# Thoughts on Halakhic Creativity

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Rabbi David Bigman is Rosh haYeshiva of the Yeshivat Hesder of Maale Gilboa.
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A Ladder upon the Earth, Whose Top Reaches the Heavens[1]

In this article I will attempt to analyze the halakhic approach of Rabbi Joseph B. Soloveitchik, and to compare and contrast it with two other models of halakhic thought—those of Rabbi Abraham Issac haCohen Kook and Rabbi Isaac Hutner. The central question at the core of these different halakhic approaches is the relationship between halakha and reality; that is, the relationship between the legal source material of preceding generations and the human concerns that arise from the specific question that a posek (halakhic arbiter) is asked. A central prism through which these various approaches may be best understood is their alternative theories of *mahloket* (talmudic dispute)—a central characteristic of the oral tradition. Over the course of this study, we will explore the way each approach understands the balance between halakha and reality, as well as its relationship to the nature of *mahloket*.

**Rabbi Soloveitchik—Divine Law**

In the eulogy for his uncle, Rav Velvele of Brisk (Rabbi Isaac Zev Soloveitchik), ‘*Ma Dodekh Mi Dod*,’ Rabbi Joseph B. Soloveitchik describes the role reality should play on halakhic pesak through a parable. He compares the real-life circumstances, the difficulties and needs of the individual who asks a halakhic question, to a rocket that launches a satellite into its orbit.

The halakhic process can be compared to a satellite that enters a particular orbit. The satellite’s entry into orbit depends on its thrust at takeoff. However, once in orbit, it begins to travel with amazing precision according to the specific

parameters of its particular orbital path. At this point, its original thrust cannot affect it in the least.[2]

Indeed the rocket propels the satellite into its trajectory; however, once it enters its orbit it continues to travel by the laws of physics. The same is true for the process of pesikah (halakhic decision-making):

The case is the psychological prompt that pushes pure thought into its path. However, once on its path, it [pure thought] pays no deference to the particular case, but operates by its own unique ideal-normative categories.[3]

Even though the posek is dependent upon a question from reality, the process of pesikah itself, the search for an answer to the halakhic question, must be separated from the reality in which the question was asked. The premise of halakhic decision-making is that halakha is based on a set of absolute a priori principles, and as such has no direct or necessary connection with reality. The posek's role is uncovering the halakhic truth by way of a predetermined course controlled by the principles of the halakhic process.

Professor Avi Sagi summarizes this outlook:

Apparently the closed nature of the system is determined from the fact that it operates as a legal system drawn from predetermined postulates and that it derives its conclusions in consonance with a system of objective rules. Halakha is therefore similar to a deductive system whose fundamental assumptions are the content given from Sinai and its principles are the a priori legal system that also was given at Sinai. The system develops from its own internal axioms on the basis of its own rules, and not on other external factors. Rav Soloveitchik is in fact aware that halakhic ruling is done in relation to the questions that reality itself raises. However, in his opinion, reality is not a component within the halakhic decision itself, rather, it is the motive driving the sages of the halakha to activate the system.[4]

This attitude toward halakhic decision-making greatly influences the place of, and the need for, creativity when making a pesak. It seems to me that Rav Soloveitchik does not deny the fact that pesikat halakha is a process in which the posek compares and connects different sources. For him it is a process through which he creates and adapts halakha to reality and to the new halakhic question that has been asked. Even so, the room for creativity is limited by the predetermined rules that he strives to uphold. In the end, creativity then becomes just a servant to the quest to reveal the halakhic truth. Reality is only an instrument through which the posek is launched into his logical, mathematic-like

calculations.

Rabbi Soloveitchik's fundamental aim is to disconnect halakha from reality and to limit external influences on the halakhic decision-making process.

Why does Rabbi Soliveichik oppose the influence of external realities on pesikah, as described so eloquently in the parable of the rocket? Rav Soloveitchik's position was expressed on the background of the Haskalah and the historical approach of Zecharia Frankel, which later became the foundation of the Conservative movement. The historical school held that halakha needs to be analyzed through sociological and historical factors to uncover the close connection between these factors and the posek, and the pesikah itself. Emphasizing the influence of the historical reality on pesikah permits one to claim that a certain pesak that was appropriate to an earlier era, is no longer relevant. [5] Since these movements were understood as a threat to Orthodoxy, it seems that Rav Soloveitchik attempted to create a structure of pure halakha, transcending social, cultural, or historical context in order to protect against a complete abrogation of halakha. He therefore strove to disassociate any connection between the halakha and the reality of the questioner.

