“Friendly” *Halakhah* and The “Friendly” *Poseq*

Daniel Sperber

**Abstract:** This study attempts to delineate the characteristics required of a rabbi and a decisor (*poseq*), both in their personal behavior as well as in their decision-making policy (*pesiqah*). Based on normative rabbinic sources, it stresses the need for absolute moral rectitude, sensitivity and empathy for the aggrieved, independence of thought and the courage to express personal legal opinions in a public manner. There must be a genuine desire to find solutions for halakhic problems in the spirit of compassion and understanding, thus contributing to the spiritual betterment of the individual and the community.

**Biography:** Daniel Sperber is President of the Ludwig and Erica Jesselson Institute for Advanced Torah Studies at Bar Ilan University and rabbi of Congregation Menachem Zion in the Old City of Jerusalem. Professor Sperber was awarded the Israel Prize in 1992 for his seven volume work, *Minhagei Yisrael*, and is a frequent contributor to *The Edah Journal*. 
“Friendly” Halakhah and The “Friendly” Poseq*

Daniel Sperber

Introduction

In this article I wish to consider the need for contemporary rabbis and halakhic decisors (poseqim) to reexamine the manner in which they reach their halakhic decisions and determinations. In an earlier article published in 2002,1 I tried to show that contemporary halakhic decision-making tends toward an exaggerated stringency and conservatism. I cited examples of the phenomenon and suggested a possible explanation, beginning with the enormous influence of the Hatam Sofer (R. Moses Sofer) and his adage, coined during his early-nineteenth-century battle against Reform, that “the new is forbidden by the Torah.”1a The point of the adage is that all innovation is unacceptable, for the way of “innovation” is the way of the Reform “innovators.” This approach was maintained by the Hafez Hayyim (R. Israel Meir Kagan) in the Mishneh Berurah, his widely accepted commentary on the Shulhan Arukh, and, perhaps even more so, by the Hazon Ish (R. Abraham Karelitz). The Hazon Ish theorized that there were periods of halakhic consolidation, and that which was consolidated in certain works—such as the Shulhan Arukh—represented the Creator’s will and should not be changed, even if changed circumstances intervene. An additional factor is the desire to “discharge one’s obligation according to all opinions,” i.e., to act with respect to a halakhic obligation in a manner that satisfies every view on the subject recorded in the halakhic literature, including the most stringent, and to take all those views into account in halakhic rulings. Finally, our time has seen the spread of a “dread of ruling”: because of the speed of communications, there is no longer any private domain of halakhic rulings, and a poseq (decisor) will always look over his shoulder in concern about how his ruling is received by the rabbinic “establishment” with which he is associated. This is also a result of the politicization of rabbinic appointments, which ties every person holding a rabbinic office to a sort of “professional association” that determines policy for him and constrains the independence of his halakhic and ideological thinking.

Our time has seen the spread of “dread of ruling”.

As a result, contemporary halakhic decision making seems to lack adequate sensitivity to the questions that are asked. It is marked by a well known tendency toward stringency and prohibition, for that is the way to avoid “complications” and stay clear of errors. I cited some instructive examples of this in an article published in 2004.2

Most importantly, I tried to show in my article that this approach to halakhic decision making is not the traditional one. On the contrary, over the many generations since the time of the tanna’im, great rabbis have confronted new problems and worked mightily to find solutions that people could live with, for the Torah is a “Torah of life” and “its ways are ways of pleasantness.”

* Translated from the Hebrew by Joel A. Linsider. Except as otherwise indicated, translations of quoted material are by the present translator as well.
1a The adage is a play on words; the statement actually refers to the halakhic requirement that each year’s new grain not be used until certain conditions are met—translator’s note.
It is true, of course, that with respect to technology, great strides have been taken in adapting halakhah to modern life—or, perhaps more precisely, in adapting modern life to halakhah—and that this has all been done by the application of normative halakhic rules and in accord with precedents in the traditional literature. Examples include the widespread use of electric timers on the Sabbath and the application of the notion of indirect causation (gerama) to the resolution of problems related to medical treatment on the Sabbath.

However, it is different with respect to human relations, halakhot “between man and his fellow.” With regard to such matters as divorce and its withholding by a recalcitrant husband, illegitimacy, conversion, birth control and modesty in dress, we find, with only a few exceptions, little of the open-mindedness, sensitivity to the questioner, or pleasantness that characterized earlier generations.

Accordingly, I propose that we restore halakhah to its glory by reverting to the old ways of reaching decisions; that we strive to increase recognition of the maxim that, in fact, “the force of permissive ruling is paramount” (koah de-hetera adif); and that we enhance sensitivity to questioners by personalizing responses, taking account of their effects on the questioner’s life. All this must be done, of course, within the framework of traditional, normative halakhah, as it has come down to us through the utterances and writings of the great halakhic scholars through the generations.

Certainly there will be cases in which it will be impossible to arrive at a halakhic response that pleases the questioner or satisfies his “needs.” There will inevitably be situations of heart-rending grief, anguish and even personal tragedy, and we will have no alternative but to sympathize with the unfortunates who find themselves in these circumstances. No legal system can avoid all situations like these. Yet my hope is that through proper and profound use of the balakhab’s resources, we can diminish significantly the number of such situations and relieve the distress of people seeking the pleasantness of the balakhab’s ways.

In the first part of the article I consider what appear to be fundamental values in halakhah, the signposts that guide the rabbi in giving instruction. In the second part I attempt to describe the characteristics a rabbi must possess if he is to fulfill his calling as one providing instruction to the Jewish people.

**Congenial Halakhic Ruling**

On numerous occasions I have attempted to show that there are fundamental values underlying the halakhic system. It is these values that give the poseq the flexibility to relate individually to each

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Accordingly, one should not take matters of

And see the comments of Maharal of Prague,

And see B. Z. Bacher,

And even though in most views, "an eye for an eye" (Ex. 21:24) refers to monetary compensation (Bava Qamma 83b-84a), we nevertheless find "It is taught: Rabbi Eliezer says, an eye for an eye—literally" (id. 84a). The talmudic sages were troubled by that opinion and reacted: "Do you really think 'literally'? Did Rabbi Eliezer reject all those tanna'im [who maintained it referred to monetary compensation]? Rabbah said: He teaches that [in assessing monetary compensation, the injured party] is not evaluated as if he were a slave…” (id., 84a). See also Rabbi M. M. Kasher, Torah Shekeleimah, part 17 (New York, 1957), p. 127, n. 444; David Daube, Studies in Biblical Law (Cambridge, 1947), pp. 109 et seq., showing that there was, in fact, monetary compensation for injuries of this sort; Jacob Meron, "An Eye for an Eye: A Comment," Jewish Law Association 1 (1992), pp. 93-94. And see, recently, R. Yehuda Kooperman, Maro’ le-limmud ha-torah [Introduction to Torah study] (Jerusalem, 2005), pp. 125-140. The approach suggested by R. Eliezer seems brutal to us today. My son’s comment is apt; but the viewpoints on which I am relying are those that have been adopted as actual halakhah in practice, not those never accepted by the halakhic mainstream. And as far as stringencies and leniencies are concerned, the gemara already teaches “the force of permissive ruling is paramount” (Berakhot 60a and variants). See also below, n. 29.

As a practical matter, some of what I am suggesting here was said years ago by R. Prof. Eliezer Berkovits, of blessed memory, in his various writings. Berkovits sought to forge a comprehensive philosophical-moral-halakhic theory; it is doubtful that he succeeded in doing so. See the important introduction by David Hazony to his edition of an anthology of Berkovits’s writings, Essential Essays on Judaism (Jerusalem, 2002), pp. xi-xxvi; and, see, especially, id., pp. 57-79 (excerpted from Not in Heaven: The Nature and Function of Halacha [New York, 1983]). Zev Falk took a similar, though not identical, course in his various studies, such as his books cited earlier in this note. Also important is M. Elon’s article “Esevnot musaruyim ke-normah bilihatat” [Ethical principles as halakhic norm], De’ot 20 (1962), pp. 62-67, where he showed that a person’s “natural moral sense” sometimes determines the law. As an example, he cites the view that if a convert dies leaving no post-conversion heirs, his property is considered ownerless and may be seized by anyone. Because he acquires the assets not as an heir but as a taker of ownerless property, the new owner has no greater obligation than anyone else to allocate a portion of the assets to the convert’s burial expenses. The view appears in the Responsa of the Rosh, Rule 16-3; is cited by the Rosh’s son, R. Jacob Ba’al ha-Turim, in Tur Hashen Mishpat, sec. 275; and is codified in R. Joseph Karo’s Shulhan Arukh, id. But the Ba’al ha-Turim, R. Joel Sirkes, commenting on the Tur, id., objects that the rule will lead to controversies, “for if people come and waste the assets, others will be required to bury him. And the Torah said ‘its ways are ways of pleasantness’” (see below, n. 4). Accordingly, the Ba’al ha-Turim concludes that burial expenses are to be taken from the convert’s estate, and only what remains may be consumed by the person who seizes it. Elon infers from this that “here, the moral sense of the principle that its ways are ways of pleasantness served as a strong support, and perhaps as principal rationale, for a sense of opposition to existing halakhah and the issuance of a ruling consistent with that inner moral sense.” An important contribution was made by Aaron Kirschenbaum in his two books, Equity in Jewish Law: Halakhic Perspective in Law: Formulation and Flexibility in Jewish Civil Law (Hoboken NJ and New York, 1991) (Kirschenbaum I) and Equity in Jewish Law: Beyond Equity: Halakhic Agitationism in Jewish Law (Hoboken NJ and New York, 1991) (Kirschenbaum II). A comprehensive bibliography on the subject appears in N. Rakover, ed., Ogur ha-mishpat [Treasury of law], part 1 (Jerusalem, 1975), pp. 34-35 (and, especially, pp. 903-906) and id., part 2 (Jerusalem, 1991), pp. 52-55. I believe this is the simple meaning of the adage derakh eretz gadmah le-torah (“the way of the world [or: proper conduct] precedes Torah”) (see Lev. Rabbah 93, ed. Margalioth, p. 179 and Tanna de-bei Elieyhu, chap. 1, ed. Ish-Shalom [citing Seder Elieyhu Rabbah and Seder Elieyhu Zuta] [Jerusalem, 1960], p. 3: “this teaches that derakh eretz precedes everything…”). Cf. Mishnah, Avot 3:17—“If there is no derakh eretz, there is no Torah.” And see the comments of Maharral of Prague, Netzot Olam, Nette Derekh Erez “Accordingly, one should not take matters of derakh eretz lightly, for derakh eretz precedes Torah… and the Torah cannot exist without derakh eretz, as they said, ‘if there is no derakh eretz there is no Torah,’ for derakh eretz is the basis for the Torah, which is the way of the tree of life’” (cited by R. Amital, Ve-ha-arg natin li-venei adam, p. 102). And see the remarkable statement by R. Simlai in Sehut 14a: “The Torah begins with acts of kindness and concludes with acts of kindness. It begins with acts of kindness, as is written: ‘And the Lord God made for the man and his wife garments of leather and garbed them’ (Gen. 3:21), and it concludes with acts of kindness, as is written ‘and He buried him in the valley’ (Deut. 34:6).” (For parallels, see Ecel. Rabbah 7:2; Tanhuma, ed. Buber, Vaye’ir ; Midrash Shefar Tor [=Psalms] 25:10. And see B. Z. Bacher, Aggadat Amorai eretz yiziruv [The aggadah of the amorai’im of the Land of Israel], vols. 1-2 [Tel-Aviv, 1926], p. 324.) And cf. the midrash of R. Lamma bar Hanina, Sota, id.
case, in a manner suited to the time, place, and situation. These values find their expression in halakhic books, where they are woven into specific passages, but their meaning and import transcend those isolated passages and extend through all branches of the halakhab. Sages throughout history have associated them with early sources, but they appear to use those texts more as ex post facto pegs (asmakhta) than as sources from which to infer the ideas.

