannot be changed, the *Mishna Berura* writes that a *Ba'al Nefesh* should, and will, act stringently. In his explanation of the *Shulhan Arukh* and in his decision, the *Mishna Berura* utilizes the *halakhic* principles of being strict, since he advises a *Ba'al Nefesh* to act according to the stringent position, and also of being lenient, in his condoning of the lenient practice.

Like the *Mishna Berura*, the *Arukh HaShulhan* does not accept the established custom to use a *Tzurat HaPetah* per se. On the contrary, he believes the *Halakha* to be according to the opinion that does not consider population when defining a public domain, which would mean that he thinks using a *Tzurat HaPetah* would be ineffective for the streets in question. However, he also accepts the more lenient opinion out of a desire to incorporate those who follow it into the realm of observance. After explaining how the requirement of six hundred thousand people to be actually present is not found in any of the *Rishonim*, he writes:

> But in any case what will result in continuing at length after the *Eruvin* that have spread throughout the majority of cities in Israel for many hundreds of years which are based only on this leniency, and it is as if the *Bat Kol* (Heavenly voice) went forth and said that the *Halakha* is according to this opinion, and if we come and restrain it not only will they not listen but it seems as if they have gone crazy.[85]

Of course, the *Arukh HaShulhan* does not rely solely on the assumption that "the Heavenly Voice went forth and said that the *Halakha* is according to this opinion"; rather, after making this statement, he also goes back and attempts to support the leniency via textual analysis. His textual analysis,

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[84] MISHNA BERURA 345:23; 364:8.

[85] ARUKH HASHULHAN, ORAH HAYYIM 345:18.

however, serves only a justificatory purpose; it is predicated on the legitimacy of the established custom, reflecting his basic methodology—when the Talmudic texts can be made consistent with the common practice—that is the purpose of his work.

C. Example 3—Tefillin of Rabbenu Tam and Tefillin on Chol Hamoed

In the following example, the *Mishna Berura* utilizes the following *halakhic* principles: Avoidance, Explanation, Mysticism, and Talmud.

The *Shulhan Arukh* provides the following description for the order of the Torah sections, which are placed in the box of the phylacteries:

> The order of the sections of the Torah which are placed in the phylacteries according to *Rashi* and *Rambam* are as follows: "*Kadesh*" (Exodus 13:1-10) on the outer left, "*VeHaya Ki YaViacha*" (Exodus 13:11-16) on the inner left, "*Shema*" (Devarim 6:4-9) on the inner right, and "*VeHaya Im Shamoa*" (Deuteronomy 11:13-21) on the outer right. According to *Rabbenu Tam*, the order is "*Kadesh*" (Exodus 13:1-10) on the outer left, "*VeHaya Ki YaViacha*" (Exodus 13:11-16) on the inner left, "*VeHaya Im Shamoa*" (Deuteronomy 11:13-21) on the inner right, and "*Shema*" (Devarim 6:4-9) on the outer right. The universal custom is according to *Rashi* and *Rambam*. Those who fear Heaven will fulfill their obligation through donning both, and they will make two pairs of phylacteries, and while donning them both they will have the intention that the one which is *halakhically* acceptable will be the one through which they fulfill their obligation and the other one will be as regular straps. . . . If they cannot don both at the same time, they will don the set that is according to *Rashi* first and the set that is according to *Rabbenu Tam* second without a blessing.[86]

If a person dons the phylacteries of both Rashi and of Rabbenu Tam, he cannot have the intention that both of them fulfill the commandment. Counter-intuitively, the reason is not because one will transgress the prohibition of "*bal tosif*" (adding on to the 613 Torah commandments); rather, if a person dons the phylacteries of Rabbenu Tam, for the sake of fulfilling a commandment, he may find himself transgressing "*bal tigra*," (the prohibition of *subtracting* from the 613 commandments in such a way that it is perceived as though one is denying the perfection of the prescribed performance). In the *Biur Halakha*, the *Mishna Berura* explains. He writes that Rambam's position is that if one takes away from what is in the Written Torah, or from what is accepted in the Oral Torah, he transgresses the prohibition of "*bal tigra*." Since the *poskim* have accepted that the correct

