

Review Essay: Rabbinic Authority and Personal Autonomy, ed. Moshe Z. Sokol

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This collection of essays, published by the Orthodox Forum, a think tank sponsored by Yeshiva University's Rabbi Isaac Elchanan Theological Seminary, addresses the most fundamental question plaguing the orthodox modernist, which is the relationship between an imposed religious authority and a sense of individualism and autonomy which is endemic to the modern sensibility.

The volume's lengthiest entry is Lawrence Kaplan's study, "*Da'as Torah: A Modern Conception of Rabbinic Authority.*" By explaining *da'as Torah* as a "modern conception" of rabbinic authority,¹ Kaplan not only describes the doctrine but claims that it is the product of a historical process rather than a core dogma in the Sinaitic Covenant as understood by the Sages. According to *da'as Torah*, the rabbinic elite of the Council of Torah Sages of Agudas Yisroel, or *Mo'etzes Gedolei ha-Torah*, is capable of determining God's will on the basis of its intuitive understanding of the totality of Torah, and its rulings apply to theology and social policy as well as to ritual.

Kaplan's thesis is based upon the original researches of Gershon Bacon and Mendel Piekarz. For Bacon, *da'as Torah* is a strategic invention of those who sought to defend Orthodox interests against a corrosive modernity whose secularizing forces challenged Orthodox Judaism.² Piekarz argues that the term as currently used finds its sources in nineteenth century hasidic circles.³

Kaplan regularly reminds his readers that the *da'as Torah* ideology invests a particular rabbinic elite with charismatic authority:

Their [the *gedolim*'s] views were binding because precisely these giants, as a result of their immersion in Torah, were, in all of their pronouncements, the authentic spokesmen for, the quintessential embodiment of, the Jewish tradition.⁴

On the basis of this doctrine, membership in mixed [Reform, Reconstructionist, Conservative, and Orthodox] bodies is forbidden,⁵ service of Israeli women in Sherut Leumi is disallowed,⁶ and the institution of a "modern" orthodox rabbinical seminary is opposed.⁷ The person whose opinion [*da'as*] is *da'as Torah* must, according to a view attributed to R. Meir Kagan [the Hafez Hayyim] of Radin,

be pure, without any interest or bias. However, if there is a person who possesses *da'as Torah* but it is intermingled with other views from the marketplace or from the newspapers, then this *da'as Torah* is turbid, intermingled with dregs. Such a person cannot penetrate into the heart of the matter.⁸

For R. Abraham Karelitz (the Hazon Ish), *da'as Torah* is presented as a *halakhic category*⁹ even though its force is localized in the personal charisma of the decisor rather than in the available, accessible Torah literature. According to R. E. Dessler,

Our rabbis have told us to listen to the words of the Sages, even if they tell us that right is left, and not to say, heaven forbid, that they certainly erred because (one as inadequate as) little me can see their error with my own eyes. Rather, my seeing is null and void compared with the clarity of intellect and the divine aid they receive. . . . This is the Torah view [*da'as Torah*] concerning faith in the Sages [*emunat hakhamim*]. The absence of self-negation toward our Rabbis is the root of all sin and the beginning of all destruction, while all merits are as night compared to the root of all—faith in the Sages.¹⁰

Kaplan cites an oral communication from Rabbi N. Lamm, who correctly understands the idiom *emunat hakhamim* of Avot 6:6 not as “faith in the Sages,” but “the faith of the Sages.”¹¹ Kaplan proceeds to analyze the classical understanding of Jewish authority, recorded by Maimonides, who rules that a Jew is required to accept the rulings of the Jewish Supreme Court [*bet din ha-gadol*, or Sanhedrin] over which the *gadol ha-dor* presides, albeit without charismatic authority.¹²

Da'as Torah capacity is seen as a form of inspiration, or *ruah ha-kodesh*.¹³ According to R. Elya Svei, the rejection of *da'as Torah* negates the honor that one must give to sages,¹⁴ and is tantamount to abject heresy.¹⁵ While *da'as Torah* ideology is attributed to the late R. Moshe Feinstein, his son-in-law, R. Moshe Tendler, comments that R. Moshe made critical remarks about people talking about *da'as Torah* “when they don’t even know a Shakh or Taz!”¹⁶ In point of fact, R. Feinstein, like the Hazon Ish, never invokes *da'as Torah* in his responsa.

While concurring with Kaplan that *da'as Torah* is not a valid norm within the halakhic system, one must concede, following Bacon’s reading, that the idiom serves as a strategic tool which, for its adherents, strengthens Torah life. The use of *da'as Torah* rhetoric may be seen as a strategic instrument which is employed “in order to bring the masses back to religion.”¹⁷ Kaplan correctly identifies *da'as Torah* as an ideology of submission,¹⁸ and he also notes that within the *haredi* community, *da'as Torah* orthodoxy is claimed by different, competing groups.¹⁹ The common thrust of *da'as Torah* usually reflects the position or practice which is ‘more traditional,’ the more *frum*, the less—heaven forbid!—modern.²⁰ While Kaplan concedes

that rabbinic input in communal policy is appropriate, he understands *da'as Torah* as a partisan article of countercultural faith,²¹ and he, like most Orthodox Centrists, cannot accept this subjective doctrine as an element in halakhic decision-making. Kaplan does not define what the status of rabbinic input ought to be given his rejection of *da'as Torah* ideology, and while there is much merit in Kaplan's essay, it is blemished with a gratuitous sarcasm which blunts the force of his argument and diminishes his credibility as an objective critic.

In an important contribution, Dr. Aaron Kirschenbaum, a professor of Jewish Law at Tel Aviv University, endorses *emunat hakhamim* in the second article in this collection, "Subjectivity in Rabbinic Decision Making."²² An exponent of the "Historical School" who is also a pious, practicing Orthodox scholar, Kirschenbaum contends that "equity" is the "inner mechanism of the law that makes for flexibility in its interpretation and application."²³ For Kirschenbaum, equity enables a legal system to "negotiate the tension between its static rules and the dynamic flow of events."²⁴ Legal norms are by nature general, and their specific applications may result in consequences that are unfair or which violate the "inner spirit of the law." Kirschenbaum contends that the equity principle "corrects" inadvertent miscarriages of general rules of justice which may create "defective" rulings in specific situations.²⁵ Since Kirschenbaum is ideologically Orthodox, he offers, without addressing their inherent incompatibility, three approaches whereby changes in halakhah may be justified in a system whose authority is grounded in God's eternal will. He outlines a "conservative approach," in which the Sinaitic law is seen as exhaustive and complete, an "explicative approach," which surrenders the evaluation of divine intent to an authorized court, and the "accumulative approach," whereby the recognized rabbinic authorities continue the Sinaitic revelation. Kirschenbaum seems to prefer this last approach over the first two.