The principle that the Torah shows concern for Jewish property has implications far beyond the paschal sacrifice.

via a plain reading of the verse. For example, a verse pertaining to the paschal sacrifice states that “if the household be too small [to consume] an entire lamb, he and his neighbor shall take [a lamb]” (Ex. 12:4). The rules of the paschal sacrifice require any leftovers to be burned rather than used, and the sages interpreted the verse’s provision for consolidating households in order to avoid such waste as evidence of a concern that the Israelites not lose money. They learned the principle as well from the law of the afflicted house that the priest must declare impure. A verse in that passage states “the priest shall order the house to be emptied” (Lev. 14:36) before he declares it impure; doing so avoids rendering the chattel within the house impure and thereby ruining them, for impure dyed clothing must be laundered, losing its color, and impure earthenware vessels must be broken. Accordingly, the Torah directs that the house be emptied, showing concern for the Israelites’ money. (See the commentary of Rabbenu Bahya on Ex. 12:4.) But the principle that the Torah shows concern for the Israelites’ property has implications far beyond the paschal sacrifice, the afflicted building, or the other sources in which it is mentioned (animal carcasses, non-kosher animal fat), and it underlies the important rule of halakhic decision making that one must be concerned about “undue loss” (hefsed merubah). As practical matter, this means that a wealthy person and a poor

4 Cf. R. Yehiel Mikhel Epstein, Qigzer Shenei Lehot ha-Berit `im mahadura batra (Warsaw, 1879), end of Sha‘ar ha-Aharah, 5b: “Inasmuch as all people do not share the same nature and all times are not the same, it was impossible for the Torah to specify explicitly the quantity that must be eaten, for sometimes a person who eats a half-liter regards it as excessive, while someone else does not consider himself to have eaten to excess unless he consumes more than an entire liter…”

5 It is worth noting here a comment made on the verse “now quickly send and hasten in your cattle and everything of yours in the field; every person and beast to be found in the field and not brought home will have the hail come down on them and die” (Ex. 10: 19). R. Abraham Menahem ha-Kohen Rapa of Port, in his Sefer Minhag Belolah, (Verona, 1594) (cited in Rabbi M. M. Kashser, Torah Sholimah, part 9 (New York, 1956), p. 90, n. 56, says: “A lovely statement by the sages of blessed memory is that the Torah is concerned about the Jews’ money, but this verse proves that it is concerned about gentiles’ money as well.” But see Hulin 49b, where Rava ruled an animal kosher where its intestine was pierced (which would otherwise render it unkosher) but the break was closed up by a piece of thick fat; he did so because the Torah was concerned about the Jews’ money. R. Papa, however, objected: “This [case] involves a prohibition of biblical [rather than rabbinic] origin, and how can you rule on the basis of the Torah is concerned about the Jews’ money?” Tosafot ad loc. concludes that the halakhab is in accord with R. Papa’s view, that where we are dealing with a prohibition of biblical origin, we cannot rule permissively on the basis of “the Torah is concerned about the Jews’ property,” and that Rava, too, changed his mind on the point. Rabbi Z. H. Chayes (comment on Hulin 49) distinguishes in this regard between positive and negative commandments: in the context of a negative commandment, we do not rule on the basis of “the Torah is concerned about the Jews’ money,” and that Rava, too, changed his mind on the point. See also the extent of the power of this principle according to Responsa of Rashba, vol. 1, section 253: “In times of need when there is potential great financial loss or similar one need not follow the majority can rely on a single opinion even in a Torah prohibition. Shakh questioned this as did
person posing the same halakhic question will not necessarily receive identical answers, for the wealthy person will not suffer noticeably on account of a stringent ruling that would cause hefsed merubah for the poor person. Applying the rule, the posaq will seek a way to rule leniently within the framework of normative halakhah in order to avoid an undue burden on the poor person. Commenting on Hulin 49b, R. Menahem ha-Be’eri put it this way: “Whenever a sage is called upon to rule and it is possible for him to rule permissively without causing dissension, relying on a worthy authority, it would not be proper for him to adopt a hyper-pious stance and seek out excess stringencies. Rather, he should care for the money of Jews, for even the Torah cares for the property of Jews…”

To similar effect is the principle of “in order to sustain life,” which underlies the authorization to work during “The Three Weeks” (17 Tammuz—9 Av, a period of progressively more intense mourning practices), on the intermediate days of festivals, and even during the period of mourning following the death of a close relative. For the same reason—the Torah’s concern for the money of Jews—the rabbis permitted working on the intermediate days of festivals where needed to avoid wasting an asset or losing a business opportunity, and they waived some of their restrictions related to Passover Eve in order to avoid loss (Eruvin 47b).

Throughout the ages, the principle that the Torah cares for the property of Jews has served as the basis for a wide range of remedial legislation affecting all aspects of life—but especially for sumptuary laws intended to avoid luxurious excesses that would humiliate the poor. Recall the statement in Mo’ed Qatan 27a-b: “At first, [food for the post-funeral meal would be brought] to the mourner’s home [in various ways]; the wealthy [would bring food] in gold and silver bowls…and the poor would be humiliated. So they enacted that all would bring [food] in [simple] baskets.” To similar effect is a statement at Ta’anit 27b: “No days were so joyous for Israel as the fifteenth of Av and Yom Kippur, on which the daughters of Israel would go forth in borrowed white garments so as not to humiliate one who had none of her own…” The sages’ sensitivity to the situation of the underprivileged and to the need to protect them against “social pressures” generated these enactments, which pertained to festive dinners, attire, jewelry, and so forth. We first see such enactments in fifteenth-century Italy, Germany, and Spain, and they spread to all Jewish communities. In his survey of these enactments, R. Bezalel Landau cites, among others, a 1749 ordinance from the community of Rundel, Germany, which nicely exemplifies communal leaders’ concern about the economic situation of their constituents:

The Torah cares for the money of Jews, and our sages of blessed memory likewise diligently enacted remedial legislation of various sorts for the Jews, and we have no alternative but to follow in their footsteps. And now we have seen fit to enact something appropriate and sensible, worthy of comparison to Hillel’s prozbol, applicable to both rich and poor, namely: One who is privileged by God, may He be blessed, to bring a son or daughter to the wedding canopy should invite to the wedding banquet only relatives of the two families, by blood or marriage, to the third degree of consanguinity, and should not invite the entire community, not even those who attend his synagogue. And one who is blessed with a son should invite to such events as the circumcision,
In the area of economics also is Hillel’s renowned prozbol, referred to in the foregoing statute, which was intended to ensure that lenders, concerned about loan cancellations during the sabbatical year, would not withhold loans from would-be borrowers needing cash to see them over hard times. Later, the sages developed the “beter isqa,” likewise intended to ensure that needed financing would not be withheld from the poor, in this instance by providing lenders an interest-like incentive to lend. Sefer Me’or Einayim comments on it as follows: “This is something surprising that appears to evade the law, but it should not be forbidden when needed in a particular situation to provide sustenance to fellow Jews.” From these examples, we see how the halakhabah manifests kindness toward the poor and disadvantaged.  

These enactments reflect the sensitivity of the sages to the socio-economic situation of all classes within their communities.

As noted, the formal sources generally refer to isolated specific cases, but the rules span the entire halakhic system. Consider, for instance, the passage at Sukkah 30b, which attempts to identify precisely the four species used in the observance of the festival of Sukkot. The gemara there rejects suggestions to identify two of the species listed in Lev. 23:40 with plants that are particularly thorny, reasoning that the Torah, “whose ways are ways of pleasantness and all of whose paths are peace”  

10 In this connection, it is worth noting the following comment of R. Barukh Epstein, Torah Temimah on Deut. 14:22, n. 40 (p. 168): “The exemption from tithing that applies to wheat purchased [in the market] may be explained by the sages’ having applied the verse [Deut. 28:66] “and your life shall hang in doubt before you” to one who purchases wheat for his own needs from the market (Menagel 103b); they said that “any person who does not own land is not [fully] a person” (Yeramot 63a) and elsewhere as well spoke of the lowly state of one who did not own land. [In that regard, see my comment in my Roman Palestine: The Land (Ramat-Gan, 1978), p. 209.] Accordingly, in the case one purchasing wheat [who presumably does not own land of his own and, therefore], whose situation is depressed and impoverished, the Torah did not wish to burden him further with tithing, for he has enough trouble just sustaining himself. But that is not the case with regard to merchandise and other goods that are sold and traded even among the rich. In those situations, they are, in fact, obligated…..”  

11 See the use to which this expression is put by Maharshdam (R. Samuel Di Modena, 1506-1584) in his responsa at Hashen Mishpat sec. 259: “It is the wide consensus that ‘her ways are ways of pleasantness and her paths are peace’ and [the sages] therefore said their rulings should prevail when they are united in agreement, and no individual among them can reverse himself and undermine their genuine peace…” He thereby follows the path of R. Elijah ben Benjamin ha-Levi (first half of the sixteenth century) who wrote (in his Zegen Aharon [Constantinople, 1534]): “Where the majority has a particular leaning, the minority should lean in that direction as well, for otherwise, the law will never be truly determined. That is why the Torah instructed ‘incline after the majority’ [Ex. 23:2; the phrase is widely taken as the basis for majority rule; in context, it reads “do not follow a multitude to do evil.”], for its ways are ways of pleasantness and all its paths are peace.” See also A. Bashan, “Derakhabah Darkhei No’ani” [Its ways are ways of peace], De’ot, 48 (1980), pp. 171-176, esp. pp. 172-173. See also above, n.
(Prov. 3:17) would not require us to take up plants that would stick and scratch our hands. But this principle that the halakhah must be in accord with “the ways of pleasantness” appears throughout the Talmud, in many, varied, halakhic contexts, as a sort of detail that extends beyond its initial context,\(^7\) to the point that Radbaz (1480-1573) wrote in a responsum (Orah Hayyim, sec. 37, Salonika ed., 1595, Orah Hayyim, sec. 39) that “most rabbinic enactments are for the sake of compassion and bettering human life, and they learned this from the scriptural statement, ‘its ways are ways of pleasantness.’” Eliezer Goldman stated it well (De`at, id., p. 71): “We are not dealing here with a halakhic norm, or even with a moral norm deployed as if it were a halakhic norm, but with a norm whose purpose is to guide us in interpreting and applying the halakhah.” In other words, enhancing human comfort and avoiding human suffering must be central components in halakhic thought and decision-making.\(^8\)

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**Enhancing human comfort and avoiding human suffering must be central components in halakhic thought and decision-making.**

In that vein, one of the leading abaronim (decisors since the time of the Shulhan Arukh) ruled that the prayer leader should not recite out loud the blessing “Who did not make me a woman” because of its potential slight to women.”\(^9\) As early as the time of the Second Temple, the sages

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1; and see Responsa of Radbaz, secs. 1052, 1049. On the rule of “for the sake of peace,” see the comments of Rabbi A. I. Untermann in “Darkhei Shalom ve-Hagdaratam” [Defining the ways of peace], Or ha-Mishnah 15 (1965-1966), pp. 227-231; in Qol ba-Torah 20 (1966), booklet 6, pp. 3-7; and in Morashah 1 (1971), pp. 5-10, asserting that the rule is something to be followed ab initio (le-kha-tehlik), not merely ex post facto (be-diverad), and that it is a moral obligation drawing its force from the Torah’s profound moral nature. See also the critique by Rabbi H. D. Halevi in Assb Lekha Rav, part 9 (Tel-Aviv, 1989), sec. 33, pp. 83-84, contending the principle is only ex post facto; see also his article “Darkhei Shalom be-Yahalim bein Yehudim le-she-‘enam Yehudim” [Ways of peace in relations between Jews and non-Jews], Telhumin, 9 (1988), pp. 71-81. See further on this, A. Karlin, “Darkhei No’am ve-Darkhei Shalom” [Ways of pleasantness and ways of peace], Dirrei Sefir (Tel-Aviv, 1952), pp. 125-134; A. Bograd, Mippenei Darkhei Shalom [For the sake of the ways of peace], thesis, Bar-Ilan University, Department of Talmud, 1977; A. Hilevitz, “Le-Be’er ha-Sugya ‘Mippenei Darkhei Shalom’ be-Yabas le-Goyim” [On the matter of “for the sake of the ways of peace”], Sinai, 100 (1987), pp. 328-358; H. Pardes, “Mippenei Darkhei Shalom” [For the sake of the ways of peace], Sefer Haggai: Memorial Volume for Four Students of the Nir Qiryat ‘Arba` yeshiva (Hebron, 1985), pp. 467-474; S. T. Rubinstein, “Taqpanot she-Hitiqin Harzel Mippenei Darkhei Shalom” [Rabbinic enactments for the sake of the ways of peace], Torah she-be-‘al Peh 21 (1980), pp. 60-66; Eniyagalotda Talmudit 7 (Jerusalem, 1955, 1956, 1964).

12 See Berkovits, above, n. 3, pp. 84, et seq.; Eniyagalotda Talmudit 7 (1952-1955), Goldman, above, n. 3, pp. 71-72 cites another example in which the principle is applied. See, recently, M. Elon, Ma’amad ha-Ishah: Mishpat Yashir, Masoret, u-Temurah, Arukhhal shel Medinah Yehudit ve-Demagogiyyah [The Status of women: law, tradition, change; the values of a Jewish and democratic state] (Tel-Aviv, 2005), pp. 344-347, esp. his references to the comments of Maharsha on Yeamot 122b.