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[86] SHULHAN ARUKH, ORAH HAYYIM 34:1–2.

order of the sections in the phylacteries is according to Rashi, the phylacteries of Rabbenu Tam contain two invalid sections, since they are not in the proper order. Thus, wearing the phylacteries of Rabbenu Tam is like wearing phylacteries with only two sections, instead of the required four. To don the phylacteries of Rabbenu Tam after that of Rashi does not ameliorate the problem since there are opinions claiming that according to the Torah, a person is obligated to wear phylacteries throughout the entire day. Therefore, when he dons the phylacteries of Rabbenu Tam, he cannot say that he has already fulfilled his obligation and is now just performing a supererogatory act. The difficulty in how to consider the meaning of wearing both the phylacteries of Rashi and of Rabbenu Tam is exacerbated by the statement in the *Shulhan Arukh* which states that those who fear Heaven wear both sets of phylacteries, yet when doing so, they have the intention that one of them fulfills the obligation whereas the second is considered to be mere straps with no *halakhic* significance.[87]

The *Mishna Berura* explains the statement in the *Shulhan Arukh* to mean that those who fear Heaven do not have the intention that both phylacteries have the status of being proper, according to the Torah; rather, they seek only to act according to all opinions. Nevertheless, they avoid both potential nonfulfillment and possible transgression since their intention stipulates that one set is *definitely* invalid, thereby avoiding adding to the commandment by wearing two valid, yet different sets, and that each set be judged on its own, thereby also allowing the phylacteries of Rashi to be deemed fully valid within the conditional stipulation.[88] When a person does not don both sets at the same time, the *Mishna Berura* advises that it is essential that one explicitly have in mind, while donning the phylacteries of Rabbenu Tam, that he does so only due to a doubt and not to fulfill a commandment. As we saw above regarding "*bal tosif*," the prohibition of adding on, or acting due to doubt, is also not so definitive to be considered "*bal tigra*."[89] When donning the phylacteries of Rashi, on the other hand, a person does recite the blessing, since according to the main ruling, it is only with them that a person actually fulfills his obligation.[90] In his explanation of the *Shulhan Arukh* and in his decision, the *Mishna Berura* utilizes the *halakhic* principles of avoidance, in finding a way to avoid potential transgression as a result of conflicting priorities, and explanation, in describing how the various positions developed.

After going through the opinions of the various *Rishonim* up to the opinion of the *Shulhan Arukh*, the *Arukh HaShulhan* writes:

> It should not seem wondrous in your eyes that since the phylacteries of *Rashi* invalidate those of Rabbenu Tam and those of Rabbenu Tam invalidate those of *Rashi* how it is

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87 SHULHAN ARUKH, ORAH HAYYIM 34:2.

88 MISHNA BERURA 34:8.

89 BIUR HALAKHA 34: *sub voce yaniah shel Rabbenu Tam.*

90 MISHNA BERURA 34:13.

> possible that the great one of the world and the pious of the generations and all of Israel at various periods did not fulfill the commandment of donning phylacteries and made blessings that were in vain [by wearing both sets of phylacteries], Heaven forfend. Yet so, even in our book of laws it is not appropriate to write of things that are said in a whisper, and the hidden things are for Hashem our God, and in particular because of our many sins we do not have any idea in this matter. Nevertheless, in order so that it should not be a wonder in your eyes, I will explain a little according to our understanding.[91]

He then goes on to give an account of how the opinion of wearing the phylacteries of Rabbenu Tam developed.

The *Mishna Berura* is faced with a similar harmonizing challenge with respect to the ruling in the *Shulhan Arukh* that it is prohibited to wear phylacteries on *Hol HaMoed* (the Intermediate days of the Festivals of Sukkot and Passover) because, like Shabbat and Yom Tov (the Festivals and Holidays themselves), *Hol HaMoed* itself is considered a "sign" of the relationship between Man and God, and one must not have two different signs displayed together.[92] The difficulty is that the *Rema*, on the other hand, rules that a person *is* required to don his phylacteries, since he is of the opinion that *Hol HaMoed* is not considered a sign. Since there is nothing that would prohibit donning phylacteries during those days, one is required to do so.[93] (The reason one must not have two signs together is that it shows contempt for each one. It is also considered a transgression of "*bal tosif*," again the prohibition of adding to the 613 commandments given in the Torah in such a way that it is perceived as though one is denying the perfection of the prescribed performance, i.e., like saying "This alone is not good enough.")