Kirschenbaum presents two cases in which equity rectifies "the defect by deciding as the (divine) lawgiver would himself decide if he were present on that occasion."²⁶ He cites the understanding of R. Isaac Arama²⁷ who comments upon the talmudic narrative in which a hitherto unknown brother lays claim to an estate inherited by Mari b. Isaac. Mari refused to acknowledge that the claimant was his brother. R. Hisda asked the claimant to bring confirming witnesses, but the claimant was unable to comply because Mari was known to be a violent man and witnesses were too fearful to appear. Since R. Hisda also realized that this complaint was valid, he required Mari to bring witnesses that the claimant was not his brother, against normal rules of judicial procedure.²⁸ Kirschenbaum endorses R. Isaac Arama's reading that R. Hisda "corrected" the law which, if applied according to strict rules of procedure, would have produced a "defect," an instance of inequity.²⁹

Kirschenbaum then summarizes the arguments put forward in a

responsum of R. Samuel b. Moses de Medina,³⁰ who contends that the group involved in the engagement of a rabbi on the part of a community must be weighted in favor of people of material and spiritual substance, for a simple numerical majority would leave this important decision in the hands of brutes. Following such an unstructured majority compromises the “ways of pleasantness,”³¹ for it enables the unlettered to impose their will upon the learned and economic elite of the community. Kirschenbaum also reports a question put to R. Asher by his son, R. Yehiel, concerning the recovery of assets from the estate of a convert whose property was plundered upon his demise. R. Asher rules that in the absence of a lien against the estate, those who plundered it cannot be forced to pay for the funeral, and the community must bear the burden. It must be remembered that the estate of a convert who dies without heirs becomes *hefker*, belonging to no one, and title to it may be established by mere possession.³² Although the *Tur* and *Shulhan Arukh*³³ prefer a narrow reading of principle and precedent, and therefore agree with R. Asher, R. Joel Sirkes argued that it is scandalous to allow some parties to plunder an estate and require others [the corporate community] to assume burial costs out of the public purse.³⁴ While conceding that strict law follows the rendering of the *Shulhan Arukh*, Kirschenbaum happily notes R. Sirkes’ demurral. Changing subjective conceptions of equity, fairness, and justice found their way into halakhah through *minhag*, *pesak*, and *takannah*. Kirschenbaum regards these deviations from strict statute to be subjective, legally valid, and a manifestation of rabbinic authority whereby the Torah system is preserved. Unexamined by Kirschenbaum, however, is the possibility that changing subjective values might actually undermine the integrity of the halakhah and Torah’s social/religious construction of reality. Kirschenbaum finds that in some instances, Jewish law is “defective,” by which he means that they yield inappropriate results. He applies the doctrine of *emunat hakhamim*, or rabbinic discretion, to such cases, allowing competent rabbinic authorities to “correct” the “defect.” The search for equity and adjudication is, in his words,

the product of the deliberate attempt of the Rabbis to have the everyday administration of the halakhah conform to the *true meaning and the true intent of the Divine legislator*³⁵ [emphasis mine].

He understands the idiom “*ha-dan din emet la-amito*” to refer to “true intent” of the divine legislator.³⁶ For Kirschenbaum, the authority to make this rendering resides not only in the *bet din ha-gadol*, but in

the corpus of law-abiding citizenry of the Jewish people who decides. From a theological perspective, as believers and the children of believers, we aver that it is a man (or those men) whom the *hashgahah* (Divine Providence) has selected.³⁷

In defense of this position, whereby the rabbis “correct” the “defective” law, Kirschenbaum offers an apologia for the “Historical School:” “A kind of ongoing revelation takes place whereby the authorized human agencies—made of men possessing the requisite scholarship, piety, integrity—make Torah law.”³⁸ For Kirschenbaum, post-talmudic courts also “have the power to explicate the true intention of the divine Legislator.”³⁹ The ability to change Jewish law is, for Kirschenbaum, a refreshing reformulation “of the doctrine of *Emunat Hakhamim*.”⁴⁰ He therefore cites the Hazon Ish’s understanding of Rava’s derisive observation (*Makkot* 22b) that dull witted people will stand before a Torah scroll, but not before a Torah scholar who embodies Torah values. For Kirschenbaum, “the authentic *talmid hakham* embodies the *living Word*.”⁴¹

However, Rava is not claiming that the Sage embodies God’s will; while one is required to honor the scholar, it is only the community of scholars, sitting in the Sanhedrin’s plenum, that is authorized by God to speak authoritatively about Torah. The idiom “living Word” reminds the reader of the beginning of the fourth Gospel.⁴² Christian authority is hierarchical and charismatic; Jewish legal authority is grounded in Text and Tradition. On theological as well as anthropological grounds, one must take care not to appropriate idioms of alien creeds because they miscast the “construction of reality” of the culture under question. There is no objective criterion whereby Torah law can be defined as “defective,” and appeals to the spirit of the Law are invariably rhetorical ploys whereby the letter of the Law is compromised or suppressed in favor of the agenda of the one who claims to be privy to the esoteric “spirit” of Divine “intent.”

Talmudic legislators were not so presumptuous as to believe that they could read God’s mind; they are authorized to interpret a Torah which is transmitted and surrendered to them for legal explication. The Akhnai oven narrative⁴³ teaches that the Sages, when they “play by the rules,” are authorized by God to overrule divine intent. Once the Torah is promulgated, God’s actual legislative intent becomes legally irrelevant.⁴⁴ Like Professor David Weiss Halivni, who makes the theologically unacceptable claim that the text of the Torah is “corrupt” and that the Sages “restored” its true meaning,⁴⁵ Kirschenbaum assumes an arbitrary conceptual standard by which the Torah is found to be “defective,” and he claims that faith in the rulings of the Sages of Israel render the Torah perfect and whole in its application. The “Historical School” and its advocates find the Torah wanting because it does not conform to subjective, alein, and arbitrary standards; in Kirschenbaum’s model, the community of the faithful and their rabbinic leadership correct what are (mis)taken to be errors, Heaven forbid, in Torah. Even those scholars who accept the doctrine of *emunat hakhamim* will not concede that the Torah is deficient or that they possess the authority to change Torah law.

In his “*Eilu ve-Eilu Divrei Elohim Hayyim: Halakhic Pluralism and Theories of Controversy*,” R. Michael Rosensweig examines the precedent

for legitimate dissent in Jewish tradition. He correctly regards the apparent tension between a God given legal order and the finite, human application of that order as “superficial.”⁴⁶ Like Kirschenbaum, Rosensweig believes that Torah learning requires “the pursuit of objective halakhic truth.”⁴⁷ He then shows that in matters of exegesis and thought, Jewish tradition affords a wide range of legitimate differences, and he correctly understands the differences between contradictory views as “multiple layers of meaning” which are inherent in a divinely inspired text.⁴⁸ For Rosensweig,

the ultimate goal of a halakhic analysis is to arrive at a specific, single solution, and halakhic debates generally revolve around mutually exclusive positions, only one of which is purported to represent *absolute truth*⁴⁹ [emphasis mine].