13 Rather surprising is the pointed comment of the Torah Temimah on Deut. 15:14, n. 48: “We have already noted in the preceding verse [id., n. 43] that this verse [you shall furnish him liberally…] requiring the owner of a Hebrew slave completing his term of slavery to provide the departing slave with assets applies [only] to a slave who had been sold into slavery by court order but not to one who sold himself into slavery. It appears that the reason for that exclusion is based on the comment of Mishneh la-Melekh on Maimonides, Mishneh Torah, Hilket ‘Avadim 3:12, to the effect that these gifts are a matter of charity. Accordingly, if one is sold by the court [an event occasioned by his inability to repay an amount he had stolen], and the court receives the proceeds of the sale to pay off his debt, it is a commandment to provide him these gifts on account of his having suffered [emphasis provided by D.S.], for he was sold against his will and worked without compensation. But that is not the case if one sold himself [because he was poor and needed sustenance], for he undertook to be a slave of his own free will, on account of the compensation he received. It is no different from any other employment arrangement; accordingly, there is no obligation to provide these gifts.” It thus appears that the Torah takes account of the thief’s suffering. This calls to mind R. Yoḥanan ben Zakkai’s explanation (at Bava Qamma 79b) of Ex. 21:36, which requires a thief who sells or slughters a stolen ox to pay five-fold compensation, and one who sells or slaughters a lamb to pay four-fold compensation: “See the importance of human dignity. An ox, which walks on its own feet, requires the thief to pay five-fold. A lamb, which the thief must carry on his shoulder, requires four-fold compensation.” Rashi there comments: “That the thief had to carry the lamb on his shoulder, thereby demeaning himself, caused the Holy One Blessed Be He to be more lenient regarding his payment….” (And see Rabbi M. M. Kashar, Torah Shelheim, part 17 [New York, 1956] p. 213, n. 728 “the Torah considers the thief’s suffering, burden, and humiliation and on that account cases his punishment.”)

14 See R. Aaron ben R. Aberli Worms, Sefir Me’orei Or, part 4 (Be’er Sheva) (Metz, 1819), p. 20, cited in R. Yehuda Henkin,
of blessed memory had already permitted women to lay their hands on the animals they had brought to sacrifice—something presumably forbidden to them—in order to give them the satisfaction of doing so. In the Middle Ages, the Ashkenazi sages allowed menstruating women, normally barred from entering the synagogue, to do so on festivals and the high holidays because of the sorrow and anguish they would have endured had they been barred from communal prayer. And several major lenient rulings were issued by the sages with reference to the principle of “human dignity,” that is, avoiding its impairment.  

Responsum Benei Banim, part 4 (Jerusalem, 2005), sec. 1, p. 11. R. Hayyim Hirschensohn also saw a possible slight to women in this blessing, though he did not go as far as Rabbi Worms; he wrote as follows (in his Malki ha-Qodesh part 4 [Saint Louis, 1923], p. 104): “And all of this is to account for the wording of the blessing; but I will tell you, in truth, something that all the earlier and later decisors did not sense, though the earlier prayer leaders recognized to a degree in the prayer books they compiled, namely, that the Babylonian Talmud objected to this blessing…. And in this passage itself (Menahot 47b) there is opposition to the blessing ‘Who did not make me a woman’ even though no one sensed it, but bear with me a moment and I will relate it to you…. But it is clear to me that both R. Aha bar Jacob and his son opposed the blessing ‘Who did not make me a woman’; for even if its explanation, as we have said, is that women are not obligated by as many commandments, these faultless ones sensed an element of disdain for the honor of women; and R. Aha bar Jacob accordingly did not want to recite it, and he and his son therefore said, instead, ‘Who did not create me a boor.’ And regarding this, his father said to him, ‘given that, is it not also improper to disparage common folk, who are equally subject to all the commandments and can remedy their situation [by study]?….And his son asked, ‘what, then, should he recite to complete the series of three blessings?’ and his father replied that he should recite ‘Who did not make me a slave.’ And yet, despite all this, I daily recite ‘Who did not make me a woman,’ for it is not my way to change the practices that Jews have followed in accord with earlier and later rulings, even though my view is sometimes different from theirs in theory though not in practice.  

But my intention in reciting the blessing is exclusively in accord with the words of the Tosafot, that is, to rejoice in my obligation as a man to support my wife properly, in the manner of Jewish men, and to rejoice in the time-bound positive commandments that I perform because I am obligated to, while a woman is not obligated to…..” (Cited in David Zohar, Melogayat Yeludit ba-Olam Modern: ha-Rav Hayyim Hirschsohn ve-Yahadut el ha-Modernah [Jewish commitment in a modern world] (Jerusalem, 2003), p. 371, n. 10.)  

16 See Hagigah 16b: “It was asked: [Scripture states], ‘speak to the children [lit., sons] of Israel…and he shall lay [his hand on the head of the burnt offering]’ (Lev. 1:2-4)—the sons of Israel lay their hands, but the daughters of Israel do not lay their hands. R. Yossi and R. Simeon say: the daughters of Israel are permitted [but not obligated] to lay their hands. R. Yossi said: Abba Eliezer recounted to me that one time, we had a calf for an offering and we brought it to the women’s court [in the Temple] and the women laid their hands on it. Not because women [are permitted to] lay their hands, but because it brought them satisfaction…. And Rabbi Goren, in a collection of responsum entitled “Seder Nashim,” Telzemin 25 (2005), p. 373, wrote that “even if we say that they laid their hands on the animal with their hands backward, it would still be forbidden by rabbinic law [even if not by biblical law], as stated in Tosafot on Ervin 96a, s.v. mikhal and on Hulin 88a, s.v. nashim.” The Vilna Ga’on wrote to similar effect in his explanation of Ornah Hayyim sec. 589:6, et al. I have treated the matter extensively in Le-biyot Ishah Yehudit, ed. M. Shilo (Jerusalem 2003) vol. 2, pp. 25-33.  

15 See Haggahot 47b.  

16 See the important article by R. Aaron Lichtenstein, “Kedid ba-heryot” [Human dignity], Mahanehayot 5 (1993), pp. 8-15. He writes (p. 14): “Several decades ago, I wrote…about the limited practical use being made of this rule by halakhic sages.” He goes on to analyze the reasons for that insufficient use, and he concludes (p. 15): “We have a need to internalize the value of ‘human dignity,’ and we must not discard it. Nor should we get caught up in its other, overly refined formulations within secular humanism. We must forcefully insist on our own concept of ‘human dignity,’ in all its aspects.” See also my extensive treatment of the matter in “Congregational Dignity and Human Dignity,” The Edah Journal 3,2 (2003), pp. 1-14. See also Berkovits, above, n. 3, pp. 105, et seq., who presents numerous instances in which the concept was applied; we here cite two of them. First, the early sages interpreted the biblical phrase “sick with her impurity” (Lev. 15:33) to mean “that a menstruant may not color her eyelids or rouge her cheeks or dress in colored clothes. That practice was followed until R. Akiva taught “if you do that, you make her repulsive to her husband, to the point that he divorces her. Rather, what does ‘sick with her impurity’ come to teach? That she remains in her impure state until she immerses” (Shabbat 64b). Here, the moral line of reasoning that a woman should not be made repulsive to her husband determines the meaning of the verse. An even greater example is that in Mishnah, Yoma 8:1, which provides that even though refraining from washing is one of the abstentions required on Yom Kippur, a bride is permitted to wash her face. The reason, according to R. Hana ben Teradyon, is that she not become repulsive to her husband. Similarly, a bride is permitted to wear jewelry during the mourning period for a deceased close relative. The authorization to wash her face on Yom Kippur is particularly innovative, inasmuch as some of the rishonim consider the prohibition on washing to be of biblical, not rabbinic, origin. (Ran ad loc. so understood the view of Maimonides in Mishnah Torah, Hilkhot Shavitat Asor 1,5, and his own view tends in that direction as well. See also Kesef Mishneh ad loc. and Bet Yosef, Ornah Hayyim sec. 611. That is not the view of the Mappad Mishneh, however, and see the explanation in Lehem Mishneh ad loc.)
On the basis of this principle, Rema issued his well known responsum (sec. 125) permitting the betrothal of a woman on the night of the Sabbath. At issue was

a solitary, orphaned girl, whose relatives had distanced themselves from her and paid her no heed. The one exception was her mother’s brother, who took her in, in the absence of any closer relative. When her time to marry came, she saw nothing of any dowry or other necessities, but someone told her to immerse and prepare for her wedding, for she would have a dowry. And that maiden did as the neighbor women told her to do, heeding their voice, and they covered her with a veil on Friday, as is done with maidens.

But then, it seems, a dispute arose over the amount of the dowry and the groom backed out of his agreement, disregarding the communal leaders who pleaded that he not humiliate her. They eventually reached an agreement, but by then, the Sabbath had already begun. Rema ruled that the betrothal should go forward. In his responsum, he replied to his harsh critics, explaining, among other things,

that in a time of great urgency, there is a basis for permitting it. And there is no greater urgency than that occasioned by the prospect of an orphan being humiliated and consigned to disgrace her entire life, treating her differently from all other maidens. And human dignity is potent to the point of overcoming in this instance the negative commandment of “do not turn aside from what [the sages] they instruct you” (cf. Deut. 17:11), [for betrothal on the Sabbath] involves only a rabbinic [but not a biblical] prohibition….17

Rema considered this rationale, along with others, to be decisive: “in any case, they learned from on high to be permissive in such circumstances, for it is a case of great urgency, and the maiden, having already immersed, would be humiliated if the wedding were delayed until after the Sabbath.”

This sensitivity extends to other matters as well. Rebuking one who is committing an offense is a biblical commandment; the Torah states “you shall surely rebuke your neighbor, and not bear sin because of him” (Lev. 19:17).18 But the gemara (Arakin 16b) cites a baraita that reads as follows:

Our rabbis taught: How do we know that one who sees his fellow doing something improper is obligated to rebuke him? As it is said, “you shall surely rebuke.” If he rebuked him but [the latter] did not accept the rebuke, how do we know he should again rebuke him? That is why is says “tokhiah”—you should in any event rebuke.18a How far [should he carry] the rebuke? Rav said: to the point of striking [i.e., the person rebuked cuts off the rebuker and returns his rebuke]; Samuel said: to the point of cursing [i.e., he curses]...
the rebuker]; R. Yoḥanan said: to the point of reproach.

In addition, there is a statement at Bava Mezī’a 31a that one should rebuke his fellow “even up to one hundred times,” and that the obligation encompasses even a student’s rebuke of his teacher; and a midrash at Sanhedrin 27b takes the biblical statement that “they shall stumble one upon another” (Lev. 26:37) to mean they shall stumble over one another’s sins, for they [i.e., all Israel] are bound up with one another, and they could have rebuked one another but did not do so. Finally, we read at Avodah Zarah 18a that R. Hanaı ben Teradyon and his wife were both executed by the Roman authorities, he by burning and she by the sword. The gemara attributes their deaths to his pronunciation of the ineffable divine name and her failure to rebuke him for doing so. On that basis, the sages said “one who has the opportunity to rebuke and does not do so is punished for the offense….” (Cf. Shabbat 54b, et al.)

Though there is a biblical commandment to rebuke, if the rebuking causes mortification it is forbidden.

But along with all this, the sages also determined (Torat Kohanim on Lev. 19:17; Arakhin 16b) that one should not rebuke one’s fellow to the point of severely embarrassing him, a result derived by understanding the conclusion of the verse—“[you shall] not bear sin because of him”—as qualifying rather than reinforcing the obligation to rebuke. In other words, even though there is a biblical commandment to rebuke, if the rebuking causes mortification it is forbidden (see Sefer Mīgvat Gadol, negative commandments, 6; Sefer Yerei’im ha-Shalem, end of sec. 195). To be sure, the gemara at Yevamot 65b finds a scriptural peg for the limitation; but the verse is from the Book of Proverbs and presumably lacks the authority of a verse in the Torah. The passage in Yevamot reads as follows:

R. Ila’a said in the name of R. El’azar bar Simeon: Just as a person is commanded to say words [of rebuke] that are heeded, so is a person commanded not to say words [of rebuke] that are not heeded. R. Abba said it is an obligation, as it is said: “Reprove not a scorner, lest he hate you; reprove a wise man and he will love you” (Prov. 9:8).

The Torah nowhere expressly forbids humiliating one’s fellow, but the rabbis infer it from various passages, as did R. Yoḥanan in the name of R. Simeon bar Yoḥai (Sotah 10b): “It is better for a man to leap into a fiery furnace rather than publicly humiliate his fellow. How do we know this? From Tamar [of whom it is said ‘when she was brought forth (to be burned) she sent to her father-in-law, saying, “by the man who owns these I am pregnant”’] (Gen. 38:25).” And cf. Bava Mezī’a 59a, where Rashi explains: “even though she was being taken out to be burned, she still did not mention Judah by name as the man by whom she was pregnant.” This offense, accordingly, is derived only in passing from the story of Tamar, yet the rabbis said of it, “One who humiliates his fellow in public has no share in the world to come, even though he has studied Torah and performed good deeds, for man is created in the image [of God, and must not be humiliated]….”