It seems to me that it is difficult to reconcile Rav Soloveitchik's attempt to disassociate reality from the halakhic process with the tradition's attitudes toward halakhic dispute. There are many examples in the tradition of two authorities who faced similar realities and yet came to different and even opposite conclusions. How are we to understand the essence of talmudic dispute and the question of "halakhic truth" that arises from this phenomenon?

The talmudic tradition asserts that in cases of dispute "both these and those are the words of the living God."[6] This statement can be explained in two ways.[7] The first understands that indeed there are two truths. Both sides of the dispute are actually one hundred percent right. Alternatively, some suggest that there is only one absolutely true halakha that the posek tries with all his might to arrive at and uncover, but there is no guarantee that he will indeed succeed. One side of the dispute is mistaken but nevertheless is afforded the designation of "words of the living God" because of its positive motivation and aspiration to arrive at the truth.

Reconciling either of these understandings of halakhic truth with Rav Soloveitchik's approach of disassociating reality from halakhic process proves difficult. Let us assume for the moment that Rav Soloveitchik does not accept the literal understanding of "these and those" but opts for the more figurative explanation. This is an approach that claims that the legitimacy of each side lies

in its aspiration for truth, not necessarily having reached the absolute truth. Both sides are “the words of the living God,” because both sides are striving for divine truth. The process of searching and striving itself is the divine truth. If we return to the parable of the rocket, there is no guarantee that the posek indeed will manage to enter the proper orbit. It may be that the satellite will never make it into the proper orbit, or maybe at some point it will leave the orbit, and then the gravitational force will overtake the centrifugal force, and the satellite will fall.

The difficulty with this approach is that we are then forced to concede that at least one of the opinions is wrong. One of the posekim did not manage to launch the rocket into the right orbit. This explanation depletes Rav Soloveitchik’s approach of its great strength. He tried to create a paradigm of a priori halakhic truth, and thereby to disassociate halakhic truth from the chains of reality. The moment we acknowledge that posekim may be wrong, we have brought into the process of pesikah the problem of human imperfection with all its ramifications. There may indeed be a “halakhic truth,” but if we never know if we’ve reached it (for the aspiration for truth with no guarantee of its realization is equally applicable in the case of an individual posek as for the body of halakhic disputes), in the end the earthly reality and the human situation prevail over this truth and halakhic decision-making is ultimately dependent on them.

On the other hand, it may be possible to claim that Rav Soloveitchik accepts the other explanation of the nature of dispute in which indeed there are multiple truths. Thus, we can claim that there are a number of different “orbits” that the posek can enter. Each one of them is true in a certain way and provides alternative correct answers to any question that arises.

Yet, it seems that this explanation of dispute is also difficult to reconcile with Rav Soloveitchik’s approach as it provides an opening for the influence of reality on the posek. Ostensibly, reality is only the rocket that causes the take-off,  so how could it influence an entry into an alternative orbit? For every question are there a number of rockets? And even if there indeed are a number of “correct” answers for each question, have we not lost the benefit that we wanted to reap from disassociating halakha from reality? How is the posek to decide among the various options? In the end, there is no escape from the responsibility of the posek to take into account the circumstances and to decide which of the halakhic options best fits them. Indeed, there are multiple mathematic laws that allow for different solutions. Perhaps the axioms themselves don’t change but only their application; be that as it may, this does not remove the central role given to reality itself.

Despite these difficulties in reconciling the nature of rabbinic dispute with his theory of pesikah, it is clear that Rav Soloveitchik prefers that the halakha construct reality, and not vice versa. Halakha is to have the upper hand over reality since it is pure and impervious to human, earthly factors.

Rav Soloveitchik's approach is best understood in light of his Brisker background. He was completely entrenched in the Bet Midrash, and there seems to be a correlation between his talmudic and his halakhic approaches.