With respect to the *Shulhan Arukh*'s reasons for prohibiting the donning of phylacteries during *Hol HaMoed*, the *Mishna Berura* writes that the prohibition of displaying two signs and of "*bal tosif*" applies only to times when a person would don phylacteries for the sake of performing a commandment. If he dons them without such intention, it would neither show contempt, nor would it be a transgression of dual signs. Also, if a person wears them publicly, it would entail only a rabbinic offense.[94] Therefore, during *Hol HaMoed*, a person should don his phylacteries without saying a blessing and have in mind the following intention: If he is obligated to don phylacteries, then his donning is for the sake of fulfilling a commandment, and if not, then it is not.

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91 HILKHOT TEFILLIN 34:6.
92 SHULHAN ARUKH, ORAH HAYYIM 31:2.
93 SHULHAN ARUKH, ORAH HAYYIM 31:2.
94 MISHNA BERURA 31:5.

The *Mishna Berura*'s explanation of the *Shulhan Arukh*'s reasoning gives him the tools to deal with a blatant contradiction and create a compromise in the following way. He first mentions that the *Aharonim* agree with the *Taz* that a blessing on donning phylacteries during *Hol HaMoed* should not be said. The reason not to say the blessing is that its requirement in the first place is in doubt, since there is a doubt as to whether or not one must don phylacteries at all on these days; and also, even if there is a requirement to don them, missing blessings do not actually impact upon fulfillment of a commandment. Thus one need not make the blessing. Having removed this otherwise necessary verbal indication that donning phylacteries is certainly required, i.e., the saying of a blessing, which implies that this, the putting on of phylacteries, is a required act, *today*, the *Mishna Berura* advises that a person have a particular intention while donning his phylacteries, which would allow him to fulfill the potential obligation without running into a possible transgression if donning them *were* really prohibited. He writes that before a person dons his phylacteries, he should think to himself that if he is obligated to do so, then his donning is for the sake of fulfilling a commandment, and if not, it is not. This stipulation removes the possible transgression of "*bal tosif*" since one acts without definitiveness, yet it provides enough intention to be considered efficacious if necessary, even, as we said, without a blessing.[95]

Moreover, the *Mishna Berura* cites the *Pri Megadim* that one does not don the phylacteries of Rabbenu Tam on *Hol HaMoed*.[96] The *Pri Megadim* explains that the reason is that the *Zohar* is very strong in its language of punishment for those who wear phylacteries on *Hol HaMoed*, and the phylacteries of *Rashi* are enough. Also, there is a *sfeik-sfeika* (a case of double-doubt, in which case the rule is to be lenient) that maybe the *halakha* is that one is exempt on *Hol HaMoed* from phylacteries at all, and maybe the *halakha* is according to *Rashi*.[97] In his explanation of the *Shulhan Arukh* and in his decisions, the *Mishna Berura* utilizes the *halakhic* principles of avoidance, in finding a way to avoid potential transgression as a result of conflicting priorities; explanation, in describing how the various positions developed; and mysticism and Talmud, in exempting one from donning the phylacteries of Rabbenu Tam.

In his discussion of wearing the phylacteries on *Hol HaMoed*, after going through the differing opinions of the *Rishonim*, the *Arukh HaShulhan* writes:

> The *Bet Yosef* rules that one should not don phylacteries, but *Rema* writes that there are those who do don them, but make the blessing in a whisper. No Sefardi dons and all Ashkenazim don, but today they don without a blessing, and so it seems proper to act accordingly. And many great

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95 MISHNA BERURA 31:8.