In other words, this moral value, hinted at by scriptural passages and inferred by agгадic midrash but not explicitly commanded, nevertheless became the rabbis’ benchmark as they explicated the Torah’s non-explicitly stated commandment of rebuke. It provides yet another example of a basic moral value serving as the underpinning for settled, binding law.

This sensitivity to public humiliation manifests itself in other halakhot as well. We read as follows in Sotah 32b:

R. Yoḥanan said in the name of R. Simeon bar Yoḥai: Why was it determined that the prayer [i.e., the amidah] be recited silently? So as not to embarrass those who sin [Rashi: They confess their sins during their prayers].

Cf. Berakhot 24b: “One who raises his voice while praying is one of little faith [Rashi: It is as if he believes God cannot hear
The same idea appears in Yerushalmi, Sotah 9:11, regarding the recitation provided for in Deut. 26:13-16:

R. Ila said: God is angered by one who recites “I have done [all that you commanded me, regarding the tithe that is the subject of the recitation]” but has not actually done so. Should we say, then, that one who tithes should recite and one who does not tithe should not recite? It is in accord with what has been taught: they would recite in a soft voice up to “look forth” [verse 15; i.e., the portion of the recitation that describes one’s compliance with the requirements] and only from that point on would they recite out loud.

The author of Qorban ha-Edah explains ad loc.:

They would not recite aloud in order to avoid humiliating those who do not tithe. One who properly tithes would make the entire declaration of compliance softly, during which one who does not tithe would remain silent, they would join in, aloud, beginning with ‘look forth.’ It may be self-evident that physical discomfort or distress likewise warrant lenient rulings, such as allowing those accustomed to shave daily, for whom facial hair is like thorns, to do so during “The Three Weeks,” during the Omer period between Passover and Shavu’ot, and on the intermediate days of festivals. Likewise the allowance of bathing during “The Three Weeks” in warm climes, so as to wash away sweat. Even the waiver, during winter in cold climes, of the requirement for immersion by one who has emitted semen arises from the same reason.20

Moreover, the rabbis held that people might be compelled to go beyond the letter of the law21 in order to fulfill the mandate of “you shall do that which is right and good” (ve-asita ha-yashar ve-ba-tov) (Deut. 6:18).22 They enforced certain rights of adjoining landowners on that basis (the law of bar megra, Bava Meg’i’a 108a-b), and they permitted one whose lands had been foreclosed on for the collection of a debt to redeem the lands from the

20 With regard to cutting hair during the Omer, Shulhan Arukh Orach Hayyim 493:2 states “and it is the custom not to cut one’s hair until Lag ba-Omer, when they say that [Rabbi Akiva’s students] stopped dying in the epidemic…” And the author of Yosef ‘Omeq wrote in the name of R. Jacob Castro (1525-1610), Oholi Yaa’agov (Lehgorn, 1783), sec. 98, that one should be lenient where allowing the hair to grow causes great distress, as Radbaz wrote in his responsa (Part 2, sec. 687): “And this custom is certainly not entitled to greater deference than the positive commandment of dwelling in the sukka, from which one who suffers thereby is exempt—see Shulhan Arukh, Orach Hayyim 640:3—and on Lag ha-Omer, the day of Rabbi [Simeon bar Yohai], a person will be even more distressed.” (See my Minhag Yisroel, part 1 [Jerusalem, 1989], pp. 112-115.) See also Maharam Schick, on Yoreh De’ah 374, who justifies the practice of those who shave every few days throughout the year “also shaving during the Three Weeks until the start of the month of Av or even until the week of 9 Av)…because it is difficult for them to conduct business among respectable people without doing so.” With regard to shaving during the intermediate days of festivals, see M. Samet, “Ma’amor ‘al ha-Tiglah be-Had Ha-Miv’d” [Essay on shaving during the intermediate festival days], chapter 6 of his recent book Azur min ha-Torah, pereqim be-tudekat ha-ortodoqyiah [Forbidden by Torah law: aspects of the history of Orthodoxy] (Jerusalem, 2005), pp. 93-156 [originally published in Tiglah be-Had Shel Mo’ed (Shaving during the intermediate festival days), ed. M. Benayahu (Jerusalem, 1995), esp. pp. 97-99 on the ruling by the Noda bi-Yehudah and the Halam Sofer’s attitude toward it. He also cites, (id., pp. 244-364, 286-306) the view of R. Abraham Jonah of Venice and R. Isaac Samuel Reggio, one forbidding and one permitting, but both on different grounds, related to desecration of God’s Name. See recently R. Jacob H. Charlap, “Hilkhah ba-Shem ke-’Corem bi-Pesiqat ha-Halakhah” [Desecration of God’s Name as a factor in halakhic rulings], Tehumin, 25 (2005), pp. 397-398.)


22 See Commentary of Nahmanides at the beginning of Parashat Qedoshim, Maggid Mishneh on Maimonides, Mishneh Torah, Hilkhah Shekhavin 14:5.
creditor at any time (Bava Megi‘a 35b).23

Even more extreme are Rav’s rulings in a famous incident recounted at Bava Megi‘a 83a: Porters employed by Rabbah bar Hannah had broken a barrel of his wine, and he had taken their garments for enforcement of their damages. Rav ruled, however, that the garments had to be returned, and, in response to Rabbah bar Hannah’s protest about whether that was, in fact, the law, he cited “that you may walk in the way of good men” (Prov. 2:20). But the porters complained further that they were poor and hungry and had nothing to show for an entire day’s work, and Rav directed Rabbah bar Hannah to pay them their wages. Rabbah bar Hannah again questioned whether that was the law, and Rav cited, in response, the second colon of the same verse: “and keep the paths of the righteous.” The law itself may have supported Rabbah’s position, but Rav compelled him to pay more than the law required: the ethical value of walking in the paths of the good and righteous trumped the letter of the law.24

Similarly, the sages determined that one is “compelled with regard to [avoiding] the quality of Sodom [i.e., selfish insistence on all one’s legal rights] (Ketubbot 103a).25 Thus, for example, if two brothers are about to divide the field they inherited, and one requests a particular section because it adjoins a parcel of land he already owns, the other brothers are compelled to honor that request, for declining to do so is following the way of Sodom. Here, too, the brothers are obligated to do more than the law itself requires and act in accordance with the dictates of morality.

What all these examples have in common is that the practical ruling is based not on the simple meaning of the law itself but on something above and beyond it—namely, the fundamental ethical values of kindness and pleasantness, which trump the letter of the law. The author of Maggid Mishneh (on Maimonides, Mishneh Torah, Hilkevot Shekheinim 14:5) formulates it this way:

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The practical ruling is based not on the simple meaning of the law but on something above and beyond it: the fundamental ethical values of kindness and pleasantness.

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And so [the Torah] says “you shall do that which is right and good,” meaning that one should conduct himself in a good and just manner with respect to people. And it would not have been proper here to command the details [of such conduct], for the Torah’s commandments apply and

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23 On these rules, see Kirschenbaum I (above, n. 1), pp. 255-268.
24 See S. Shilo, Lifnim Mishurat Hadin: On One Aspects of Jewish Law, Israel Law Rev. 13, 3 (1978), pp. 359-390; Saul Berman, “Lifnim Mishurat Hadin,” Journal of Jewish Studies 29 (1975), pp. 86-124; id., 28 (1977), pp. 181-192; Kirschenbaum II (above, n. 1), pp. 109-136 (and pp. 212-222, criticizing Berman’s approach); R. Aaron Lichtenstein, “Musar va-Halakhah be-Masoret Yisra’el: Ha’im ba-Masoret Makirah be-Etiqah she-Einah Teluyah ba-Halakhah?” [Morality and halakhah in the Jewish tradition: does the tradition recognize an ethics not dependent on halakhah?] De’ot 46 (1977), pp. 5-20. See also Rema on Hoshen Mishpat 12:2—“The court may not compel acting beyond the letter of the law, even though it appears proper to them to do so (Bet Yosif in the name of Ri and Rosh), but others take a different view (Mordekhai on chapter 2 of Bava Megi‘a etc.) And even though Rema generally favors the view that he cites first (Hukimat Shelomoh, ad loc.), it appears from his responsa (sec. 32) that he recommends compelling conduct beyond the letter of the law (Kirschenbaum, id., p. 125, n. 82). Rema writes as follows (ed. A. Ziv [Jerusalem, 1971], p. 188): “But I say, in any event, that if it causes no great harm to the aforesaid Reuben to have the synagogue windows open on his house or courtyard, he should not have insisted on his rights under the letter of the law but should have gone beyond the letter of the law and honored his God and enhanced the house of God. And one who does not care for the honor of his Creator [per Mishnah, Hagigah 2:1—“One who does not care for the honor of his Creator would be better off had he not been born] is compelled to go beyond the letter of the law, in accord with the Mordekhai’s view is his comments on “Eidus megamot” [chapter 2 of Bava Megi‘a, sec. 257], even though some decisors disagree.” See also the comments of the editor, ad loc., n. 4, who cites Tosafot on Bava Megi‘a 24b, s.v. lifnim, Bava Qamma 100a, s.v. lifnim, and Beh on Hoshen Mishpat 12:4 and id., 304:1, where he writes “…we have dealt at length with this case, in which it appears that Rav required Rabbah bar Hanina to act beyond the letter of the law.”
must be followed at all times and in all situations, but human conduct must change in accord with circumstances.

In other words, the details of the halakhah will change in accord with circumstances, but always in a manner consistent with these fundamental values, such as “you shall do that which is right and good.” Accordingly, the poseq must not see himself as entirely bound by established legal doctrine and precedent, for, if he did, he would be included among those “who rule solely on the basis of the text [without understanding its rationale]” (Sotah 22a).26

The point is made clearly in the familiar statement (Bava Mez`i`a 30b) that “Jerusalem was destroyed only because they adjudicated there in accord with the [letter of the] law of the Torah,” which the author of the Derishah (on Tur, Hoshen Mishpat, sec. 1) interprets as follows:

It seems right to me to interpret their meaning as calling for judging truly to its truth [emet le-amito]; that is, in accordance with the matter’s time and place, considering the truth of the situation and not always judging [in accord with] the actual law of the Torah. For occasionally, the judge will have to rule beyond the letter of the law, in accord with time and place; and if he does not do so, he may be judging “truly,” but he will not be judging “truly to its truth.” It is as the sages said, that Jerusalem was destroyed only because their judges ruled [solely] in accordance with the law of the Torah and did not go beyond the letter of the law.27

These values figure most prominently in cases that pose a conflict between what appears to be the formal halakhic decision and what appears to be required as a matter of human justice and religious ethics.

It seems right to interpret their meaning as calling for judging truly “to its truth”; that is, in accordance with the matter’s time and place.

The most prominent example of the phenomenon we have been discussing is the principle that “the rabbis rule leniently on account of iggun [a woman’s inability to remarry; see n. 28a]; that is, to ease an agunah’s plight, the rabbis would find ways to rule leniently and allow her to remarry. Regarding that, Maimonides wrote as follows (Mishneh Torah, Hilkhot Geirushin 3:28):

Do not question the rabbis having permitted [remarriage, despite] the seriousness of the forbidden union [that would occur if the first husband were still alive] on the basis of testimony [regarding the husband’s death] by a woman, a slave, a

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26 See the important article by Pinhas Schiffman, “Ish ha-Halakhah Niddon le-Heirat” [Halakhic man is sentenced to liberty], in Bein Samkhut le-Otonomiyah be-Masoret Yisra’el [Between authority and autonomy in the Jewish tradition], ed. Ze’ev Safrai and Avi Sagi (Tel-Aviv, 1997), pp. 243-251.

27 Interestingly, R. Hayyim Sofer used this statement as the basis for stringent rulings. He stated that although there are technical halakhic ways by which certain people known to be Sabbath violators may avoid formal classification as public Sabbath desecrators (a classification having specific, adverse halakhic consequences), it would be improper to use those methods; instead, the formal halakhic determination should be applied and such people regarded as sinners, who should be ostracized by the community and whose wine should not be drunk. See Responsa Mahaneh Hayyim, part 2 (Jerusalem 1969), Yoreh De`ah sec. 1, where he states: “And because at the time of the destruction of the Temple they ruled in accord with the law of the Torah regarding whether the wine of such a Sabbath violator was forbidden or whether his slaughtering was kosher or whether he could be counted to a minyan [and thereby produced lenient rulings on the basis of the Torah’s technicalities], the Temple was destroyed. See the discussion in Zvi Zohar and Avi Sagi, Sefer Ma`agalet Zehut Yehudit be-Sifrut ha-Hilkhatit [Circles of Jewish Identity: A Study in Halakhic Literature] (Tel-Aviv, 2000), p. 194.