However, an oracle is to have proclaimed the views of both schools of Shammai and Hillel to be “the words of the living God.”⁵⁰

After demonstrating that talmudic sources record what may be taken to be a theoretical if not practical halakhic pluralism, Rosensweig cites the author of the *Netivot ha-Mishpat*⁵¹ who views Torah study as a search for truth which includes the evaluation and rejection of error, and the Neziv who distinguishes between the divinely authorized intuition of the priest and the analytic reflection of the legislator/judge.⁵² Even minority views possess some value, even after they are rejected.⁵³ Citing R. Moshe Feinstein⁵⁴ and Rashi,⁵⁵ Rosensweig shows that in halakhic argument, like non-legal discussion, a wide range of ideas is acceptable, and there is “no absolute truth or falsehood.” He then cites the Ritva and others⁵⁶ to suggest that God gave a multitude of halakhic possibilities to Israel, and the rabbis are authorized not so much to read God’s mind, as suggested by Kirschenbaum, but to apply those manifold possibilities according to their own authorized discretion. In the words of the Ritva:

When Moses ascended to receive the Torah, it was demonstrated to him that every matter was subject to 49 lenient and 49 stringent approaches. When he queried about this, God responded that the scholars of each generation were given the authority to decide among the perspectives in order to establish the normative halakhah.⁵⁷

Rosensweig’s summary and analysis comports well with Hans Kelsen’s theory of legal validity. For Kelsen, in order for a legislated norm to be valid, it must not contradict the higher norm which serves as its basis.⁵⁸ But legislators may enact alternative and even contradictory norms, with each maintaining individual validity because they do not contradict the higher, or Covenantal/constitutional ground upon which they are based.⁵⁹

After outlining the precedent for parameters of halakhic pluralism, Rosensweig discusses the place, force, and standing of rabbinic juridic dis-

cretion. An error in *devar Mishnah* must be overturned, while errors in procedure of due process enjoy limited legal validity.⁶⁰ By focusing upon the actual literature of halakhah, Rosensweig ignores without polemic the claims of *da'as Torah*, most likely because he cannot find the term so used in the classical halakhic literature. The Torah scholar explicates and evaluates facts, but he does not invent them.

R. Jonathan Sacks, Chief Rabbi of the United Hebrew Congregation of the British Commonwealth, serves as a communal rabbi who is well read in the literature of the social sciences and humanities as well as in Torah sources. Unlike the authors previously discussed, Sacks is openly normative and prescriptive as he applies Torah principles for the community he serves. Focusing upon the role of rabbi/*posek* as leader, Sacks defines the scope of individual rabbinic authority while affirming that "Halakhah changes because Torah does not change."⁶¹ Having decided to fill a normative, prescriptive function, he neither contents himself with academic description nor does he cede to the advocates of *da'as Torah* the sole authority to apply Torah. Since he addresses an Orthodox community that is self-consciously situated in modernity, he examines the parameters of discretion that are given to post-talmudic rabbis.⁶² Following the Maimonidean method, according to which the law remains perpetually the same even as it responds to everchanging conditions, Sacks takes pains to explicate the differences between his concept of change and that of Orthodoxy's commitment to a "principled identity."⁶³ He rejects the view of Robert Gordis who believes that "fresh ethical insights" impact halakhic legislation,⁶⁴ and he disavows Joel Roth's contention that Conservative thinkers must disavow Orthodox rulings.⁶⁵ Since Orthodoxy refuses to accord to sociology a normative factor in halakhic decision-making, it differs with Conservative Judaism with regard to "the very nature and systemic functioning of the halakhic system."⁶⁶ Conservative Judaism rejects the laws of *mamzerut* because Jewish law functions on a global, communal level [rule consequentialism] while Conservative Judaism, it is argued, is concerned with act consequentialism.⁶⁷ Sacks also dismisses Conservative Judaism's appeals to history as a misunderstanding and misapplication of Judaism's view of history, which must be shaped by halakhah.⁶⁸ Following the line of thinking in R. Israel Francus' negative responsum concerning the ordination of women,⁶⁹ Sacks correctly identifies the "lack of integrity" in Roth's treatment of halakhic sources which, if so read, would require women "to voluntarily convert to halakhic malehood"⁷⁰ in order to function as rabbis. For Sacks, halakhah requires a strong sense of history, "not to admit change but to defeat it. A halakhic ruling gains its cogency by being set in the context, and enhancing the coherence, of Torah as a whole."⁷¹

In his critique of Conservative Judaism's approach to the ordaining of women to the rabbinate, Sacks overstates his case. By arguing that women are precluded from functioning as rabbis because of the issues of *kevod ha-*

zibbur (respect of the congregation, which is why a woman is not to receive an *aliyah* to the Torah) and *kol ishah* (the “nakedness” of a woman’s voice),⁷² Sacks manipulates idioms for rhetorical effect without paying close attention to their specific halakhic force. When a *zibbur* waits for the rabbi to finish praying, requiring the congregation to stand/sit idle, one might argue that a *zibbur* is waiving [being *mohel*] its honor. Furthermore, were *kol ishah* the operative halakhic category in the instance of *aliyah*, the Sages would have said so. Furthermore, R. Caro⁷³ is not nearly as restrictive as contemporary Ashkenazic usage with regard to women’s singing in the presence of men.⁷⁴ Sacks’ assessment of Roth’s lack of judicial integrity is a far more devastating and convincing critique than objections to a woman’s singing voice or the honor of the community. Sacks defines with precision the unbridgeable chasm between halakhic Judaism and those ideologies which appropriate halakhic “style” because only Orthodox Judaism recognizes the

absolute determination on the part of the sages to conserve and preserve the institutions of the covenant in an utterly transformed world. They were changes intended to establish *that nothing had changed*.⁷⁵

Sacks is the first thinker to articulate a Centrist strategy of halakhic application based upon philosophical, theological and other considerations. Consequently, Sacks never attacks the “right” for its agenda; following Maimonides, he correctly argues that halakhic Judaism after the close of the Talmud affords multiple, if not unlimited options. He is, however, troubled that

the most serious issue confronting contemporary halakhah is not lack of creativity, but the sociological divorce between the centers of *pesak*—nowdays, largely the *yeshivot*—and the centers of congregational (or communal—AJY) life. *Pesak* involves applying Torah in an unchanging totality to Jewish life in its present specificity. A law interpreter, no less than a law-giver, must have a clear, objective understanding of the lives he is called on to instruct.⁷⁶

Sacks reminds the reader that, traditionally, it was the rabbi rather than *rosh yeshiva*, the community leader rather than the academic, who was the legal authority for the community. But if this “deviation” is to be corrected, Sacks and other communal rabbis must become as competent in *pesak* as the *rashei yeshiva* in order to recapture halakhic authority.

An ordained rabbi, professional academic philosopher, and the editor of this volume, Dr. Moshe Z. Sokol synthesizes Torah content and the method of his *madda* in his “Personal Autonomy and Religious Authority.” He observes that “for most halakhic Jews, the idea of personal autonomy is likely to be extremely remote,” because Orthodox Judaism regulates “every detail of life.”⁷⁷

Sokol begins by outlining the incontrovertible precedents for expressions of autonomy in classical Jewish religious texts, and like Rabbis Rosenzweig and Sacks, does so without attacking the "right." If Abraham may challenge God for what he believes to be autonomously correct,⁷⁸ then individuals may challenge religious ideas and opinions of human beings within the dogmatic limits of Judaism's covenantal halakhah.

Sokol then examines what he defines as "hard" and "soft" autonomy with regard to one's acceptance of law, what one accepts as knowledge, and one's personal choices. While he tries to accommodate philosophy to Jewish tradition, he rejects the conclusions of the philosophic tradition when they conflict with Torah doctrine. Following Maimonides, Sokol affirms that one fulfills the *mizvah* of coming to "know" God through philosophical speculation.⁷⁹

Sokol also rejects Michael Wyschogrod's view that an individual's religious conscience may override halakhah,⁸⁰ but he concedes that halakhic creativity is possible when applied appropriately, as in the case of R. Joseph Soloveitchik's *Halakhic Man*. He also affirms a soft personal autonomy whereby, within the limits of a covenantal halakhah, individualism is a legitimate religious option, and according to some authorities, the preferred religious position.