Many of the latter Ashkenazic talmudic authorities spoke of an abstract halakhic world, and attempted to explain disputes in an abstract fashion through the creation of a priori definitions and distinctions that were to be applied to various positions. The most notable among them were the Rogetchover (Rav Yosef Rozin), Rav Yitzchak Yaakov Reines, and Rav Chaim of Brisk. The Rogetchover adopted the philosophic language of the Rambam's *Guide for the Perplexed*,[8] Rav Reines spoke using terminology borrowed from the science of Physics,[9] and Rav Chaim adopted terminology from the halakhic literature. In contrast with the first two thinkers, who used terminology foreign to the halakhic discourse, Rav Chaim used notions that were already familiar to the students of halakha, such as *shenei dinim*, *heftza,* and *gavra* (two laws, the object, and the person). He emphasized these concepts and attributed to them major significance, and through them he analyzed the entire halakhic system. He managed to transform the talmudic discussion into an abstract philosophical discussion without resorting to external terminology.[10] You do not need a background from other fields in order to understand his philosophical distinctions, and it seems that for this reason his method caught on in the world of yeshivot. The possibility of analyzing the talmudic discussion in an abstract philosophical manner gave students a sense of elation. Indeed, many times the Brisker method of study is absolutely compelling. Talmudic controversies can be understood as disputes over philosophical principles of a transcendental ideal realm, transforming the halakhic discourse of the Gemara into a debate over ideal principles from which the halakha is drawn.

The advantage of this method is that talmudic study becomes a fascinating philosophical discussion. But it has three significant drawbacks: The first disadvantage, which is recognized in the yeshiva world, is that sometimes its innovative insights simply do not fit the text; the text is exploited to make the abstraction attributed to it. The second problem is that despite the initial interest that such study creates, at some point all the talmudic passages begin to sound alike. There are predetermined arguments the student anticipates. Patterns of thought are repeated until almost all the halakhic discussion is given over to this type of analysis. For each question that arises there is a prepackaged answer. The

third problem is the loss of the learner's awareness that the halakhic discussion almost always addresses a human, down-to-earth reality. The sages who dealt with the issues throughout the ages were intimately connected to reality. The discussions in the Talmud are often tied into the experiences, culture, and conceptions of justice of the individuals making their case. The rapid leap to abstraction loses the appreciation for the complexities and alternative explanations of the subject at hand.[11]

We see, therefore, how Rabbi Soloveitchik's halakhic approach is created from two main focal points. One is the Brisker talmudic approach and the second is the Orthodox need to give a clear answer to antinomian tendencies in the other streams of Judaism. Of course both of these focal points do not stand in isolation from each other, but rather are interconnected to each other. Thus one could speculate that the Brisker method itself grew in part from the need for an Orthodox response to the more liberal forms of Judaism, but this is not for our discussion here.

This presentation of the Brisker background of Rabbi Soloveitchik allows us to focus on one of its substantial dangers. Presenting halakha as disconnected from reality allows for disregard of the circumstances in which a question was posed and a limiting of the options available to halakhic arbiter. In my humble opinion, pesikah is a process in which the posek, sincerely attentive to reality and the human needs arising from it, uses the full gamut of halakhic tools before him to address the question that has arisen. Creativity is at the heart of pesikah, and it allows the posek to connect the sources to reality. Reality is a significant and central factor in the ruling itself and not just a catalyst for the beginning the process.

Rav Kook: Jewish Law as a Human Creation

In the beginning of his work *Lights of the Torah*, Rav Kook describes the difference between the Written Torah and the Oral Torah. He says that Divine Law is the Written Torah, and that the Oral Law is a human creation.

We accept the written Torah through the most transcendent channel in our soul... It is not the spirit of the nation that wrought this great light but the spirit of God, the creator of all...

With the oral Torah we descend into more mundane life. We sense that we are receiving the divine light through another channel in the soul, a channel that is closer to earthly life...[12]

However, elsewhere, Rav Kook stresses that Oral Torah is not like any other human creation:

Oral Torah in ensconced in the very nation's character, which found its blessing through Divine revelation of the Written Torah...[13]

Unlike the parable of the satellite of Rabbi Soloveitchik, Rabbi Kook compares the oral tradition to the sail of a ship filled by the wind of the Written Torah—the law of Moses given through the illuminating crystal ball of prophecy. Its dynamism, its direction, and its originality flow from the unique and even divine nation and therein lies its singularity among all other human creations.

From the universal spirit of God, the transcendent spirit of prophecy which creates the eternal Torah of life, comes a spirit of interpretation tucked away in the depths of the soul of the people, revealed in its favorite sons; from its penetrating gaze comes the great riches of the Oral Torah and all its wealth, all its genius and the foundation of its acclimatization to life, and its strength to master life and defeat that which is ugly and degraded in it.[14]

The emphasis is not on a certain quality of the nation that is revealed in the Oral Torah, but rather its ability to create the Oral Law. This capability is an essential and unique feature of the nation

That which Israel has the capacity to create, that is oral Torah...[15]

You can liken the approach of Rav Kook to the difference between a painting by Rembrandt and a painting done by a high school student. Indeed both are human creations, but the difference is that for the artist there is inspiration, some inner aesthetic sense through which he/she is able to create works above and beyond the ability of other people. With regard to the Torah, this uniqueness is with the people Israel. Thus Rav Kook presents a model through which the oral tradition, including the process of pesak, is on the one hand a human process, but on the other this 'humanity' is vested with a special position stemming from its status as the chosen people.