28a An agunah [pl., agunot] is a woman whose disappeared husband’s death cannot be proven, or (the most common situation today) whose husband withholds a Jewish bill of divorce [get] even though the marriage, as a practical matter and perhaps as a matter of secular law, has ended. In all such cases, the woman retains the status of a married woman and cannot remarry.—

translator’s note.
maid servant, a gentle with no ulterior motive, hearsay, or by written testimony [all of which are normally unacceptable], which constitute adequate inquiry, as we have explained; for the Torah did not insist on the

[usually required] two witnesses or on the other rules of evidence. The rabbis accordingly ruled leniently in this matter, so Jewish women would not have to remain agunot.

28 See Rabbi A. I. Kook, Responsa Ezerat Cohen (Jerusalem, 1969), sec. 21, pp. 53-56, who permitting accepting the testimony of a Sabbath desecrator [usually disqualified from testifying] for the purpose of freeing an agunah. There may be a point of similarity between that ruling and his decision that charity is to be given even to a non-observant community, for “in the ordinary course, we consider them to be unintentional transgressors, who must be sustained without further examination….And as a general matter, it is necessary nowadays to extend charity to all Jews; for on account of the [the Jews’] travails, even those who appear to be deliberate offenders may be said to be inadvertent.” And see N. Gutel, Hadashim Gam Yeshanim: Bi-Netivei Mishnato ha-Hilkhatit-Hagutit shel ha-Rav Kook [Innovation In Tradition: The Halakhic-Philosophical Teachings Of Rabbi Kook] (Jerusalem, 2004), pp. 57-58. See, as well, Rabbi Kook’s pained comments in Afikim ba-neger (Jerusalem, 1972), p. 23: “It is difficult, very difficult, to love a Jew who brazenly violates the laws of our holy Torah….’” And see the extended discussion of the matter by M. Z. Nehorai in his important article, “He`am be-Darko shel ba-Rav Kook bi-Pesiqah [Comments on Rabbi Kook’s way in halakhic decision-making], Tarbiz, 59 (1990), pp. 486 et seq.

29 In a similar spirit, Maharsha (on Yevamot 122b) explained why that tractate concluded with the comment by R. Eli`ezer in the name of R. Hanina that “scholars bring increased peace to the world, as it says, ‘and all your children shall be taught of Omer she-heh`amer ha-tov besh’tov’” [Ps. 29:11], “The Lord will give strength and power to his people, who are scholars, to rule leniently in this matter, for “the Lord will bless His people with peace,” as is written, ‘all its paths are peace’”—and there will be no peace if she becomes an agunah. In this way, we can interpret the verse (Num. 6:26) “The Lord lift up His countenance to you”—even to [seemingly] uproot something from the Torah, for the Lord will give you peace.

See also Elon (above, n. 12), p. 346: “The element of peace (“all its paths are peace”) has a two-fold role in the world Jewish Law. First, it serves as a source for making law and as an interpretive principle to be applied in deciding cases. Second, it serves as a purpose and a goal of the entire system of Jewish law, an interpretive touchstone for the Jewish legal system as a whole.” He continues: And it is interesting to note the formulation of the point in R. Natronai Ga’on’s responsa (cited in M.B. Levin, Orag ha-Ge’onim, Gittin (Jerusalem, 1941), “Responsa,” sec. 487, p. 207): “We have seen that if one divorces his wife after apostatizing, his get is a sound and proper get, for when all is said and done, the man issuing the divorce is the man
Maimonides, to be sure, identified a halakhic rationale—“a witness will not lie regarding a matter subject to verification” (id.)—but it appears that the primary motivation is that “so that Jewish women not remain agunot”; for in other situations, the rabbis declined to take such radical steps as changing the rules of evidence. See, for example, Gitin 67a: “we are concerned that she might hire witnesses” or Yevamot 111a: “so that a woman not become attracted to another man and [take steps] to become forbidden to her own husband.”

Kindness and justice cry out for some proper yet humane solution to be found.

We likewise found compassionate statements regarding the mamzer (the offspring of an adulterous or other forbidden union, permitted to marry only another mamzer), who is “punished” despite having committed no offense. Here, too, the rabbis found distinctive ways to avoid imposing the taint. They determined, for example, that if a woman gave birth up to twelve months after her husband had gone overseas, the child would be considered legitimate (i.e., not conceived in an illicit union after the husband’s departure), on the premise that it had gestated for twelve months (Yevamot 12a); only if it were born more than twelve months after the husband’s departure would it be presumed to be a mamzer. But the author of Sefer Halakhot Gedolot ruled that even such a child would not be presumed a mamzer, and, unless the husband acknowledges the contrary, we proceed on the premise that he had secretly returned home during the course of the year and cohabited with his wife. Similarly, if a married woman is widely reputed to be acting promiscuously, her children are nevertheless not considered to be mamzerim, since most of her sexual activity will still be with her husband (Sotah 27b). Even if she declares that the fetus she is carrying is not her husband’s, she is not believed for purposes of tainting the child (Yevamot 47a, etc.). Moreover, to be disqualified from marrying, one must be a mamzer beyond any doubt; “but one whose status as a mamzer is in doubt may [marry]” (Qiddushin 77a). In other words, our who betrothed married her, and if he betrothed her now, after apostatizing, would not his betrothal be effective? Moreover, if that were not the case, what remedy would this poor Jewish woman have? Would she be imprisoned [i.e., unable to marry] forever? We find that the rabbis ruled leniently with regard to an agunah in situations more difficult than this, and certainly here, where there is no other remedy. And that is the halakhah.”

This is the rule as a matter of Torah law—i.e., in a case of doubt, a person is not to be considered a mamzer—but the rabbis required a two-fold basis for doubt before permitting a possible mamzer to marry. For further clarification, see Responsa Yabia Omer, part 5, Even ha-Ezer, sec. 2, par. 9, p. 284. In addition, the sages determined (Qiddushin 71a) that “a family [suspected of having an unspecified taint] that has been absorbed [back into the community] remains absorbed” (R. Isaac, id.), that is, the family “is not ostracized and no effort need be made to determine specifically who within the family is a mamzer and who is not; rather, the doubt is not resolved and the family will be legitimate at the end of days” (Rashi ad loc.). On that basis, R. Yohanan swore in the heavenly sanctuary (Qiddushin id.), “It is within our ability [to identify tainted families in the Land of Israel—Rashi ad loc.], but what should I do, for great scholars of the generation are within those families.” And in accord with R. Isaac’s view, Ran determined (at the beginning Qiddushin, chapter 4) that one who knows of a mamzer is not permitted to publicize his information and call the family’s legitimacy into question. The position is supported by an early mishnah (Edotot 1:7): “Elijah does not come to declare [families] impure or pure or to ostracize them or reinstate them.” And see Rema on Shulhan Arukh Orach Hayyim 2:5. See also Hayot Ish on Shulhan Arukh Even ha-Ezer sec. 1, par. 18, p. 8, implying that where a case of mamzerut is known to an individual (as distinct from two witnesses), the individual is even permitted to marry into the family at issue—mamzerut that has been “embedded” is entirely permitted. See also Berkovits (above, n. 3), pp. 116-117; and see R. Moses Feinstein, Iggeret Moshe, Even ha-Ezer, part 2, sec. 9, par. 3, who writes that the prohibition related to marrying a mamzer pertains only to doing so knowingly, but that if one does not know a person is a mamzer, there is no prohibition at all, and one who marries such a person is not considered even to have transgressed unintentionally. See also R. Isaac ha-Levi Herzog, Responsa Hechkal Yizhak, Even ha-Ezer part 1 (Jerusalem, 1960), sec. 10, par. 2, pp. 62-63. And note the comments of R. Ovadiah Yosef on legitimizing a possible mamzer (“Histamkhut `al Bediqat Reqamot” [Reliance on tissue-sample testing], in Rabbi Y. A. ha-Levi Mowshowitz, ed., Memorial Volume for Rabbi Shiloh Refael (Jerusalem, 1998), p. 496: “It is well known what Rivash wrote in his Responsa, sec. 447, that one should always strive to attribute a child to a woman’s husband rather than to an adulterous union on her part, even where doing so seems farfetched, for we know that a woman engaging in adulterous unions will take pains to avoid becoming pregnant from them (Yevamot 35a). And Beit Me’ir wrote to the effect at sec. 156, par. 64. And I have
rabbis of blessed memory found ways of ruling leniently and permissively even in situations where, in other areas, the formal *halakhah* would tend to stringency. Here, however, kindness and justice cry out for some proper yet humane solution to be found.

Another of the many possible examples of the phenomenon is the case of a woman who, after ten years of marriage, has not yet borne a child. According to the *gemara*, the husband must divorce her, even if he does not wish to: “She is sent out from him, against his will if necessary, even by beating him” (Rif on *Yeramot* 64a, etc.). Maimonides also rules that way (Mishneh Torah, *Hilkhot ‘Ishut* 15:5): “If he does not wish to send her away, he is coerced, even by beating him with a rod, until he does so.” R. Joseph Karo likewise ruled that way in *Shulhan Arukh Even ha-Ezer* 154:6. Even if husband and wife love each other and have been living together in harmony for many years, the husband is compelled to divorce his beloved wife against his will and marry another to bear children through her and fulfill the commandment of being fruitful and multiplying, a commandment imposed only on the man. Is that not a tragic situation crying out for some other halakhic resolution?

Rema, indeed, comments that “nowadays the practice is not to coerce at all”; he adds “the man is believed if he says that he knows that he himself is incapable of bearing children, and he is not compelled to marry another woman.” Various reasons are offered for ruling leniently, such as that in *Sefer Bigdei Kehunah* of R. Meshullam Fürth (nineteenth century) on *Even ha-Ezer* sec. 1, where he writes:

> It is right that nowadays, we do not compel [divorce]...because there is doubt associated with the possibility that he will not have children even with another woman, and there accordingly is a view in the Talmud that he is not to be compelled...it provides a basis of for adopting a posture of “simply do nothing” (*shev ve-‘al ta`aseh*), and thereby fulfill one’s obligation to Heaven....

This halakhic direction reflects the feelings of those decisors who wanted to avoid compelling divorce in this sort of case.\(^{31}\) Even more strikingly, Rivash wrote in one of his responsa (sec. 15) that

> …all this [i.e., coercing the issuance of a *get*] is the letter of the law. But what shall we do when we know of no case today in...written several times that one should willingly rely on unlikely events (*Parashat ‘Aharei Mot*, for most women who become pregnant become pregnant from their husbands, and even if her husband was alone with her only once, that is the rule. And he wrote to that effect in his book *Ne’erot le-Shabbat*, sec. 4, par. 109. And my colleague on the high court, Rabbis Zolty and Goldschmidt agreed with me to rule leniently in reliance on this view.

And in the present case as well this may be relied on, for even if she is extremely promiscuous, the fetus is attributed to her husband... And the *aharonim* have written that it is preferable to add the additional doubtful circumstance that she may have been impregnated by a gentile [citing numerous authorities]. And they all support adding this doubtful circumstance, making it twice doubtful and warranting a lenient ruling. Congratulations to the rabbi who ruled this way for the force of his lenient ruling; he did well and I sustain him.

\(^{31}\) A similar idea can be found in the responsa of R. Ben-Zion Hai Uziel, *Mishpetei Uzzi’el: Responsa on the Laws of Even ba-Ezer* (Jerusalem, 1962), sec. 5, pp. 22-23. The question dates from 27 Sivan 5697 (6 June 1937); it is addressed to R. Judah Tavyumi:

> You have requested my opinion on the question posed to you regarding a man who contracted an illness that caused his testicles to become greatly swollen. The doctors told him the affliction could prove fatal and that the only cure was to remove his testicles, and they did so. His local rabbi thereupon advised him to divorce his wife...for he was now maimed in his genitals (*penu’ah dakkah*; cf. Deut. 23:2) and banned from marrying. He replied that he was in any event unable to continue sexual relations with his wife, since his illness had made him impotent, but that if he divorced her, he could die of starvation from lack of care and of someone to sustain him in his old age. And so the question arose of whether we were obligated to coerce him into divorcing his wife.

And to this, your Torah eminence properly replied...concluding [after extended, erudite, and insightful analysis] that we were in no way permitted to compel him to divorce his wife, or even to separate...
which a court has compelled the divorce of a woman who is childless after ten years with her husband, and doing so has been unheard for generations...the sages in all generations have looked the other way, not seeking to prevent relations in such cases and certainly not to separate the couple. As long as both of them wish [to remain together]....

The sage poseq's sensitivity is nicely expressed in the formulation of R. Yehiel Mikhel Epstein (1828-1908) in Arukh ha-Shulhan on Shulhan Arukh, Even ha-Ezer, sec. 27:

The sages' imposition of the obligation to divorce after ten years is a great stringency. For with respect to all the commandments, a person is obligated to do no more than God's command, and here, when he has married a woman who is not of ambiguous sexuality femininity...what more could he do? The fact that he does not beget children is "an affliction from God" [cf. Berakhot 6a].