Sokol's synthesis of philosophical method and Torah commitment provides an important prototype for advanced Torah study on the part of those whose professional and Torah erudition is sufficiently accomplished for a "Torah u-Madda" synthesis to take place. Sokol appropriately limits philosophy's application to Torah study to the realm of methodology, for the assumptions and biases of the philosophical tradition are not always compatible with Torah doctrine. Philosophy reflects the "social construction of reality" of the Greek mind, and reflects an arbitrary way in which the world may be understood. Since Western thought reflects the anthropology of the Greek mind and its arbitrary construction of reality, it may serve to stimulate Torah thought, but its normative consequences are limited.

Professor Chaim I. Waxman's "Toward a Sociology of Pesak" offers the critical observations of an Orthodox Jewish sociologist who is also a learned Jew. His "philosophical modern Orthodoxy" represents the underlying sensibility of this volume. (The reader is referred to *Tradition* 25:3 [Spring 1991]:12-25, where this article also appeared.) Waxman is troubled by the fact that while it is claimed that Judaism does not change in theory, it changes in fact, and, to his mind, not for the better. In point of fact, the halakhah provides a range of options and opinions, each of which is appropriate to specific times and situations. By invoking the doctrine of *da'as Torah*, some within Orthodoxy wish to close the pluralistic range inherent in halakhah because they regard the secularity of modernity to be too fraught

with the risk of contamination to permit the pleasures of intellectual curiosity and license. To justify this policy, Orthodoxy's "traditionalists" shift the focus of Torah from the objective *hefza* of Torah to the charismatic *gavra* who possesses *da'as Torah*⁸¹ and in whom one is required to have *emunat hakhamim*. The philosophical, or spiritually reflective, Orthodox modernist rejects this revisionist reading of *da'as Torah* because it does not appear in this form in halakhah's classical sources. The autonomy that the Torah gives those who hold fast to it is so dear that only the Torah may take it away.

Sokol and Waxman provide professional models of Torah and *madda*; both are expert in Torah study and in their academic disciplines, and both have succeeded in making an informed synthesis of Torah and *madda*. But the training required to effect this synthesis requires extensive expertise in secular as well as Torah scholarship, and this is very difficult for most individuals to acquire. Rosensweig's and Sokol's articles provide a model polemic. While both articles resonate with a piety that is expressed in delicate, precise formulations, neither author flinches in face of the facts recorded in the literary halakhic tradition nor are they intimidated by extremist hyperbole.

On the other hand, Kirschenbaum's essay presents an engaging apology which justifies the "Historical Method" by endorsing *emunat hakhamim* ideology. The so-called "Historical Approach" is unacceptable as a source of halakhic prescription on methodological as well as theological grounds. If all methods of viewing the historical past are influenced by the times in which they are born, then the Historical School may make no greater claim to truth than the alternative ideologies it rejects. Academic historians describe an object of analysis; law prescribes a living code in a living community. As long as halakhic decision-making does not violate talmudic statute and precedent, its claim of validity can be defended. For the Centrist Orthodox, the *da'as Torah* position is not the enemy;⁸² assimilation, ignorance, and falsehood are the collective enemies of Torah truth. The Orthodox community must first create, as suggested by Rabbi Sacks, a methodology of halakhic decision-making that is independent of charismatic *pesak*. Arguments, positions, and rulings must be accepted or rejected on their intrinsic merits, not on the basis of the person or committee making the statement or how the decision will be accepted by non-Orthodox philanthropists with their assimilationist agenda, or by those for whom secular modernity is too fraught with danger to condone. A theologically acceptable definition of the range of halakhic validity must be made explicit. Students of Torah must be trained to become true scholars who will be living and breathing halakhic models, filled with learning, piety, and fear of God as they shape the world of synagogues, schools, and religious communities in the model of the ideal Torah life.

NOTES

1. Kaplan demonstrates that with the mantle of *da'as Torah* being transmitted from R. Hayyim Ozer, who was a community rabbi, to R. Karelitz, the Hazon Ish, who was not a community rabbi, the new exponent of *da'as Torah* "functioned as a halakhic authority outside of already established traditional community structures. . . . His halakhic authority and his *da'as Torah* derived purely from his greatness as a Torah scholar and his personal charisma." See Lawrence Kaplan, "Daas Torah: A Modern Conception of Rabbinic Authority," in Moshe Sokol, ed., *Rabbinic Authority and Personal Autonomy*, 13. Kaplan concludes that the *da'as Torah* "ethic of submission is not grounded in traditional halakhic sources" (p. 50).
2. Gershon Bacon, "Da'at Torah ve-Hevlei Mashi'ah," *Tarbiz* 53:3 (1983): 497-508. According to Ya'akov Feitman, "Da'as Torah: Tapping the Source of Eternal Wisdom," *Jewish Observer* 25:4 (May 1992):13, "one of the major criticisms against 'Da'as Torah' results from the impression that the phrase is of rather recent vintage." Feitman then asserts that "the opponents of the doctrine of *Da'as Torah* delight in pointing out that the term may be found in the Talmud [*Hullin* 90b], or *Rishonim*, and it was never before taken to refer to . . . the authority of the sages to rule on matters which are not only in the sphere of religion." Ironically, Bacon's work merely describes the phenomenon, and he gives the impression that while he does not view the doctrine as a classical Jewish dogma, he appreciates the political skill with which it was used in formulating a defense of traditional Jewish life. However, for Feitman, one is an "enemy" if one does not accept the political theology that the current usage commands.
3. Mendel Piekarz, *Hasidut Polin: Megamot Ra'ayoniot ben Shetei ha-Milhamot u-ve-Gezerot 1940-1945* (Jerusalem, 1990).
4. Kaplan, 7. Kaplan (p. 17) cites the views of R. Bernard Weinberger, who asserts that "Gedolei Yisrael possess a special endowment or capacity to penetrate objective reality, recognize the facts as they really are and apply the pertinent halakhic principles. This endowment is a form of *ruah ha-kodesh*, as it were, bordering if only remotely, on the periphery of prophecy." See his "The Role of the Gedolim," *Jewish Observer* 1:2 (October 1963): 11.
 In his notes to *Even ha-Ezer* 27:3, the Hazon Ish implies that Torah wisdom is given to the Sages of the *Masorah*. One's faith in Torah wisdom must be transmitted in the person of a Sage, for this is the embodiment of *emunat hakhamim*. See *Hazon Ish, Kovez Iggerot* (Bnei Brak, 5750), I, 166, # 182. Consequently, Hazon Ish requires that one accept the aggadic statements of the talmudic Sages as a matter of dogma. See *Kovez Iggerot*, 43, #111. This view ignores the many sources within the Jewish tradition who regard *aggadah* as non-binding.
5. Kaplan, 15, 19. In n. 23, Kaplan cites Aharon Rakefet-Rothkoff, *The Silver Era* (New York, 1981), 292, who claims that R. Eliezer Silver would not sign the ban because it was an anti-Yeshiva University polemic, and in n. 24, we are told that R. Silver actually rebuked R. Aharon Kotler for interfering in internal community matters.
6. Kaplan, 14. Nevertheless, the Hazon Ish argues in *Kovez Iggerot*, II, #92 that those who restrict rabbinic opinion to formal laws and "leave freedom of choice to the second area [i.e., personal existential decisions], follow the old method of the sectarians [which led to] the fall of German Jewry, which enticed Israel to assimilate among the Gentiles without leaving a remnant." See Alfred S. Cohen, "Drafting Women for the Army", *Journal of Halakhah and Contemporary Society* 16 (Succot 1988):26-43, for an outstanding, balanced, and thoughtful summary of the relevant literature. According to Cohen, 28-30, the Hazon Ish and his peers were responding to the secularizing policies of the Labor government which used the army and national service as an instrument of social engineering, and not only of national defense. After citing *Sotah* 44b and Maimonides, *Hil. Milakhim* 7:4, which require a woman to serve in a defensive war, Cohen claims that extra-halakhic considerations are often applied when the halakhic statute appears to be "religiously" problematic. See Cohen, 42-43, and Ezriel Tshavi, "Voluntary National Service for Girls: Compromise of a Nation's Purity," *Jewish Observer* 4 (December, 1971): 20, for the *pesak*

din which forbids military service of any kind for women. Also note that no justifying halakhic sources are cited. Samuel C. Heilman, in his *Defenders of the Faith* (New York, 1992), 101-02, reports the words of Yisrael Eichler, the editor of the *haredi* publication, *ha-Mahaneh ha-Haredi*: "My father thought he was fighting for Am Yisrael [the nation of Israel], not for the Jewish State. But I would be drafted into the state army. What was possible for my father is no longer possible for me. The army is now a force that pulls people away from being Jews."