We saw in Rav Soloveitchik that halakha is basically a divine fixed system of rules, and its study and even pesikah are influenced by its nature. In contrast, for Rav Kook all of the Oral Torah, including the halakha, is a human creation based on the divine Written Torah. If Rav Soloveitchik understands reality as a stimulus to search for the absolute divine truth, for Rav Kook halakha is a human creation of a nation endowed with a special genius for the creation of an oral Torah out of its historical experience.

Such an approach, that sees the essence of halakha as a creation flowing from the nation, can be found in the thought of Ahad Ha'am. In his article "Torah of the Heart," he talks about the heart that beats through halakha over the generations. Although he had an ambivalent attitude toward tradition, he nevertheless anticipated a renaissance of Jewish law. He felt that there was narrowing of halakha in his generation, but looked forward to the day that the Jewish heart would beat again and create halakhot in an appropriate fashion. His approach can be best understood through his presentation of the talmudic determination that the statement "eye for an eye" should be understood as monetary compensation:

…If the heart in its development reached the understanding that "an eye for an eye" is an unacceptable cruelty for a cultured nation, and the heart was still at that time the absolute authority—then it is clear that the other source of authority, scripture, could not mean anything else, and there is no doubt, therefore, that "an eye for an eye" means monetary compensation.[16]

Rav Kook echoes Achad Ha'am in his attribution of halakha as an amazing human creation of the Jewish people; yet, there is a certain difference between them. Achad Ha'am writes critically of the state of halakha in his time. He laments that halakha has deteriorated, and he therefore calls for a halakhic renaissance.[17] Against this, Rav Kook writes in a gentler fashion. He does not believe that at some point in the development of the oral tradition the system broke down; rather, he accepts the Oral Torah of the generations as is and marvels at its beauty.

One could ask about Rav Kook's approach, what is the relationship between the Oral Torah of the current generation and previous generations? Is one to accept the creation of every generation as legitimate? What is the value of the current generation's creation in light of the beauty and validity of the work previously existing for many generations, which is also a manifestation of all the special character of Israel from time immemorial? It seems that in some sense Rav Kook loses the ability to critically evaluate the sources of Oral Torah. If halakha is a masterpiece, can one suggest that it is not appropriate for a certain reality? And what happens in a generation where the national spirit turns in a negative direction that one should oppose? It seems that the critical sense is something fundamental to Oral Torah that expresses itself through the talmudic tradition of dispute. Oral Torah is not a unified harmonious creation but rather a compilation of numerous positions that disagreed and critiqued each other.

It should be noted that the theoretical differences between Rav Kook and Rav Soloveitchik do not affect their actual halakhic decision-making. On the one hand,

from an examination of Rav Kook's response, he seems very similar to other posekim. There seems to be little direct influence on his pesak from his conception of Oral Torah. On the other hand, from testimony about Rav Soloveitchik's rulings in the Boston community and at Yeshiva University, it appears that he was flexible and especially attentive to reality. Nevertheless, in the next generation the influence of Rav Soloveitchik's understanding of the process of halakhic decision-making becomes recognizable. Posekim emanating from his circles tend to discuss little of the character of the circumstances and its complexity, and jump too quickly to apply a priori halakhic concepts. The idea that halakha is something transcendent and pure, affects all of the Orthodox circles in America—and a portion of the Conservative movement as well. The most striking point is that the posek generally does not deal with reality itself, but only with the reality as compared to the transcendent Law; i.e., how the transcendent law applies to the reality before him.

**Rav Hutner—Halakha as a Conversation between Heaven and Earth**

In contradistinction to Rav Soloveitchik and Rav Kook, who ignore the dimension of time in the transmission of Torah from generation to generation, Rav Yitzchak Hutner emphasizes the process of the transmission of the Torah received at Sinai from generation to generation. His approach is expressed in a number of places in his series of books on the holidays entitled *Pahad Yitzchak*, but the core of his understanding of halakha can be found in essays 1 and 3 of his volume on Hanukkah.