Let me cite one more phenomenon that supports the basic claim that there exist fundamental values that underlie the halakhab. “Visiting the sick” (biggar holim; more accurately, “frequenting the sick” and tending to their needs) is an important commandment referred to every morning in the recitation of commandments “whose fruit is eaten in this world but which continues to provide sustenance for the life of the world to come” (cf. Mishnah, Pe'ah 1:1).32 Maimonides (Mishneh Torah, Hilkhos Aveil 14:1) states that “it is a rabbinic commandment to visit the sick,” and R. Joseph Karo (Shulhan Arukh, Yoreh De'ah 335:1) formulates it simply: “it is a commandment to visit the sick.” But what is the source of this commandment? In Sotah 14a, the gemara cites a statement by R. Hama bar Hanina: “What does scripture mean by ‘after the Lord your God shall you walk’ (Deut. 13:5)? Is it possible for a human being to follow the divine presence? Is it not said that “the Lord your God is a consuming fire” (Deut. 4:24)? Rather, one should walk after [i.e., emulate] the attributes of the Holy One Blessed Be He....The Holy One Blessed Be He visited the sick, as it is written, ‘And the Lord appeared to him [Abraham] by the terebrinths of Mamre’...from her; rather, we are obligated to tell him that there is a concern about whether continuing the marriage is permitted, but if he does not want to separate from his wife, we do not require it.

After detailed and probing analysis, R. Uziel concluded as follows:

And so I agree as a matter of halakhab with everything...said [on the matter], that this unfortunate man should be subjected to no pressure to divorce his wife separate from her, but that our obligation is to tell them that it would be proper to be concerned about the views of those who forbid continuing the marriage and to divorce or at least withdraw from conjugal relations...and may God's blessing come to them.

In general, R. Uziel tended to rule leniely. See id., sec. 11, pp. 45-47, where he permitted a kohen to maintain relations with his wife even though some demon or spirit had come over her. See also id., sec. 15, pp. 63-64, where he permitted a kohen to marry a woman who had been the victim of a rape; he reasoned that “to better the situation of a Jewish woman, that she leave the fold, it was proper to permit her to marry a kohen, since not everyone would be willing to marry a woman who had been raped. And we will have the merit of saving a Jewish woman from the prospect of licentiousness, thereby averting improprieties within our community” (id., p. 64). At sec. 23, pp. 83-88, regarding a kohen's wife who had been kidnapped by brigands, he ruled that she was nevertheless permitted to her husband and we are not concerned about the possibility of self-serving testimony on her part (p. 88). See also Mishpetei Uzzi'el, part 2, Even ha-Ezer, sec. 20, pp. 49-51, allowing a twice- or thrice-widowed woman to marry again (despite the concern about her husbands’ fates), and id., sec. 21, pp. 51-54, and cf. id., part 5, sec. 20-22, also dealing with the remarriage of a multiply-widowed woman (and cf. above, n. 19). See also id., part 5² (Jerusalem, 2002), sec. 15, permitting the marriage of a woman who might be a mamzeret; id., sec. 16, regarding one with maimed genitals; and id. secs. 17 and 18, allowing the testimony of Karaites, validating their betrothals; and holding them to be possible (but not certain) mamzerim. Also noteworthy are R. Moses Feinstein's tendencies to leniency in his responsa, especially in cases involving personal matters that can cause an individual great anguish. See, e.g., Even ha-Ezer part 1 (New York, 1974), secs. 24, 41, 63, 65, 67, etc. But this is not place to consider these matters at length.

32 On the "bara'ata" included in the prayers and its various versions, see Rabbi Y. Werdiger, Siddur Zelota de-Arraham, part 1.
(Gen. 18:1 [which follows the account of Abraham’s circumcision; hence the midrashic inference that God appeared to visit Abraham during his recovery]); so, too, should you visit the sick....” At Bava Qamma 100a, we read: “As R. Joseph taught: ‘And you shall show them the way in which they shall walk’ (Ex. 18:20)—‘shall walk’ refers to visiting the sick” (That is, visiting the sick is performed by walking to where the sick person is—Perishab on Yoreh De‘ah, id.) And Nedarim 29b states: “Resh Lakish said: Where does the Torah allude to visiting the sick? It says ‘If these men [Qorah and his associates] die the common death of all men and be visited after the visitation of all men’ (Num. 16:29). What does this mean? Rava said ‘If they die the common death of all men’—i.e., men who fall ill, take to their beds, and are visited by people....”

Finally, Midrash ba-Hageg on Gen. 48:1 (“After these things, it was said to Joseph ‘your father is ill,’ so he took his two sons with him, Manasseh and Ephraim”) states “From here we learn that one visits the sick.”

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**Elemental morality guides halakhic midrash and forges halakhic reality.**

We see here that the sages were so determined to find a biblical source for the extraordinary (see Maimonides, Sefer ha-Mitzvot, Shoshen Sheni) commandment to visit the sick, or at least a biblical allusion to it, that they allowed the line between balakhah and aggadah to be blurred. They seem to have understood that a commandment of this sort, demanded by fundamental morality, simply had to be alluded to in one way or another in scripture; and they found it there through these midrashic interpretations, which depart from the plain meaning of the text. Some (such as the author of Sefer Halakhot Gadol) went so far as to regard the commandment itself as biblical in origin rather than rabbinic. This is just one of many examples of how elemental morality guides halakhic midrash and forges halakhic reality; it follows that halakhic reality reflects these value-based elements.

Maimonides’ attitude toward slavery provides a good example of the extent to which these basic moral values become fully articulated in balakhah. Although the entire institution of slavery appears to us today to be an immoral affront to human dignity and liberty, Maimonides’ formulation shows these values at work even within the laws of slavery themselves. He writes (Hilkhot Arovim 9:8):

…the quality of kindness [hasidut, which also has the sense of “piety”] and the way of wisdom suggest that a person be merciful and pursue righteousness by not overburdening and not tormenting his slave; [rather,] he should give him all manner of food and drink. The early sages would give their slaves every food that they themselves ate and would feed their animals and slaves before preparing their own meals, for scripture says, “as the eyes of servants to the hand of their master, as the eyes of a maidservant to the hand of her mistress” (Ps. 123:2). One likewise should not humiliate a slave either physically or verbally. Scripture provides for their enslavement but not for their humiliation. [The master] should not shout angrily at him; rather, he should speak calmly to him and listen to his complaints. That is specified in the account of Job’s praiseworthy qualities: “If I despised the cause of my slave or of my maidservant when they contended with me...Did not He that made me in the womb make him? Did not One fashion us in the womb?” (Job 31:13-15). Cruelty and brazenness are to be found only amongst idolaters, but the progeny of Abraham

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32a The Hebrew in the second part of the biblical verse is “u-fequdat kol adam yippaqed aleihem,” which NJPS renders “if their lot be the common fate of all mankind.” The translation above, referring to visiting, is that of OJPS, identical here to the King James Version. In view of the midrash, the use of “visiting,” albeit with a different meaning, is striking.—translator’s note.


our father—Israel, on whom the Holy One Blessed Be He bestowed the goodness of the Torah and to whom he gave righteous statutes and laws—are merciful to all. And the attributes of God, which we are commanded to emulate, include “his mercies are upon all his works” (Ps. 145:9) and all who show mercy receive it, as it says, “and show you mercy and have compassion on you and multiply you” (Deut. 13:18).\(^{34}\)

We conclude this section with Maimonides’ words in Mishneh Torah, Hilkhhot Shabbat 2:3—“and so you see that the Torah’s laws are not meant to bring punishment to the world but mercy, kindness, and peace.” We have here the clearest formulation of the idea that it is those basic values that underlie halakhic rulings. Our contemporary sages have much to learn from these remarks by the greatest of guides for the halakhically perplexed.\(^{36}\)

The clear implication of this analysis is that halakhic creativity and innovation must go forward with greater sensitivity to the demands of the moral values that are central to the halakhic process.

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\(^{35}\) See Responsa Heikhal Yizh, Even ba-Ezer, part 2 (Jerusalem, 1967), sec. 85-86, pp. 305-315, regarding the following question: “A kohen had married a widow, on the presumption that she was available, and it later was learned that her deceased first husband had a brother and that she required yibbum [levirate marriage to the brother or release from that obligation through kaliph]. The brother was a Sabbath desecrator who openly ate non-kosher food. While married to her first husband, the woman had undergone major surgery to remove her uterus and other reproductive organs, and her physicians said it was clear that she could never bear children. The husband and wife were devoted to each other and said that requiring them to separate would be at the cost of their lives. Is there any way to rule permissively here, and how can it be done?” Following a long and detailed analysis, Rabbi Herzog arrived at a permissive ruling.

\(^{36}\) As another example, we may cite the case of the oft-widowed woman (presumed to somehow be the cause of her husbands’ deaths); the Rosh there ruled that her husband was to be coerced into divorcing her (Ketubbot, chapter 4, sec. 3). Ritva likewise wrote (on Yevamot 64b), citing an actual case, that the husband was to be shunned until he divorced her, and similar views are expressed or implied by Nimugay Yosef (citing Ritva, ad loc), Sefer Hasidim (sec. 477-478), Tur, Even ba-Ezer, sec. 9, and Shithei Gihborim ad loc. Maimonides, however, wrote (Responsa Pe’er ha-dor, sec. 146) that “it has become a widespread practice among us that [a multiply-widowed] and presumed [dangerous] woman would not be betrothed without first being asked whether she wishes it; whether the prospective husband is satisfactory to her; whether there may be some other man who wants to betroth her; and whether she is doing this wholeheartedly. Only then is she betrothed before witnesses, and then the court write a ketibbah for her and she then enters the lappah and the seven [marriage] blessings are recited. That was the practice in [various sages’ courts] and in all the courts that followed them, and so have we ruled and practiced in Egypt since the day we arrived…” At first glance, this appears to be contrary to the express statement of the gemara at Yevamot 64b and Niddah 64a (and also Yevamot 24a) that “she shall not marry a third”; but Maimonides understands the statement to mean not that there is an outright prohibition (related to possible danger to human life) but only grounds for concern.” (See Responsa Pe’er ha-dor, ed. R. David Joseph, part 1 (Jerusalem 1984), pp. 282-287; the editor’s notes there cite a wealth of additional sources.) The Noda bi-Yehudah likewise dealt with the issue (Even ba-Ezer, sec. 9; Makhon Yerushalyim edition [Jerusalem, 1994], pp. 27-28), writing to a beloved student, whom he understood to be seeking a permissive ruling in the matter. He wrote: “Know, my beloved, that the words of the Shulhan Arukh Even ba-Ezer sec. 9, are open before you, and you see that it is impossible to permit this ab initio, yet many have acted permissively without being stopped, and it is enough that I will not stop you. And since I see that your desire is to reach this result, I will set forth for you Maimonides’ statement in his responsum…” After quoting the foregoing responsum, he continues: “But Rosh ruled very stringently on the matter” He finds it difficult to rule contrary to Rosh, but his mercy and compassion for his student lead him to go on: “Know that I am able to come up with one basis for leniency…” and he goes on to offer a novel rationale. But he then concludes: “But since I have not found this opinion to be held by any earlier authority, I am not brazen enough to explicitly permit it; but the explanation I have opened up before you and anyone else who may want to act in that manner should suffice to provide a peg to rely on and assuage any fear of doing so.” We see how that great decisor struggled with the issue, as his sense of compassion led him to strive mightily to find a way to ease his beloved student’s difficult personal situation. (And see the comments at the end of the edition of the responsa, p. 371, finding added support for the Noda bi-Yehudah’s position.) See also R. Aryeh Leib Gelman, Ha-Noda bi-Yehudah n-Mishne Tora le-Ore Pesagur n-Derushav [The Noda bi-Yehudah and his teachings in light of his responsa and homilies] (Jerusalem, 1962), chapter 5, pp. 43-59, “Compassion in law.” In connection with this characteristic of his rulings and in the ensuing chapter (pp. 51-52), he deals with the “force of a permissive ruling” as a theme pervading his decisions. (See above, n. 16, regarding Rabbi Uziel’s approach to the issue of the presumptively dangerous woman; and see below, n. ____, with respect to the force of a lenient ruling.)
The “Friendly” Decisor

Having identified various directions in halakhic decision-making, we turn now from the process to its practitioners and examine the qualities that properly characterize a rabbi acting as decisor. We begin with three talmudic accounts that present traits to be avoided. First, a story recounted at Gittin 31b:

R. Huna and R. Hisda were seated together, and Geniva came toward them.37 One said to the other, “we should rise before him,38 for he is a scholar.” The other said, “do we rise before someone contentious [Rashi: one involved in conflict]?” He [Geniva] reached them and said “What subject have you been discussing? They said, “Winds.” He said, “R. Hanan bar Rav said in the name of Rav: Four winds blow each day, and the north wind blows with all of them [Rashi: The north wind is pleasant, neither hot nor cold, and it sweetens all the other winds]; without it, the world could not endure even one hour. And the south wind is the harshest of all, and were it not stopped by a hawk, it would destroy the entire world, as is said, ‘Does the hawk soar by your wisdom and stretch her wings toward the south’ (Job 39:26).”38a

Naturally enough, many asked how these sages could have responded untruthfully to Geniva’s question, telling him they had been discussing the winds when they had, in fact, been doing nothing of the sort. One exponent of the Musar movement replied on the basis of a statement in Mishnah ‘Avot 3:10—

He [R. Hanina bar Dosa] would say: One who is pleasing to human beings [literally, from whom the human spirit (ruah, which also means wind) takes pleasure] also is pleasing to God; one who is not pleasing to human beings is not pleasing to God.