7. Kaplan, 21, n. 33. See R. Hayyim Ozer's letter, published in *Kovez Iggerot Hazon Ish*, II, 208, #6. For Kaplan, the idea of a rabbinic figure who has made peace with modernity is itself a denial of the Torah policies of *da'as Torah*. In his opposition to the relocation of the modernist Hildesheimer Seminary to Israel, R. Hayyim Ozer could not appeal to his authority as a community rabbi but, in Kaplan's words, to "his own personal authority as one whose opinion constituted *Daas Torah*." See Kaplan, 21, n. 33, and R. Hayyim Ozer Grodzinski, in *Hazon Ish, Kovez Iggerot, ibid*.
8. *Hafez Hayyim al ha-Torah*, ed., S. Greiniman (Bnei Brak, n.d.), cited in Kaplan, 8-9. While, according to Kaplan, this view is attributed to the Hafez Hayyim, Feitman is convinced that it reflects his actual words. See Feitman, 17.
9. *Kovez Iggerot*, I, 43, #15 and discussion of Kaplan, 24. The following is attributed to the Hazon Ish: "When I am asked for a decision about such matters [requiring a *da'as Torah* decision], I do not simply shake it from my sleeve. Rather, I study all the relevant sources: *Gemara*, Rashi, *Tosafos*, *Rishonim* and *Aharonim*, and clarify the matter. Only after studying the entire *sugya*, when the matter is clear, do I give an answer." See E. Shulzinger, *Al Mishkenot ha-Ro'im*, (Bnei Brak, 1988), 69-70, cited in Kaplan, 18-19. It is the *intuition* rather than the *demonstration* that is at the core of the *da'as Torah* opinion attributed to the Hazon Ish.
10. *Mikhtav me-Eliyahu* (Jerusalem, 5747), I, 75-77, cited by Kaplan, 16-17.
11. Kaplan, 46.
12. Kaplan's discussion of the sources of law, pp. 28-42, is very different from Aaron Kirschenbaum's in his later article, "Subjectivity in Rabbinic Decision Making," in Sokol, 68-69. Kirschenbaum follows Professor Menahem Elon's scheme, *ha-Mishpat ha-Ivri* (Jerusalem, 1963), 221-22. For Kaplan, legal norms are acts of legislation, while for Elon and Kirschenbaum they are both the acts of legislation and the legal reasoning that leads to the legislation. Consequently, if legal reasoning, or *sevarah*, is a source of law, then *da'as Torah* could well be a legitimate source of legal value. Since Kaplan finds no legal precedent for the doctrine, he believes that it is a sociological/political strategy alone. For a discussion of a consistent rendering of the concept of legal sources of law, see Hans Kelsen, *Pure Theory of Law* (Berkeley, 1978), 232.
13. See R. Bernard Weinberger, "The Role of the Gedolim," *Jewish Observer* 1:2 (October 1963): 11, cited in Kaplan, 17 and the discussion in J. David Bleich, *Contemporary Halakhic Problems* (New York, 1977), I, xvi-xvii.
14. See R. Elya Svei, "Torah: A Source for Guidance in Every Phase of Jewish Activity," *Jewish Observer* 20 (February 1987): 7-9, and summary of Kaplan, 18, n. 28, who, following Maimonides, distinguishes between honoring the Sage (*Hil. Talmud Torah* 5), and the refusal to suppress one's own opinion in matters of God's law. He maintains that one must follow the view that is most reasonable, *le-mi she-ha-da'at noteh*. See also Introduction to the *Mishneh Torah*.
15. Kaplan, 19, n. 31.
16. *Ibid*. However, see "Following the Guidance of the Torah Personality," *Jewish Observer* 12:9 (December 1977): 22, cited in Kaplan, 19. The actual text attributed to R. Feinstein, not cited by Kaplan, reads:

One might well say that the ignoring the advice of the *talmid chacham* is far worse than transgressing a *lav* clearly expressed in the Torah. Whereas one may violate a command because he finds himself too weak to resist the insistent attraction of that which is wrong, at least he realizes that his action is wrong. By contrast, when

- one does not heed the advice of the *talmid chacham*, he denies the superior wisdom of the Torah personality. This is a far more serious breach.
17. Maimonides, *Hil. Mamrim* 2:4. See discussion of R. Zevi Hirsch Chajes, "Hora'at Sha'ah," *Torat ha-Nevi'im*, in *Kol Kitvei Maharaz Chayes* (Jerusalem, 1958), 190-93.
 18. He writes, (pp. 27-28):
The debate over *Daas Torah* is ultimately a debate over the ethic of *submission*, over what is the proper posture of the halakhic Jew standing in the presence of God. . . . The ideology of *Daas Torah* enables the Traditionalist Orthodox to present their rejectionist approach to modernity as being the sole legitimate approach, thereby delegitimizing the more affirmative approach of the modern Orthodox, and even more important, the ideology of *Daas Torah* is a key element of that rejectionist approach, being perhaps the quintessential expression of the traditionalist ethic of submission.
Kaplan's description is echoed by one of *da'as Torah's* most articulate advocates, R. Moshe Sherer, who believes that authentic Jewish commitment is manifest in "total subservience on all questions of policy to the *da'as Torah* of *gedolei Yisrael*, the true leaders of the Jewish people." See his "Thinking Out Loud," *Jewish Observer* 25:4 (May 1992): 7. The rosh yeshiva interviewed by Heilman in *Defenders of the Faith*, 269, uses the same metaphor when he requires that a good Jew "annul his reason and (to) surrender completely to the wisdom of the Torah" [italics mine].
 19. See Kaplan, 52, and Heilman, *Defenders of the Faith*, 265, where it is observed that there are differences of customs in the *haredi* community.
 20. Kaplan, 53.
 21. See M. Herbert Danzger's discussion of Orthodoxy's appeal to countercultural sentiments in the *ba'al teshuvah* phenomenon in *Returning to Tradition: The Contemporary Revival of Orthodox Judaism* (New Haven and London, 1989), 81-84, and 219-21, where he argues that there is a link between sectarian Orthodoxy and counterculturalism. See *Mikhtav me-Eliyahu*, I, 75-77, cited in Kaplan, 17, and the discussion in Samuel C. Heilman, *Defenders of the Faith*, 274-75. See especially the letters of the Hazon Ish, *op. cit.*, where the operational considerations are not always the talmudic text, but the preservation of a society that is committed to traditional Jewish life as conceived in Eastern Europe. See Kovez *Iggerot*, I, 115-16, #99, which claims that there is a tradition to consider as non-kosher some animals which, according to Torah law, are kosher, but which were unknown to traditional society, and also to emphasize the importance of the preservation of the beard, which provides a traditional Jewish appearance. See also *ibid.* 197-98. According to H. L. A. Hart, legal orders consist of "rules of obligation," which in halakhah are called *mizvot*, and "rules of recognition," which are the secondary rules by which the actual rules of obligation are to be recognized. See his *The Concept of Law* (Cambridge, 1986), 91-92. Nowhere in the entire halakhic literature is there provision for *da'as Torah* as a rule of recognition whereby a great rabbi may justify his ruling on its basis without rigorous proof from talmudic sources.
 22. Kirschenbaum, 71 and 88-90.
 23. Kirschenbaum, *ibid.*
 24. According to Kirschenbaum, the principle of equity is the meta-legal principle which enables the judge to "judge," evaluate, and process the empirical information and legal principles before him. It is unclear as to whether this concept of equity inheres in the Torah covenant or whether it is one of many possible and plausible ways the jurist can fill the gaps in the law. For further discussion, see H. Kelsen, 101-03, for whom non-legal "oughts" are ideological imputed intrusions into the law.
 25. This doctrine also appears in the thought of Professor David Weiss Halivni, in his "Hate'u Yisrael," in *Halakhah and the Modern Jew: Essays in Honor of Horace Bier* (Mt. Vernon, 1989), 54: "The paramount concern of Jews dedicated to the rule of halakhah is that our behavior accord with the dictates of the divine will." However, any statement of what is taken to be the divine will which is not recorded, legislated, and examined by the Oral Torah is halakhically irrelevant and theologically meaningless. See also Eliyahu Grossman,