In essay 1, he presents an idea that there is something unique about the style of the Oral Torah that is indicative of its essence. He expresses this idea in his usual fashion through a spectacular homiletic in which he goes through various sources and explains them in creative ways.

Rav Hutner bases his approach on three sources. The first is a Tosafot in Tractate *Gittin* from which he learns that the translation of the Oral Torah into foreign languages would cause the Jewish people to lose its uniqueness:

The Midrash states: "they will be considered foreign" for the gentiles wrote (translated) the Torah. If all of the Torah had been written down for Israel, the gentiles would have written (translated) all of it. Therefore, the Merciful one said, "I will write for him most of the Torah, for what I wrote for them, is considered foreign, since foreigners copied it.[18]

In this puzzling midrash, the Sages say that God intentionally refrained from writing the Oral Torah in order to prevent non-Jews from translating it. Were they

to acquire it through translation, Israel would lose its uniqueness. The rabbis of the midrash claim that God knew that non-Jews would translate the Torah and therefore commanded that the Oral Torah should not be written. For the purpose of Israel maintaining its uniqueness, the Oral Torah was not written. Rav Hutner connects this midrash to the statement of Rabbi Yohanan who says that the essence of the chosenness of Israel is the Oral Torah:

R. Yohanan said: God only made a covenant with Israel for the sake of the matters that were transmitted orally.[19]

The third source for Rav Hutner is the Vilna Gaon's commentary on the blessings of the Torah:

“Who chose us from all the nations,” “who gave us his Torah” … “who gives the Torah.” He wrote in the abovementioned book of the GR”A (The Gaon Rabbi Eliyahu of Vilna) that this blessing has three parts corresponding to the three times Israel accepted the Torah: When God said "you shall be my treasured possession" (Exodus 19:5), they accepted all the commandments, and the second time, at the revelation of Sinai, and third, when Moses made the covenant. Thus, all three occasions are referenced in this blessing: "who chose us" refers to "you shall be my treasured possession," "who gave us his Torah" refers to the revelation at Sinai when they received the Torah from God, and "who gives **the** Torah" with the definite article, refers to the Oral Torah which they received from Moses orally. Therefore, it is written in present tense, "who gives" because knowledge of the Oral Torah constantly renews knowledge.[20]

Despite the emphasis of the GR”A that the Oral Torah is the third link in the threefold giving of the Torah, Rav Hutner processes his words against their simple meaning and claims that the essence of the Oral Torah predates the chosenness of Israel and the giving of the Torah. The uniqueness of Israel, as expressed in God's proclamation that Israel will be “treasured to Me,” is dependent on the Oral Torah being unique to the nation, but had the Oral Torah been translated, Israel's uniqueness, and treasured status would be abrogated retroactively.

In this surprising explanation, Rav Hutner further claims that this fundamental aspect, which is part of the nature of the Oral Torah, already existed before the giving of the Torah, during the period of the Patriarchs, and before the content of the Oral Torah was revealed.

And because the covenant includes the repudiation of writing down the oral tradition, it follows that the prohibition of, "you are not permitted to write down the teachings of the Oral Torah" precedes all the specific prohibitions of the

Torah, and moreover, it precedes the very event of the revelation of Torah.[21]

This is astonishing! On the one hand, this fundamental predates even the giving of the Torah, but on the other hand it is embodied specifically in the Oral Torah. This begs the question, what is this foundation and what is the significance of the fact that it was established before the giving of the Torah? It appears that Rav Hutner was not referring to any halakhic content that was given at Sinai but rather to something more essential and fundamental.

We will put aside for the moment the question of what this fundamental is, and turn to essay number three on Hanukkah. In this essay, Rav Hutner claims that ever since the Torah was given at Sinai, parts of it were forgotten from generation to generation. But God actually rejoices over this loss because in its wake, people attempt to restore the Torah which causes it to expand. How is it that forgetfulness causes an expansion of Torah? On the simplest level, the logical arguments through which we succeed in regaining the lost halakha is the Torah that is reproduced.