It is not enough to be a scholar, the scholar must also be pleasing to human beings.

It was these “winds” that they were speaking of;39 that is, it is not enough to be a scholar, but the scholar must also be pleasing to human beings, such that their spirits (“winds”) take pleasure from him; only then will he be pleasing to God. And so we find it said in ‘Avot de-Rabbi Natan, version, 1, chapter 22:

He would say: To what can we compare a person who does good deeds and has studied much Torah? To a tree standing near the water, whose branches are few and whose roots are many. It stands firmly in its place even if faced by winds from all directions, as it is said, “He shall be like a tree planted by streams of water…” (Ps. 1:3). To what can we compare a person who does not do good deeds but has studied much Torah? To a tree standing in the desert, whose branches are many and whose roots are few. When a wind blows on it, it is uprooted and turned on its face,

37 Geniva was a scholar, as we learn from Yerushalmi ‘Avodah Zarah, chapter 2, 41d-45a and from the course of this story in Gittin 62a. See, more broadly, the article by M. Barr in Tarbiz 31,3 (1962), pp. 281-286.
38 Cf. Shabbat 31b: “Let us rise before him, for he is man who fears sin [i.e., he is pious]; Qiddushin 33b: “R. Ezekiel is different, for he is a man who does great things, and even Mar Samuel rises before him.”
as it is said, “He shall be like a tamarisk in the desert…” (Jer. 17:6).

It is clear, then, that one who is unworthy of being honored by his fellows cannot be a communal leader, and one is contentious and quarrelsome cannot provide instruction on what the Torah requires. The rabbi who provides such instruction must not only be a scholar who reveres God’s word; he must also be concerned that his rulings be good for people, and then the spirit of God will take pleasure from him.

The second incident appears at Mo`ed Qatan 17a:

A certain scholar was rumored to have acted improperly. R. Judah said: what shall we do? If we excommunicate him, we lose his needed erudition. If we do not excommunicate him, the Name of Heaven is desecrated. He said to Rabbah bar bar Hannah: Have you heard of any precedent in this matter? He replied: R. Yohanan said as follows: What is the meaning of the verse “For the priest’s lips should keep knowledge, and they should seek the law at his mouth; for he is the messenger [mal’akh, which also means “angel”] of the Lord of Hosts” (Malachi 2:7)? [It teaches] that if the rabbi resembles an angel of God [in probity], they should seek the law from his mouth; if not, they should not seek the law from his mouth. So R. Judah excommunicated him. Later, R. Judah became gravely ill, and the rabbis came to visit him, the excommunicated scholar among them. When R. Judah saw him, he smiled. He [the scholar] said to him: is it not enough that you excommunicated me; must you laugh at me as well? R. Judah said: I am not laughing at you; I am smiling because as I go to the other world, I am happy that even with regard to one [as great a scholar] as you, I [showed no favor] but acted in accord with the law.

R. Judah died, and the scholar came to the study hall and asked that his excommunication be ended. The rabbis said to him: There is none here as great as R. Judah, and only such a person could end the ban. But go to R. Judah the Prince [in the Land of Israel] and ask him to cancel the ban. He went before him, and [R. Judah the Prince] said to R. Ammi: Go look into the matter, and if the ban should be cancelled, do so [as my agent]. R. Ammi looked into the matter and concluded the ban should be lifted. R. Samuel bar Nahmani arose and said: The excommunication of a maid in R. Judah the Prince’s household was not lightly lifted and was kept in place for three years; should not this excommunication by R. Judah be treated just as seriously? R. Zera said: Is it not remarkable that [R. Samuel bar Nahmani], chose just this day to come to the study hall, after not having come for several years? We learn [from this seeming coincidence] that the ban should not be lifted, and they did not lift the ban.

40 Cf. the passage at Haggah 15b, where the same verse is cited in the course of expressing surprise at how R. Me’ir could have learned Torah from “Aber,” as Elisha ben Abuyah was called after becoming an apostate. That passage, and this subject in general, are discussed by Neriyah Gotel in his comprehensive article “Bein Qabbalat ha-Emet ‘mi-Mi she-’Amerah’ le-vein Qabbalatat ‘mi-Mal’akh ha-Shem Zeva’ot” [Between accepting the truth “from whoever utters it” and accepting the truth from “an angel of the Lord of Hosts”], in Sefer Iyyunim be-Hinukh Ivri [Studies in Jewish education], vol. 9 (Jerusalem, 2004), pp. 129-151, esp. pp. 137 et seq. At p. 139, he cites the passage in Ta`anit 7a explicating Deut. 32:2—“My teaching shall drop as the rain; my speech shall distill as the dew”: If he is a scholar who conducts himself properly, he is like dew; if not, cast him down like rain.” The passage also explicates Deut. 20:19—“For man is like a tree of the field.” “Is man in fact like a tree of the field? Rather, it is because the verse previously said ‘you may eat of them but shall not cut them down’ while [the next verse] reads ‘you may destroy and cut down.’ How can that be? If he is a scholar who conducts himself properly, you may eat of him and shall not cut him down; if not ‘you may destroy and cut [him] down.’” See also his consideration of how the rishonim (the Tosafists and Maimonides) and the acharonim (Maharal and Rabbi Kook) treated the issue; there is no need to reproduce his instructive analysis here.
excommunicated scholar departed in tears, was stung on his genitals by a wasp, and died. He was brought to burial in the graves of the pious, but was not received there; he was brought to burial in the graves of judges, and he was received. Why? Because they acted in accord with the view of R. Il`a`i. As was taught in a baraita: R. Il`a`i says: If you see a person whose evil impulse overcomes him, he should go to a place where he is not known, don black garments like a mourner, and do what his heart demands, but not desecrate God’s name in public.

In other words, a rabbi who is supposed to serve as a guide to others must be clear of any taint and extremely strict with regard to proper conduct. This calls to mind the statement in Yoma 86a:

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41 See the comments of Maharik (R. Joseph Colon) on rabbis “of poor repute, through whom the Name of Heaven is desecrated” (Responsa Maharik, sec. 161). Great rabbis would go to extreme lengths to distance themselves from any scintilla of sin; it is told, for example, that when the Holy Grandfather, R. Israel of Vishnitz, would send a letter by messenger rather than by post, he would nevertheless tear a postage stamp. See Nathan Elijah Roth, Sefer Qedash Yisra`el (Benei-Beraq, Qiryat Vishnitz, 1976), pp. 247, 248. See also Sefer Mei`i`r Eynei Yisra`el (on the Hagez Hayyim), 2/1 (Benei-Beraq, 1991), pp 291 et seq., on his care to avoid any sort of missappropriation; Rabbi H. D. Ha-Levi, Sefer Asah Leha Ram, part 3 (undated), p. 72, declaring that a rabbi should never receive any gifts. On that, see also R. Menasheh ha-Qatan (=Klein), Sefer Meshaneh Halakhot, part 6 (Israel, 1973), sec. 288, p. 354, reporting that the Hagez Hayyim “once sent a letter by messenger and tore a postage stamp so as to cause no loss to the government.” And he once ruled that way in a similar case in the United States.

42 Cf. the responsa attributed to R. Amram Ga’on, cited in Shut Hilkhot Pesuqot min ba-Ge’onim [Geonic responsa], ed. R. Joel ha-Kohen Miller (Crakow, 1893; photo-offset, Jerusalem, 1967), sec. 92, pp. 51-52: “A congregational cantor who is the subject of bad reports must be removed by the congregation and replaced with another, for one who strives to make Israel pleasing before their Father in Heaven must be righteous and upright and without any blemish, and of one who is not so, the sages said: ‘My heritage has become to me as a lion in the forest, raising her voice against me; therefore, I have hated her’ (Jer. 12:8)—this refers to one who leads prayers though not worthy” (Ta`anit 16b). (This responsa appears in Sefer Rav Amram Ga’on, part 2, sec. 55, ed. D. Goldschmidt [Jerusalem, 1972], p. 94 and in Sefer ba-Manhig, beginning of Hilkhot Ta`anit, ed. Y. Refael [Jerusalem, 1978], p. 269, and elsewhere. For other citations to its appearance among the rishonim, see the editor’s note to line 15, id., and Goldschmidt’s note id. See also B. M. Levin, Ozar ba-Ge’onim, Ta`anit [Jerusalem, 1933], sec. 55, pp. 27-28, and Shi`a`i Tesubabah, sec. 51, in the name of R. Hai.) Maimonides, however, was asked about “a man renowned as a cantor, a scholar, but he was reputed to have committed a sin best not mentioned, though it was not verified by competent witnesses…. Must such a man be removed from his cantorial office or not?” He responded that no official should be removed from office on account of a rumor, even if he is not known to have enemies who might have spread the rumor maliciously. (Teshuvot ba-Rambam [Responsa of Maimonides], ed. Rabbi A. H. Freiman [Jerusalem, 1934], sec. 18, pp. 16-17; ed. Rabbi Y. Blau, part I [Jerusalem, 1958], sec. 111, pp. 191-194; cited in Radbaz, part 2, #2078; and in Birkhad Yosef on Orakh Hayyim 53:9.) In his ruling, Maimonides seems to rely on a statement in Yerushalmi Sanhedrin 2:1—“R. Li`ezor said: a high priest who sins is lashed [apparently in private] but is not removed from office. R. Mana said: why is it written ‘Neither shall he go out of the sanctuary, nor profane the sanctuary of his God’; for the consecration of the anointing oil of his God is upon him; I am the Lord’ (Lev. 21:12)—as it were, just as I [God] retain My sanctity, so does Aaron retain his sanctity.” (It may be that the words “nor profane the sanctuary of his God” led to a concern about desecrating God’s Name.) Maimonides ruled likewise in Mishneh Torah, Hilukot Sanhedrin 17:8: “A high priest who sinned is beaten by [verdict of a court of] three, like any other person, and returns to his high office.” In halakhah 9, however, he writes: “But the head of the academy who sins is lashed but does not return to his office, not even to serve as simply a member of the Sanhedrin, for sanctity may be increased but not diminished” (and see the continuation of the passage from the Yerushalmi, id.) In Usha they enacted that “a judge who transgressed is not excommunicated; rather, he is told ‘be honored, but remain at home’” (2 Kings 14:10). If he transgresses again, he is excommunicated because of the desecration of God that is involved. And this disagrees with Rosh Laqish, for Rosh Laqish said: a scholar who sins is not publicly excommunicated, as it is written, ‘You shall stumble in the day, and the garment like a mourner, and do what his heart demands, but not desecrate God’s name in public.’
“What constitutes desecration of God’s Name? Rav said: ‘If one like me takes meat from a butcher without immediately paying for it.’”

43 Cf. the pronouncement of R. Shabbetai in Pesiqta Rabbati, chapter 33 (anokhi anokhi), ed. Ish-Shalom (Vienna, 1880), 150a. The wording of R. Shabbetai’s statement there is obscure, but its point is that the judge must be entirely above suspicion in all respects.