- “. . . And Never the Twain Should Meet”, *Jewish Observer* 25 (October 1992): 27-28, for a derisive dismissal of Halivni, and my review of Halivni in *National Jewish Post and Opinion* 58 (June 5, 1991), 5.
26. Kirschenbaum, 72-73.
27. R. Isaac Arama, *Akedat Yizhak to Parashat Yitro*, ed., H. Pollack (Pressburg; rep. Jerusalem, 1961), para. 4, cited in Kirshenbaum, 72.
28. *Bava Mezia* 39b and *Ketubot* 27b, cited and discussed in Kirschenbaum, 72-73.
29. For Kirschenbaum (p. 76):
Maimonides appears to emphasize the general nature of law and the tendency of that general nature to create hardships—even injustices—in certain individual cases. Such cases undoubtedly exist, for the law does not easily bend to adapt itself to exceptional circumstances. R. Arama appears to place greater emphasis on those instances where the law does depart from the general norm in its desire to achieve greater justice, in other words, the justice appropriate to the facts of the particular case.
According to Kirschenbaum’s understanding of Maimonides (p. 77), rabbinic legislation creates new provisions in the law; rabbinic adjudication creates nothing new. In other words, reading Maimonides one gets the feeling that equity in legal interpretation and in decision making is essentially achieved by the halakhic authority unawares.
Kirschenbaum does not explain “equity” as defined by some, but not all halakhic authorities, as an essential element of the law. Kirschenbaum’s understandings of equity and *emunat hakhamim* are examples of what H. Kelsen (p. 105) calls ideology:
(the) nonobjective presentation of the subject influenced by subjective value judgments and glorifying or disfiguring the subject of cognition; and if we subjugate as “reality” not only the natural reality as the subject of natural science, but every subject of cognition including the subject of the science of law, namely positive law, as legal reality, then a presentation of positive law must keep itself free from ideology.
30. *She’elot u-Teshuvot ha-Maharashdam, Orach Hayyim* # 37 and *Hoshen Mishpat* # 421; in Kirschenbaum, 79.
31. *Ibid.*, *Hoshen Mishpat* # 259, cited in Kirschenbaum, 80. In n. 34, Kirschenbaum cites R. Yosef Colon who ruled that the principle of *darkhei no’am* might well lead to an alternative conclusion. While Maharashdam favored a monopoly of power, Maharik ruled in favor of a collectivist approach to communal arrangements. See *She’elot u-Teshuvot ha-Maharik*, # 181. The choice of appropriate principles is given to the halakhic authority when there is no clear statutory guide. See the outstanding study of Samuel Morell, *Precedent and Judicial Discretion: The Case of Joseph Ibn Lev* (Atlanta, 1992), 161-63.
32. *She’elot u-Teshuvot ha-Rosh* 15:3, cited in Kirschenbaum, 81.
33. *Tur and Shulhan Arukh, Hoshen Mishpat*, 275.
34. R. Yoel Sirkes [*Bah*], *ad loc.*
35. Kirschenbaum, 77.
36. *Ibid.* 77-78.
37. *Ibid.*, 89.
38. *Ibid.*, 66. See also J. David Bleich, *Contemporary Halakhic Problems* (New York, 1977), xvii: “It goes without saying that his [the authorized *posek*’s] decisions are authoritative only if his personal piety and religious probity are beyond question.” According to this view, technically correct opinions issuing from those whose piety and probity may be challenged are invalid. Consequently, Bleich denies the rabbinic title to R. David Feldman, even though the latter affirms halakhic theology and practice, because he affiliates with Conservative Judaism. See *Contemporary Halakhic Problems*, 78-81.
In n. 1 to the quote cited above, Bleich calls the reader’s attention to R. Elchanan Wasserman, *Kuntres Divrei Soferim*, n. 2, appended to *Kovez Shi’urim II* (Givatayim, 5720), which addresses the issue of *da’as Torah*. Implied but not stated by Bleich is his apparent view that Jewish law is transmitted not only on the basis of public principles, but on the

basis of a *da'as Torah* elite. For an alternative understanding of R. Wasserman's position, see Kaplan's summary (pp. 10-11, n. 15). Bleich indicates that one who is sufficiently learned may participate in the development of halakhah, but, unlike Kirschenbaum, does not claim that these conclusions, authorized by revelation, are themselves acts of revelation.