We learn from here a wonderful novel idea that it is possible for the Torah to grow in consequence of it being forgotten to the extent that it is possible to receive congratulations for forgetting Torah. See that the Sages state that three hundred halakhot were forgotten in the days of mourning for Moses, but were restored by Otniel ben Kenaz through his casuistry. The logical arguments and the restoration of halakhot, these are the words of Torah that expand only through the forgetting of Torah.[22]

Moreover, in radical way, the *pilpul* (logical argumentation) causes the creation of totally new halakhic positions. It is possible that the Sages did not “succeed” in their attempt to discover the original halakha that was since forgotten. We see that there are arguments regarding the correct halakha, and this indicates multiple reconstructions of the halakha by various Sages. This point is expressed in the ability of a rabbinic court to rely on a minority opinion that was rejected in the past and rule accordingly, a fact that indicates its legitimacy:

The even bigger novel insight that flows from this understanding is that Oral Torah’s extraordinary strength is more evident in cases of difference of opinion than in cases of unanimity. For embedded within the statement “these and those are the words of the living God” is the principle that even an opinion that was rejected by halakha is a legitimate Torah opinion.

…And if a latter vote is taken and they decide to accept the previously rejected opinion, from then on, the halakha genuinely changes.[23]

What is the content of those halakhot that were regenerated in the wake of forgetfulness, and what is the relationship between them and the original, forgotten halakhot? Rav Hutner suggests that “new Torah values” that may even be contrary to the original values are created.

The war of Torah (the creation of disputed positions) is not simply another characteristic of Torah study. Rather the war of Torah is a positive creation of new Torah values that would not otherwise be found in the words of Torah themselves.

The advantage of forgetfulness is the creation of new opinions that would not have been created otherwise. When the sages of Torah accept an opinion that was rejected in the past, it becomes the halakhic precedent. In extreme circumstances it is possible that a halakha will be accepted that expresses the very opposite of the original halakha, and nevertheless, it will become the true and accepted halakha. This process is not a negative one, but on the contrary, it receives God’s approbation who declares, “Yasher Koach (congratulations) that you broke them.” It seems that Rav Hutner understood how radical his words were, and therefore he emphasized:

The approach rejected from Halakha remains a legitimate Torah opinion, **as long as it is said within the boundaries of the discourse of the Oral Torah.**[24]

It is possible to understand the forgetting that Rav Hutner speaks of in a straightforward fashion—that in the past we knew what to do in a particular situation, but today we don't anymore. Yet it seems clear that Rav Hutner refers to not only the forgetting of technical halakhic details, but also to a more essential forgetting. Throughout the article, he claims that forgetfulness is an ongoing phenomenon of the Oral Torah and continues even after the writing of the Oral Torah that ostensibly prevents technical forgetfulness. Therefore we need to expand the notion of forgetfulness to include situations in which the reality has changed and we find it difficult to apply the previous halakhic precedent as it stands. A hint to this idea can be found in his quotation from Nachmanides where he says that “it is known that not all minds will be in agreement over how to address new situations.”[25] According to Nachmanides, halakhic disputes are the result of attempts by imperfect sages to apply the divine Torah to new realities.

Rav Hutner speaks about forgetfulness in its usual sense, but he is also referring to something similar to, yet beyond forgetting—that is the quandary that we experience when upon first glance we do not know how to apply the halakha in a given reality. He calls it “darkness-forgetfulness,” where the darkness is a type of confusion: when we don't know what to do; we feel as if we are standing in the

dark.

It is from this perspective of forgetting that one should understand the reconstruction of lost halakha. This is a process in which the posek tries to apply anew the halakha to reality. He tries to compare the situation at hand to a myriad of sources, to innovate out of those sources and thereby resolve the difficulty. The halakhic sources reach us through a long tradition, whose origin can be traced to the acceptance of the Torah at Sinai and afterwards through the cycles of forgetfulness and restoration of these sources. The posek continues to engage in a conversation with the sources, through which he formulates his new ruling. These rulings are the essential and main benefits of forgetfulness that forces the posek to create and innovate.

What is the deeper significance of a conversation with things that were revealed at Sinai and what is the importance of entering into this conversation? To understand this point we will return to essay number one and to the “secret fundemental” that still needs to be uncovered.

I suggested as a solution to the puzzle of essay 1 that the foundation (or “secret”) of the Oral Torah is the dialogue and give and take that the posek establishes between the present situation and past sources. This process is like a tug-of-war between the posek and those sources. The Aramaic words *shakla vetarya*, translated as give-and-take, are the talmudic terminology for this process of matching the sources to the reality. This same phrase is also used as the term for bargaining. There is a process of bargaining between the human needs on the one hand and the authority of the sources on the other. Sometimes we submit before the authority of the source, but other times we reinterpret a source so that our conclusion will fit with the given reality. In essay 3, Rav Hutner emphasizes over and again the “battle of Torah,” and it seems that he is referring specifically to the talmudic dialogue, of which an essential part is argument and constant debate.