96 MISHNA BERURA 31:8.

97 MISHBETZOS ZAHAV 31:2.

> *Aharonim* have already written at length regarding this, one saying one thing, and another saying another. Thus[,] each should continue according to his minhag, and now many even among the Ashkenazim do not don and I will not continue at length on this. However, in any case, in one beit midrash people should not be doing different things because of *lo titgedidu* [the rabbinic prohibition to fragment Jewish society through the adoption of various and differing rituals and customs].[98]

Before concluding these three examples, we need to acknowledge that Benjamin Brown, the brilliant historian of another great rabbinical authority, the Chazon Ish, has argued that the *halakhic* methodology of the *Mishna Berura* is founded upon the principle of "soft stringency" and not the complex analysis we put forward in this article. Much as we admire Professor Brown's work, we think this approach is mistaken.[99]

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[98] ARUKH HASHULHAN, ORAH HAYYIM, HILKHOT TEFILLIN 31:4.

[99] *See generally* Benjamin Brown, *"Soft Stringency" in the Mishnah Brurah: Jurisprudential, Social, and Ideological Aspects of a Halachic Formulation*, 27 CONTEMP. JEWRY 1 (2007). He argues that, as opposed to "hard stringency," which demands that everyone follow the more stringent opinion, the principle of "soft stringency" allows the individual to decide for himself whether to adhere to the stringent or to the lenient opinion, both of which are effective. Stringent suggestions are exactly that; they are optional norms whose adherence stems from an extra-*halakhic* motive and an attempt to democratize Jewish law. Of course, the *Mishna Berura* encourages his readers to adhere to the stringent opinion, yet encouragement falls far short of requirement. (Before defending his claim that the *Mishna Berura*'s intention to use the principle of "soft stringency" is to democratize the *halakhic* process, Brown gives a possible alternative explanation. His alternative answer is that the *Mishna Berura* was deliberately ambiguous in terms of providing normative conclusions out of a sense of deference to his predecessors. *See id.* at 7. He could not render a decision that would be in opposition to the ruling of a *posek* he thought greater than himself. *See id.* Brown rejects this conjecture based on the fact that the *Mishna Berura* does at times make definitive recommendations, and because the *Mishna Berura* writes in his introduction that the purpose of his commentary is to provide clarity with respect to what to do in practice when differences of opinion exist about a given matter. *Id.*)

We think this approach is wrong and this note explains why. Because the *Mishna Berura*'s multifaceted recommendations are not the result of avoiding decision but rather are deliberately constructed decisions in themselves, Brown contends that the *Mishna Berura*'s *halakhic* methodology is not strictly juridical. Rather, it has the underlying premise that within the *Halakha*, there are preferred behaviors that are not universally obligatory; on the contrary, *halakha* also contains ideals toward which individuals should aspire. As Brown describes it, "This is an approach that perceives two levels of *halachic* norms: a uniform norm that is equally obligatory for all Jews without exception, and a hierarchical norm that merely is suggested, designed for those who wish to serve God on a higher level." *Id.* at 8. The principal of "soft stringency" informs those who wish to aspire toward the higher level to know how to act and provides an opening for everyone else to follow the legitimate lenient opinion.

In claiming that the *Mishna Berura* deliberately gives ambiguous rulings in order to accommodate various degrees of legitimate religious observance, Brown asserts that the *Mishna Berura*'s methodology demonstrates the notion of "open texture," as understood by H.L.A. Hart. *See supra* note 9. In reference to the *Mishna Berura*, Brown writes, "He, too, tried to clarify the differences of opinion and display their variety, but in all the many cases where he did not decide between them, he actually was willing to accept the open texture

caused by that variety. The final decision between them was not made through an intellectual coping with the text, but through the choice of the layman, which was based on other considerations." Brown, *supra* note 99, at 10. While his commentary does demonstrate the notion of open texture, contrary to Brown's assertion, the *Mishna Berura* attempts to adjudicate given the open texture of the *Shulhan Arukh*; he does not deliberately create vagueness in the law in order to give the layman autonomy for self-legislation.