39. Kirschenbaum, 64. However, J. Faur has argued that God's mind cannot be deciphered; only the words, once surrendered to a reading public, are given to analysis. See his *Golden Doves with Silver Dots* (Bloomington, 1986), xxv, and 1-12.
40. Kirschenbaum, 90. Kirschenbaum endorses *da'as Torah* as a quasi-prophetic doctrine of continuous revelation whereby the Torah is "updated." For the classical doctrine, cf. Maimonides, *Hil. Yesodei ha-Torah* 9:1 and R. Zevi Hirsch Chayes, *Torat ha-Nevi'im*, chapter 1. The only prophet whose legislation, as prophet, is binding, is Moses. Kirschenbaum's understanding of this doctrine may well be taken from the response of the late R. Moshe Feinstein to Kirshenbaum's own query concerning smoking cigarettes, given the fact that smoking is a life-threatening habit. See R. Feinstein, *Iggerot Moshe, Yoreh De'ah*, II, 69, # 49.
41. Kirschenbaum, 86.
42. The idiom "embody" sounds strikingly similar to the Christian concept of *incarnation*, and the concept of *logos*, implied in the idiom "the living Word," echoing John 1:1. By transferring the locus of authority from the object, or *hefza* of Torah, to the person, or *gavra*, one restates the halakhah in a Christian idiom. According to the Maimonidean model which Kirschenbaum rejects, it is the legal order that transcends society, and only the norm creating organ, the *bet din*, with its *collective* wisdom, is invested with legislative, as opposed to interpretative, authority.
43. See *Bava Mezia* 59b and the discussion of J. D. Bleich, *Contemporary Halakhic Problems*, I, xiv.
 See also J. Sacks, "Creativity and Innovation in Halakhah," in Sokol, 127, who makes a sharp distinction between revelation and interpretation. "The word—that is, the Torah—has been revealed. The *meaning* of the word has not been revealed. That which is disclosed through a heavenly voice, a mystical insight, or even a prophetic visitation has no privileged status over a purely human interpretation. . . . Some criterion must therefore be sought if we are to decide the law, and that criterion cannot be 'truth' in the sense of identifying the intention of the Lawgiver. . . . The Talmud finds such a criterion in the principle of a majority vote of the sages. The principle of *lo ba-shamayim hi* is that the Torah confers authority on the sages to interpret and apply its laws."
44. According to J. Faur, the application of an alien cultural model assumes that the value grid of the society used as the archetype, as opposed to a neutral method of analysis, indicates that the scholar has internalized the assumptions of that society. See his *In the Shadow of History* (Albany, 1992), 189. It is likely that this subtle assimilation and consequential compensatory overstatement underlies the critical words of R. Perlow, the Noviminsker Rebbe, towards one who might say a good word about Moses Mendelssohn. See the discussion in Kaplan, 2, n.1.
45. Citing R. Joshua Falk, *Derishah, Hoshen Mishpat* 1:2, Kirschenbaum, like Halivni, believes that there is an extra-textual and extra-systemic mind of God that can be "read." In point of fact, the halakhic legal order does provide for judicial discretion with alternative rulings which are contingent upon a manifold of variables. For a critique of the halakhic theory of the "Historical School," see J. Faur, *Golden Doves with Silver Dots*, xi-xii. For a discussion of the "gaps" in the law in which judicial discretion is appropriate, see H. Kelsen, 245-47.
46. Rosensweig, 93. R. Rosensweig adopts a position midpoint between R. Sacks and Kaplan on one hand, and Kirschenbaum and the advocates of *da'as Torah* on the other. While he believes, as a Brisker conceptualist, that there is a knowable *devar ha-Shem*, an "objective halakhic truth" (p. 96), R. Rosensweig also contends that in halakhic application there is an "almost autonomous human capacity and obligation to interpret that *devar ha-Shem* along with the responsibility that this measure of autonomy entails".

47. Rosensweig, 96.
48. *Ibid.*, 97. A similar point is made by J. Faur, *Golden Doves*, xiii, in his discussion of *kepatish yefozez sela*. See Jeremiah 23:29, *Sanhedrin* 34a, and Faur, 120.
49. Rosensweig, 100.
50. *Eruvin* 13b.
51. Introduction of *Netivot ha-Mishpat* to *Hoshen Mishpat*, cited in Rosensweig, 102.
52. *Kidmat ha-Emek* to *She'iltot de-Rav Ahai Gaon* (Jerusalem, 1961), 18-19, cited in Rosensweig, 103.
53. Rosensweig, 104.
54. R. Moshe Feinstein, *Iggerot Moshe* (New York, 1982), 4:9, 24, cited in Rosensweig, 106.
55. Rashi to *Ketubot* 57a, cited in Rosensweig, *ibid.*
56. Ritva to *Eruvin* 13b, cited in Rosensweig, 107.
57. In n. 18, R. Rosensweig demonstrates that this position was also maintained by *Midrash Rabbah* to Exodus 31:12; R. Y. Albo, *Sefer ha-Ikkarim* 3:2; R. Yair Bachrach, *She'elot u-Teshuvot Havot Ya'ir* # 481; and R. Z. H. Chayes, "Ma'amar Torah she-Ba'al Peh," *Torat ha-Nevi'im*. This conforms to the positions of Kaplan and R. Sacks, but not to Kirschenbaum for whom, as we have seen, authentic halakhic rulings possess an oracular status. It is in this context that R. Rosensweig implicitly rejects the theological underpinnings of what has come to be known as *da'as Torah* in the twentieth century formulation espoused by R. Dessler and members of the *Mo'ezes Gedolei ha-Torah*.
58. H. Kelsen, 193:

The reason for the validity of a norm can only be the validity of another norm. A norm which represents the reason for the validity of another norm is. . . a higher norm in relation to a lower norm.
59. *Ibid.*, 198. Maimonides also opines that a local court may enact any legislation as long as the higher norm of the talmudic court not be violated. See the introduction to his Code.
60. *Tosafot Sens* on M. *Eduyot* 1:4, cited in Rosensweig, 116. See Rosensweig, 118, and reference in n. 40 to the meaning of *Tur*, *Hoshen Mishpat* 25:1.
61. R. Jonathan Sacks, "Creativity and Innovation in Halakhah," in Sokol, 124.
62. Sacks, 125. However, this reviewer cannot concur with R. Sacks associating R. Eliezer Berkovits's approach with Maimonides. The latter would use the idiom of his intellectual world to discuss Judaism, while the former would try to accommodate Judaism to modernity within what he takes to be halakhic limits. See my critique of Berkovits in "Is Halakhah Really Law," *Jewish Law Annual* 8 (1989): 47, n. 57. Maimonides' teleology is secondary to his legal thought, while for Berkovits, teleology and rationality are factors in determining halakhic results.
63. Sacks, 166-67.
64. See Sacks, 126-27, n. 4, where he claims that David Hartman approaches Gordis's position when he writes that "the development of the halakhah must be subjected to the scrutiny of moral categories that are independent of the notion of halakhic authority" and that "our human ethical sense" must "shape our understanding of what is demanded of us in the mitzvot."

See *A Living Covenant* (New York, 1985), 98. The difference between Hartman, who defines himself as traditional, and the Conservative position is, for this reviewer, more a matter of sociology than ideology.

See also the critique of Michael Wyschogrod, *The Body of Faith* (Minneapolis, 1983), cited in Sokol, "Personal Autonomy and Religious Authority," in Sokol, 186-87, and my review in *Judaism* 40 (Summer 1991): 378-82. Wyschogrod believes that one is obligated to obey God's will, which may conflict with halakhah. According to the Jewish understanding of the Covenant, God's will is revealed in the Torah and expressed *only* in the halakhah. God's will expressed outside of the Covenant is not religiously binding. This is not only the point of the Akhnai oven narrative (*Bava Mezia* 59b), but it would also forbid Abraham or any of his descendants from obeying an oracular command to slaughter one's son. By relying upon a personal religious intuition, Wyschogrod actually approaches the