This grand conversation predates the giving of the Torah and it is, in essence, the ethos that our forefathers bequeathed to us for all future generations. The Patriarchs engaged in dialogue with God Himself for the welfare of His creations. An outstanding example of this is the conversation between Abraham and God before the destruction of Sodom. The interchange between Abraham and God could very well be described as bargaining; while God suggests he will utterly destroy Sodom, Abraham bargains suggesting that God should save the city if 50, then 45, then 40, etc., righteous individuals can be found. We can say that Abraham may have been the first to engage in “*shakla vetarya*” with the divine

word. Perhaps this is an indication of the aspect of Oral Torah that predates its giving that Rav Hutner was referring to. But it is not just Abraham who looks to engage God in dialogue. It seems that God is anticipating and encouraging just this type of engagement. God asks, “Shall I conceal from Abraham what I am about to do?”[26] He continues, “for I have come to know him because he will instruct his sons and household after him to guard the way of the Lord to do righteousness and justice.”[27] From a simple reading of the text it seems that God expected Abraham to argue with Him. God revealed His plan to Abraham specifically because He knew that Abraham instructs his household to do “righteousness and justice” and thus will not let Him destroy Sodom. So in addition to the ethos that Abraham creates when he stands before God in argument, God too creates this ethos and expects it from Abraham.

Like our Patriarchs, we, in every generation, stand before the formal commandment of God and adopt the ethos of dialogue in the story of Sodom, a dialogue that seeks the welfare of humanity. We stand before the divine commandment and declare that it is up to us to try to interpret it in a way that is attentive to reality and human adversity. It is incumbent upon us to engage in this give and take for the welfare of all creatures. God encourages this dialogue. Through the story of Sodom, God explains to us how to accept His Torah.[28]

This intimate conversation that is maintained between Israel and God is the unique aspect of the Oral Torah. Its uniqueness stems from its intimacy—there is much love and intimacy in true debate.[29] The acceptance of the Torah is indeed absolute, a complete commitment. Yet at the same time, it is like a student’s acceptance of his teacher’s wisdom. The student poses difficult questions, engages in a give and take that creates an intimate relationship.

In other words, when a posek tries to restore what was at Sinai, he tries to restore what should have been. Sometimes he’s not quite sure what was said at Sinai and stands bewildered by the simple application of the words that were said to the given reality. But he knows what should have been said at Sinai based on the principle of “to guard the way of the Lord to do righteousness and justice.” Indeed, this principle speaks of interpersonal commandments; yet it is also applicable to commandments between humans and God.[30]

Halakha is an attempt to make a better world of human relations and the relations between God and humanity. Were we to try to create such a world from whole cloth, we would lose out on two accounts: first we would lose the intensity of the ethical activity and the religious adherence that stems from halakhic commitment; additionally, we would lose out on the intimacy of the dialogue with

God. This dialogue is also a conversation with all those who previously engaged God in conversation. A chain of generations is in dialogue with the divine command as we attempt to apply it to reality—each generation with its own circumstances—in the best way possible.

This conversation is important, not for that sake of the debate itself, but for the attainment of love through dialogue and exchange. The joy in a shared creation is what brings love. The deep meaning of learning Torah is the conversation with God. Sometimes this conversation is not direct, but through the Torah of one who dealt with an issue in a previous generation. Nevertheless, through this conversation we feel an intimacy with God in all of His glory. The result of this intimacy is a halakha that fits the reality, is attentive, and desires to "guard the way of the Lord to do righteousness and justice."

Against the polar opposite approaches of Rav Soloveitchik and Rav Kook—a completely heavenly halakha or a halakha that is a wholly human creation—we can view the approach of Rav Hutner as the "middle road" that creates a dialogue between the approaches, between heaven and earth, in order to find the best way to maintain the divine command in the current reality.

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[2]R. Joseph B Soloveitchik, *Ma Dodech Mi Dod* (Heb.), in *Divrei Hahutve Halakha* 1982 pp. 77–78.

[3]*Ibid*.

[4]Avi Sagi, Rabbi Soloveitchik and Professor Leibowitz as Legal Theorists (Heb.), *Deot* 29; *Journal of Jewish Philosophy and Kabbalah*. Ramat Gan 5752, pp. 131–148.

[5]In fact, throughout the generations, analysis similar to the historical school has been part of traditional pesak. However, previously it was done without the historical critical consciousness which is often found in the pesikah of the Conservative movement, and that creates a sense of relativism for both the posek

and the community.

[6]Bavli *Eruvin* 13b.