Benjamin Brown explains Hart's notion of open texture to be the ambiguity of a law which thereby requires interpretation. Based upon this understanding, he claims that the *Mishna Berura*'s *halakhic* methodology presupposes that a ruling need not be categorical. In his discussion of the open texture of a law, however, Hart explicitly defines open texture in terms of uncertainty in matters of fact. *See* THE CONCEPT OF LAW, *supra* note 9, at 128. Given a particular piece of legislation, written in a manner that provides for a general rule to be followed, a particular situation may arise in which there is uncertainty as to whether the rule applies. The particular case shares some features with the general description given in the rule, yet has others which differentiate it. The difficulty lies not in understanding what is required by the rule; rather, the ambiguity lies in determining whether the rule applies in this situation.

Because uncertainty is based upon deviation from a general norm, ambiguity in a law must, by definition, lie at the extremes of its authority and not at its foundation. Hart's example to describe the open texture of a given rule is, regarding a rule about vehicles, how far the meaning of vehicle can be stretched; it includes a motor-car, but does it also include an airplane, a bicycle, or roller-skates? *Id.* at 126. To give an example from the *Halakha*, given the rule that a person must pray in the morning, does the morning include only the first three hours of the day, the first four, or until noon? Just as one citizen cannot choose to include roller-skates within the definition of vehicle while another includes an airplane if a community is to maintain any social stability, in Jewish law, community ties would deteriorate if any layman can determine the meaning of morning for himself. In both cases, the authority of interpretation is vested in the adjudicators. As Hart writes, "The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts of officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case." *Id.* at 135. As one who admits that he is interpreting laws, the *Mishna Berura*'s commentary should be seen as an attempt to resolve the tension resulting from the open texture in the *Shulhan Arukh*, as it relates to varying situations which all seem to fall under the same *Halakha*. This would explain why the *Mishna Berura* calls the *Shulhan Arukh* a closed book, and gives as justification for his commentary that the *Shulhan Arukh* writes one ruling in terms of an *ab initio* perspective and another in terms of an *ex post facto* perspective. These perspectives relate not to the desire of different adherents but rather to differing details of a given situation in which observance is necessary.

A few examples to demonstrate that when the *Mishna Berura* mentions that a particular act is required *ab initio* and suffices *ex post facto*, he does not imply that the individual may choose how to observe the particular command, but rather refers to the external circumstances in which a person must observe it, are the following: The *Shulhan Arukh* rules that one must make an *Eruv Tavshilin* (a mixing of cooked dishes that allows one to cook on a Festival for Shabbat when Shabbat immediately follows it) with bread and a dish of food, but if he only made it with a dish of food, it is effective. SHULHAN ARUKH, ORAH HAYYIM 527:2. The *Mishna Berura* comments that if he remembers before it gets dark that he only made the *Eruv Tavshilin* with a dish of food, he *must* add bread to it and designate the bread as part of the *Eruv*. If the voluntary *ex post facto* observance sufficed, the *Mishna Berura* would have only suggested, and not required, the person to add the bread. MISHNA BERURA 527:7. He required it since the circumstances characterized the situation as *ab initio*; therefore, he must follow the *ab initio* requirement. Once it turns dark, the person cannot make an *Eruv*; therefore, it is a situation where *ex post facto* requirements suffice.

As another example, the *Rema* rules that we have the custom to pray *Maariv* (the evening prayer) from *Plag HaMinha* (one and a quarter hours before sunset), and one should not pray *Minha* (the afternoon prayer) after *Plag*. He concludes, however, to say that *ex post*

VII. CONCLUSION

As our three examples show (and the more than 250 other examples in our longer manuscript prove), the *Mishna Berura*, rather than just allowing his reader to autonomously choose his own manner of fulfilling a particular obligation, does give fairly concrete instructions. The seeming variability is the consequence of his attempt to negotiate between his ten core *halakhic* principles in a manner that best answers his four central, guiding questions.