- position of Eugene B. Borowitz, who, in his *Renewing the Covenant: A Theology for the Post-Modern Jew*, (Philadelphia, 1991), 275, regards his informed, committed intuition as the ultimate ground for religious normativity.
65. Sacks, 132, n. 15.
 66. Joel Roth, *The Halakhic Process* (New York, 1986), 309-10, cited in Sacks, 132-33, n. 15.
 67. Sacks, 137, n. 21.
 68. *Ibid.*, 140.
 69. See *On the Ordination of Women as Rabbis: Position Papers of the Faculty of the Jewish Theological Seminary of America*, (n.d.). See also the responsum of the late Professor Saul Lieberman on the subject in *Tomekh ke-Halakhah* 1 (1986), 15-18 [Hebrew], and 20-22 [English].
 70. Sacks, 157. R. Sacks' exposition coheres well with the "Pure Theory of Law" of Hans Kelsen according to which history *describes* while law *prescribes*. As a normative order, legal authorities use historical information, but the prescriptions are based on norms. See H. Kelsen, 101, who argues that when law speaks in terms other than "ought," it is speaking ideologically. Appeals to "history" only mask the subjectivity expressed in the speaker/writer's view of history. R. Sacks is clearly correct in asserting (p. 140) that, "Halakhah is the translation of the metahistorical word of God into the shifting history of the human situation. . . . Halakhah is, in short, the Jewish protest against history." See also Izhak Englard, "Research into Jewish Law," in Bernard S. Jackson, ed., *Modern Research in Jewish Law* (Leiden, 1980), 52-53.
 71. Sacks, 167. For a trenchant critique of the application of the "Historical School"'s position in general and its Jewish exponents in particular, see I. Englard, 27-37 [for the general discussion] and 37-40 [for the application to Jewish law]. Essentially, law functions synchronically, whereas history, by its nature, functions diachronically. A similar point is made by J. Faur, who writes that

ever since 1819, Jewish scholarship has been dominated by the movement known as *Wissenschaft des Judentums* or the "Scientific Study of Judaism." The basic premise of this school was the belief in the (historical) objective study of the humanities. Following German historiography, it was maintained that there are universal categories determining the institutions and cultural development of man. . . . Essential to this outlook is the belief that Jewish history reflects a gradual progress, to be understood in Hegelian terms, of the national or religious spirit peculiar to Judaism.

See his *Golden Doves With Silver Dots*, xi-xii.
 72. He cites the passages of *Berakhot* 20b and *Sukkah* 38a, without comment. See Sacks, 162.
 73. See, however, *Meiri to Berakhot* 20b, and Maran Yosef Karo, *Bet Yosef, to Tur Orah Hayyim*, 75. In his *Shulhan Arukh (Orah Hayyim 1:3)*, R. Karo rules "that one ought to refrain from hearing the song of a woman singing during *keriyat shema*." Note that R. Isserles does not object to this ruling. See however the list of restrictions in the *Mishnah Berurah (ad loc., n. 16, 17)*, who understands the word "*ervah*" as implying a generic restriction similar to *niddah*. Cf. *Be'ur ha-Gera, loc cit.*, who cites eastern European Ashkenazic authorities who rule restrictively (Maimonides only rules restrictively in his responsa, and in his Code, following R. Asher). See also the responsum of R. Yehiel Yaakov Weinberg, *She'elot u-Teshuvot Seridei Esh*, 2:18. The issue is not that there are restrictive opinions; R. Weinberg concedes the merit of those who rule restrictively.
 74. See the seminal article of R. Saul J. Berman, "*Kol Isha*," in the *Rabbi Joseph L. Lookstein Memorial Volume* (New York, 1980), 45-66, in which Berman shows that the popular restrictive usage does not reflect the Gaonic tradition or the opinion of the early Sephardic authorities. He shows how the popular assertion that women's singing in the presence of men is forbidden was actually limited by R. Moshe Feinstein, and how the *Hazon Ish*, whose views are usually associated with stringency, actually restores, in part, the historical understanding of the talmudic statute. He also cites the view of R. Yehiel Yaakov Weinberg, cited above (n. 73), who applies historical and philological methods to

understand the actual norms and values implicit in the legislation of the talmudic court, whose rulings are binding on all Israel, unlike the interpretations of post-talmudic rabbis.

It must be noted that the philological method of R. Weinberg must not be confused with the ideology of the "Historical School." The latter localizes rulings in "history," thereby relativizing and dismissing them as products of other eras. On the other hand, R. Weinberg uses philology to recover exactly what the talmudic Sages require by decoding their actual words in a linguistic and historical context, and he is bound by the norms encoded in their words.

75. Sacks, 142.

76. *Ibid.*, 168.

77. Moshe Sokol, "Personal Autonomy and Religious Authority," 169.

78. See Genesis 18:25, and the discussion in Sokol, 173. Sokol's argument is exceedingly powerful. Because God is infinite, and since Abraham, as great as he was, was nevertheless mortal, every human being is closer to Abraham's station than Abraham was to the Divine. Consequently, it is the concept of a shared law and covenantally ordained common theological language of discourse that establishes spiritual autonomy.

79. Sokol cites Maimonides, *Mishneh Torah*, *Hil. Yesodei ha-Torah* 10:6 and *Hil. Yesodei ha-Torah* 1:1-6. Maimonides could be referring to *Hil. Yesodei ha-Torah* 2:1-2 as well.

In fairness, it must be noted that there is a considerable body of opinion which opposed philosophical study. For example, see *She'elot u-Teshuvot ha-Rosh* 55:9.

80. Sokol, 186 and n. 24.

81. Chaim I. Waxman, "Toward a Sociology of Pesak," 178. He cites Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example, *AJS Review* 12:2 (Fall 1987): 205, who wonders how religious law, conceived "as a revelation of the divine will," could be controlled by human beings. It is unfortunate that Professor Soloveitchik uses this idiom, because it gives the unacceptable impression that an intuition may define or change the law. See my comments above, n. 64.

For an example of how *not* to study the interface of halakhah and sociology, see Marc B. Shapiro's review of David Ellenson, *Tradition in Transition: Orthodoxy, Halakhah, and the Boundaries of the Modern Jewish Identity* (Lanham, 1989), in *Tradition* 27:1 (Fall, 1992), where Shapiro demonstrates that the author's biases and inability to read his sources carefully skewed his conclusions.

Waxman's disheartening impressions of modern Orthodoxy's actual halakhic practice are corroborated by the findings of Samuel C. Heilman and Steven M. Cohen, *Cosmopolitans and Parochials: Modern Orthodox Jews in America* (London and Chicago, 1989), 60-61, 89, 91, 99, 158, and 176. A greater percentage of modern Orthodox Jews will attend immodest movies than traditional *haredi* Orthodox affiliates, and 60 percent of those over 36 and only 46 percent under 36 disapprove of pre-marital sex. According to Jewish law, any non-marital erotic physical contact is forbidden. See Maimonides, *Hil. Issurei Bi'ah* 1:1, 4:1, 21:1, and R. Moshe Isserles, in *Shulhan Arukh, Even ha-Ezer*, 21:5.

82. There is limited precedence for the *da'as Torah* doctrine in Ashkenazic thought. According to R. Asher, rabbinic authority depends upon charisma and power, not upon an objective text made accessible to the masses. The authority of R. Asher resided primarily in his position of community rabbi, which invested him with the authority of *bet din shel yahid*. But his authority was also based upon an appointment by the king. See *She'elot u-Teshuvot ha-Rosh* 21:8-9. [It is no small irony that those who oppose the Israeli Chief Rabbinate on the grounds that it is a *rabbanut mi-ta'am*, a rabbinate whose authority stems from the appointment of a non-Torah authority, do not pay attention to R. Asher's monarchical appointment.] But this authority is still unlike the power claimed by yeshiva deans, who lack a communal constituency. See Kaplan, 10, and Jonathan Sacks, 168. R. Asher did not believe that the masses could understand the intent of Maimonides's Code, and if the layperson could determine proper practice on the basis of such a code, the power of the communal rabbi would be rather limited. See the discussions of Jose Faur, *In the Shadow of History*, 16-17, 22, and M. Elon, 1013-17.

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