[7]Early sources already addressed this issue, and here is not the place to present the discussion with all of its details. The three most prominent approaches are found in Nachmanides' commentary to the Torah, Deuteronomy 17:11, Maimonides' introduction to his commentary of the Mishnah, and Rabbi Shimon of Shantz's commentary to the Mishnah *Eduyot* 1:5-6. It is especially appropriate to note the approach of Rav Aryeh Leib ben Rav Yosef HaCohen Heller in the introduction to his book *Ketzot HaChoshen*, which lays out in a clear fashion the possibility of a "soft" interpretation of "these and those are the words of the living God," understanding "words of the living God" to refer to any attempt to achieve the divine truth even when beyond human ability.

[8]Menachem Mendel Kasher, Decoder of Secrets—Studies in the Torah Teachings of the Rogotchover (Heb.), Jerusalem, 5736.

[9]*Edut B'Yaakov—ReisheetBikurim Al Halakha*(Vilna 5637), *Chotem Tochnit—Beiur BeYeshodot HaGeyoniyot et Clalei HaTalmud BeHaPoskim HaRishonim* (Meinz 5660) *Orim Gedolim—Chakirot Bikarei Halachot* (Vilna 5647).

[10]It should be noted this tendency might in fact already exist among the Talmudic sages. The Mishnah in *Hullin* 9:6, discusses the status of a mouse that is made half of flesh and half of clay -- does such a mouse have the status of an impure creature or not? Saul Lieberman (*Greek and Hellenization in the Land of Israel*, Bialik Institute 5723, p. 286) discusses whether the sages dealt with this question because the science of the time believed that such a creature was possible and therefore this discussion is addressing "reality," or whether they never treated it as a practical question, but only as a theoretical discussion of an extreme case in order to clarify the margins of the law. As with this example (which is just one of many amongst the Talmudic discussions), we can say that the deliberations of Rav Soloveitchik were also only for theoretical study.

[11]For example, the question of credibility of witnesses: It is clear that the original question stemmed from the reality and its goal was to clarify out whether under the circumstances in question it was possible to trust them, or not. However the *ahronim* (later talmudic commentators) went in the direction of

creating an a priori “status of trustworthiness.”

[12]*Orot Hatorah*1:1 and *Shemoneh Kevatzim*, Kovetz 2, 56–57. It should be noted that while the text in *Shemoneh Kevatzim* speaks of a channel, in *Orot Hatorah* the term is “picture,” which reduces the division between Written and Oral Torah as stemming from different places entirely.

[13]*Shemoneh Kevatzim*, Kovetz 2:233.

[14]*Shemoneh Kevatzim*, Kovetz 4:52.

[15]*Shemoneh Kevatzim*, Kovetz 1:296.

[16]Asher Zvi Ginzberg (Ahad Ha'am), Torah of the heart.

[17]*Ibid*. ff. "But it all that changed after that. Oral tradition, whose proper name is the Torah of the heart, became ossified in writing, the nation's heart was filled with only one clear and strong recognition: the recognition of its absolute insignificance and eternal subordination to the written word. The voice of God in the heart of man no longer had value in and of itself. For the ultimate questions of life it has no say, only what was written in the books is deemed relevant.

[18]Tosafot *Gittin* 60b sv."Atmuhi KaMetamah,” according to the *Midrash Tanhuma* and *Shemot Rabbah Parashat Ki Tisa.*

[19]Bavli *Gittin* 60b.

[20]Avnei Eliyahu on the *Siddur IsheiYisrael*.

[21]Pachad Yitzchak, Hanukkah Essay 1.

[22]*Ibid*. Essay 3.

[23]*Ibid*.

[24]*Ibid*. The emphasis is mine.

[25]Ramban on Deuteronomy 17:11.

[26]Genesis 18:17.

[27]*Ibid*. 19.

[28]The nation’s acceptance of the terms of Torah through the declaration, "we will do and we will hear " was said after Israel had already acquired the methodology of negotiation with regard to the divine word—the approach of interpreting the word in favor of humanity.

[29]Study with a partner (hevruta) where its dispute and discourse produces a great love and intimacy is a reflection discourse with God—not in spite of the controversy, but actually out of it. The power that produces love out of controversy is the shared joy of creation.

[30]As an example of this, one can look at the discussions and disagreements about the activities in the temple. These discussions are about how to serve God properly in the sanctuary. Even testimony from sages who actually lived while the Temple still stood and saw how it ran is insufficient to deter those who have alternative opinions about how they imagine it should have run.