Because, as he remarks in his introduction, to study the *Shulhan Arukh* alone will not allow one to come to a proper conclusion (since no rule is able to satisfy every situation unless a person understands its intention and reasoning—its *purpose*), and because the increase of disagreements found in

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facto or in a time of difficulty, praying *Minha* then would still be effective. SHULHAN ARUKH, ORAH HAYYIM 233:1. The *Mishna Berura* interprets the *Rema* to mean that since it is a time of difficulty, it would be permitted *ab initio* to pray *Minha* at that time. To understand the *Mishna Berura*'s comment as Brown has laid out, namely that *ab initio* is the ideal form of observance and *ex post facto* is the lenient way of the multitudes, does not make sense. One must understand the *Mishna Berura*'s use of *ab initio* to mean that given the difficult situation in which the person finds himself, what is normally considered an *ex post facto* fulfillment is now the *ab initio* requirement. The facts of the case and not the desire of the self-legislator determine the level of stringency necessary. MISHNA BERURA 233:13. In other cases where the *Mishna Berura* distinguishes between degrees of observance, he discusses *ex post facto* fulfillment in a situation where someone performs part of an act erroneously, BIUR HALAKHA 455: *sub voce yesh l'smokh aleihem*, or if the *ab initio* requirement would have the undesired consequence of great monetary loss, or of limiting one's *Simhat Yom Tov* (Holiday joy). BIUR HALAKHA 455: *sub voce mayim shelanu*.

Despite the fact that we have shown that the *Mishna Berura*'s confrontation with open texture relates to questions of fact which raise doubt as to whether a given situation is under the influence of a particular law, his use of terms such as "it is good to be stringent" or "it is correct to be stringent" still seem to confirm his use of the principle of soft stringency and his acceptance of the autonomy of the layman. In the *Sha'ar HaTziyon*, the *Mishna Berura*, at times, gives an account for his use of these phrases, which may help determine whether they should be interpreted to imply soft stringency. A first example deals with saying the words, "May the expressions of my mouth and the thoughts of my heart find favor before you, God, my Rock and My Redeemer," after the *Amida* prayer. The *Mishna Berura* writes that if a person has reached the point where he would say these words but has not yet said them, and the *Hazan* begins to recite the *Kaddish* prayer after his repetition, the person may answer the *Kaddish*; however, he should be cautious not to put himself in this situation. MISHNA BERURA 122:1. This type of language would seem to imply soft stringency, since the *Mishna Berura* says that a person may answer, yet encourages him to be strict and ideally not to answer. In the *Sha'ar HaTziyon*, he explains that he used this language because the *Rema* forbids a person to interrupt his prayer to answer the *Kaddish*, yet the Gra writes that the *Rema*'s ruling is, in fact, not compulsory. In order to give a suggestion that reduces the ambiguity of having conflicting opinions, the *Mishna Berura* writes that one should be cautious to avoid the situation entirely, thereby avoiding the question of whether this extreme case falls under the authority of a disputed law. However, when the situation is unavoidable, the *Mishna Berura* definitively sides with the Gra in opposition to the *Rema*, thereby giving clarity as to what one should do in practice if this extreme case occurs. SHA'AR HATZIYON 122:5. In other places, the *Mishna Berura* explains his use of the phrase, "it is good," for the same reason. SHA'AR HATZIYON 128:7; 273:16. He similarly explains his use of the phrase, "it is correct to be stringent." SHA'AR HATZIYON 246:13.

the *Aharonim* has caused great difficulty in determining the proper action, the *Mishna Berura* seeks to provide enough information to allow his reader to always act correctly, accounting for various circumstances and differing opinions. At the same time, he desires to construct a unified, coherent *halakhic* corpus.

The *Mishna Berura*, written by Rabbi Israel Meir Kagan, is one of the two premier works of Jewish law written in the last one hundred fifty years. It undertook to survey and clarify all areas of Jewish ritual law found in one of the four sections of the classical Jewish law code, the *Shulhan Arukh*. Unlike many of his contemporaries, who adopted the basic stance that it was the duty of the decisor or commentator to endorse a particular view as the most analytically correct when matters are in dispute, or to adopt the functionally easiest plausible one, the author takes a unique legal approach. The *Mishna Berura* asserts that to adopt the most comprehensively preferred method is ideal, to adopt an answer that most commentators endorse is proper, and in times of need or urgency, the adoption of any resolution endorsed by a significant group of decisors is acceptable. His innovative approach, fundamentally invented by this work, can perhaps best be summarized by one of his own sayings:

ואשרי מי שעובד ה' בשמחה
Content is the one who worships God with Happiness[100]

[100] MISHNA BERURA 477:5.