44 On manifesting excessive piety, see Maimonides, Mishneh Torah, Hilkhhot De’ot 3:1: “Lest a person say: Since jealously, desire, and ambition are bad things that bring about a person’s demise, I will separate myself from them entirely and go to the other extreme, to the point of not eating meat, not drinking wine, not marrying, not living in a nice house, and wearing sackcloth and harsh wool instead of nice clothes...that, too, is a bad way of life and is forbidden. One who follows such a path is called a sinner....The sages forbade self-flagellation by fasting, and of all such things, King Solomon said ‘Be not overly righteous’ (Eccl. 7:16). (Cited by Benayahu, in the Rabbi Isaac Nissim Memorial Volume, part 6 (Jerusalem, 1995), p. 295.) See also Yam shel Shalom, Bava Qamma (on Bava Qamma 81b): “…If so, it follows that Bar bei Rav should be shunned, for he is pretentiously stringent with regard to matters that all Israel has come to regard as permitted...and even where it is not so obvious that something should be permitted, one should not be more stringent than his teacher unless he has proof for a contrary view.” (See also J. J. Schachter, The Neglected Mizvot [1990], pp. 40-47). One should also consider the comments of Maharshal (Responsa, sec. 27) regarding whether it is permissible to wear a freshly laundered shirt on Shabbat HaGoz [the Sabbath before Tisha’ah be-Av] or whether refraining from doing so is proper abstinence: “it seems to me that acting stringently here and abrogating the pleasure of the Sabbath is the piety of fools” (cited in Matteh Moshe, sec. 736 and Magen Avraham 551:4). It is also worth noting the words of R. Eliyzer Papu, Hesed le-alafim (Salonika, 1841) sec. 135, note 9: “…one must be balanced in judgment, not being excessively pious and filled with pretension.” (The reference is to kissing a Torah scroll by hand rather than directly by mouth. See also R. Reuven Amar’s remarks in Minbagai ha-Hida, vol. 1 (Jerusalem 1990) pp. 96-97.) On the issue of when stringency is considered foolishness and when it enhances observance of the commandment, see Shulhan Arukh ha-Rav, Onah Hayyim 32:8.

I cited additional sources on the point in Minbagai Yisra’el, part 4 (Jerusalem, 1995), pp. 285-286:

This opposition to excessive piety is sharply expressed by R. Joseph Karo in Kosef Mishneh on Hilkhot Terumot 1:11, objecting to “a certain sage”—R. Joseph Ashkenazi (see Derishah on Yoreh De’ah 331:11)—

The third incident is recounted at Ta’anit 23b-24a:

R. Yosi bar Abin regularly studied before R. Yosi of Yuqrat, but he left him and came to study before R. Ashi...[R. Ashi] said to him, “Does not my master regularly study before R. Yosi of Yuqrat?” He replied, “Yes.” He said to him, “Then why did my master leave him and come here?” He replied, “Would a man who is not concerned about his son and daughter be concerned about me?” What was the incident regarding his son? One day, hired workers were working in R. Yosi of Yuqrat’s field. The hour grew late, and food had not been brought to them. They said to his son, “We’re hungry.” They were seated under a date tree, and he [R. Yosi’s son] said, “date tree, date tree, bring forth your fruit so father’s workers may eat.” The tree brought forth fruit, and they ate. By and by, his father arrived...He said, “My son, you burdened your Creator with bringing forth fruit early? You, too, will die early.” What was the incident regarding his daughter? He had a beautiful daughter. One day, he saw a man cutting through a thorn-fence to look at her. He asked him, “What are you up to?” He replied, “I may not have merited marrying her; can I not merit gazing on her?” He [R. Yosi] said to her, “My daughter, you cause people trouble. Return to your dust, so you are not a stumbling block to people.”

We see that a person of such exaggerated piety, of such extreme halakhic opinions, is not fit to be...
A person of such exaggerated piety and extreme halakhic opinions is not fit to be a halakhic guide and educator.

An additional quality needed by a poseq, the sages teach us, is the courage to decide between differing opinions in order to arrive at an accepted halakhic conclusion. We find this expressed in Tosefta.

...
Shabbat 15:7 (ed. R. Saul Lieberman, p. 77). At issue is the question of n
gzab (items having no permitted use on Sabbath or festival days and hence subject to various restrictions related to touching or moving them) as applied to left-over food crumbs and waste:

The House of Hillel say: bones and shells may be lifted off the table (i.e., may be picked up by hand to be thrown in the trash). The House of Shammai say: One removes the entire table and shakes it (i.e., the tray on which the food is placed, which serves as a table and is referred to by the rabbis as tabla, is picked up and shaken into the trash, but the crumbs themselves are not touched directly). Zechariah ben Avqilas acted in accord with neither the House of Hillel nor the House of Shammai; rather, he took the bones and tossed them behind the sofa (on which they were seated during the meal). R. Yosa said: The reticence of R. Zechariah ben Avqilas caused the sanctuary to be burned.

R. Zechariah ben Avqilas seems to have been an important rabbi and leader toward the end of the Second Temple period (as we learn from an account in Bavli, Gittin 56a) and he was required to decide between the views of the House of Hillel and the House of Shammai. But his reticence—i.e., his failing to regard himself as worthy of rejecting one opinion and ruling in accord with the other—prevented him from deciding whether to pick up the bones or to shake the table, “and he kept himself from placing the bones on the table at all, so he would not have to remove them. This reticence was a pervasive trait, manifesting itself in other areas as well.”

The sages criticized him on that account, seeing his excessive “reticence” as a weakness betraying a lack of leadership, which ultimately brought about the destruction of the Second Temple.

His enactments “to repair the world” manifest a tendency to adapt the law to life as it changes, ensuring that the exigencies of life do not distance people from Torah.

As an exemplar of the desirable contrary trait, we need only consider Hillel the Elder. In both his personal life and his halakhot and enactments, he is the prototype of the leader who acts as a leader should. In Avot 1:12, he sets basic guidelines for interpersonal behavior: “be of the students of Aaron, loving peace and pursuing peace, loving [God’s] creatures and bringing them closer to Torah. A series of well-known incidents recounted at Shabbat 31b show his endless patience, and Ketubbot 67b tells how he would welcome converts and bring them under God’s wings. His enactments “to repair the world” (Mishnah Gittin 4:3) prominently manifest a tendency to adapt the law to life as it changes, in a manner ensuring that the exigencies

47 The Talmud there reports, in the name of R. Yohanan (according to the printed versions) that “the reticence of R. Zechariah ben Avqilas destroyed our house, burned our sanctuary, and exiled us from our land. The context was the proposal by the sages of the Sanhedrin, in a certain situation, that an invalid sacrifice be brought or that the informer Bar Qamz be killed; R. Zechariah was concerned about what the opponents of the proposal “would say.” That was a weakness, for he was more concerned about what people would say than about the ruling itself. (See below.) The incident has been widely examined but deserves another intensive and extensive analysis, including a comparison of the various parallel versions of the text, and this is not the place for that study. We cite only the article by David Rokeach, “ZEKHIYAH BEN AVQILAS – ANVITANUT O QANA’UT? [Zechariah ben Avqilas: reticence or zealousness?] Zevyon 53 (1988), pp. 53-56, which offers a different explanation of the episode and cites the principal literature on the subject. But I interpret it differently.

48 This was before the heavenly voice proclaimed that the halakhah is in accord with the House of Hillel.

49 R. Saul Lieberman, Ta’eafa ki-Veshutah, Shabbat, p. 260.

50 His weakness, and the rabbis’ harsh critique, are evident as well in the version of the story of Qamza and Bar Qamza that appears in the Genizah text of Midrash Eiskhab Rabbah (Z. M. Rabinowitz, Ginzei Midrash [Midrash archives] (Tel-Aviv, 1976), p. 153: “and he saw there [at the banquet] R. Zechariah ben Avqilas, who was uncertain whether to protest and did not protest” the conduct that ultimately led to disaster.

51 So, too, Shabbat 31a. See the analysis by Jonah Frenkel in his Sippurei ha-Aggadah – Ahbdat shel Tokhen ve-Zorah [Aggadic Narrative: Harmony of Form And Content] (Tel-Aviv, 2000), pp. 296-302.
of life do not distance the people from the Torah:\textsuperscript{52} enactments to help a woman collect amounts due her under her ketubbah from her former or late husband's children (\textit{Gittin}, id.); the \textit{prozbol} enactment already mentioned (id.), and enactments related to the sale of houses in walled cities (\textit{Arakbin} 4:3). His qualities were summed up in his eulogy: “Be kind, be humble, a student of Ezra” (\textit{Tosefta Satah} 13:3; \textit{Satah} 48b), and they were transmitted to his students, who likewise were “calm and unpretentious” (\textit{Erwin} 13b); the halakhab, therefore, was fixed in accord with their views.

This quality of kindness toward others acquires halakhic expression in the maxim that “the force of permissive ruling is paramount.”\textsuperscript{53} We note here what the Ta\text{\v{z}} had to say on the matter in \textit{Yoreh De\'ah} 141:2, following a discussion of the \textit{Tur's} ruling and rationales on several issues related to the prohibition of idolatry:

\begin{quote}
It appears that even though doubtful cases regarding idolatry are resolved stringently, it is proper to rule leniently wherever there exist rationales for both lenient and stringent rulings, for we have the general principle that a prohibition is not to be
\end{quote}

\textsuperscript{52} See \textit{Enzyklopaediya le-Hakhmei ba-Talmud ve-ba-Ge'onim} [Encyclopedia of talmudic and geonic sages], ed. M. Margaliot (Jerusalem, 1952), part I, p. 248.

\textsuperscript{53} See \textit{Berakhot} 60a; \textit{Erwin} 72b; \textit{Gittin} 41b, 74b; \textit{Qiddushin} 60b; \textit{Hulin} 59a; \textit{Niddah} 59b. See also P. Schiffman, “\textit{Hirurim al ba-lymra}” [Reflections on Stringency], \textit{Tunix Yessirun} 35 (Shevat-\textit{Adar} 5733 [1973]), pp. 10-11; E. Schochetman, “\textit{Koah Deboretu Adif}: The Power to Issue a Lenient Ruling,” \textit{Jewish Law Association} 1 (1992), pp. 126-155. See also the remarks of R. Hayyim Hirschensohn, \textit{Malki ba-Qodesh}, part 6 (Sevini 1928), p. 161: …But it is the way [of those he is criticizing] to fear every shaft of light that penetrates the Jewish camp, as if our Torah (God forbid) were not a Torah of life and light. And they do not recognize that the force of permissive ruling is not only paramount on its own; rather, it is the fundamental force of our Torah and our religion, which frees man from the many awesome prohibitions to which idolaters felt subject, as they had to watch every step they took to avoid angering their gods and to appease them. The Torah, however, forbade only those things that naturally produce bad results for man, and its ways are ways of pleasantness, setting conditions of conduct in all areas that do not interfere with life; and if they are properly understood, it is clear that they do not at all impede life, as I have explained at length on several occasions….A note should be added here on the matter of stringency. It is clearly stated in \textit{Yerushalmi Satah} 8b that just as it is forbidden to declare the impure pure, so is it forbidden to declare the pure impure. And \textit{Bardi, Berakhot} 28b reports in the name of R. Nehuniya ben ha-Qaneh that [a sage about to issue rulings] prays, among other things, that “I not declare something impure to be pure or something pure to be impure.” The \textit{Shakh}, in \textit{Qizzar Hanbasht Hora\text{\v{z}} Issur ve-Heter}, sec. 9 (in \textit{Yoreh De\'ah} 245), explains more broadly that just as it is forbidden to permit the prohibited, so is it forbidden to prohibit the permitted, even for the sake of an idolater and even where there is no great monetary loss, for in most instances a prohibition [in one matter] will result in a leniency in some other matter, resulting in a stringency that leads to a leniency. And even if it appears that the resulting leniency does not permit something that is forbidden, it is possible that it will lead to some leniency more remote in the chain of causation. And \textit{Rosh} sec. 29, writes: “like the transgression of permitting the forbidden; so too the transgression of forbidding the permitted.

See also \textit{Responsa Tem\text{\v{z}}ot Shemesh} by R. Solomon Mesas, \textit{Yoreh De\'ah} (Jerusalem, 1980), sec. 72, which expands on the idea and quotes \textit{Sefer Sedei Hemed}, \textit{Hilchot Hametz u-Mazah} 8:8, stating, in the name of \textit{Teshuvah mei-Abavah} (by R. Eliezer Fleckles), secs. 180-181: “One who imposes an unwarranted stringency is punished more harshly than one who allows an unwarranted leniency, for [the former] must seek his fellow’s forgiveness…” (see \textit{Berakhot} 4:4). See also my article in \textit{Agudat}, above, n. 3, p. 131, n. 6. R. Mesas added, among other things, that one may be stringent with regard to his own practice, “that is, specifically within his own house and walls; but to do so publicly raises concern about pretentiousness and is not permitted…” (id., p. 153). In other words, not only is the force of permissive ruling paramount; but stringency in decision making, where there is room for leniency, is firmly forbidden. See also J.D. Bleich, \textit{Contemporary Halakhic Problems}, vol. 4 (New York 1995) pp. XIII-XIV: “Leniencies and permissive rulings exist in abundance. The point is to seek neither the stringent nor the lenient, but the view that is most authoritative. Moreover, there usually is a view which has been accepted in practice by the majority of the poskim as the accepted standard. Thereupon, such a ruling becomes normative and deviation cannot be considered other than by virtue of compelling reasons. It was the view of many of the most renowned personages in the annals of halakhic scholarship that the ruling accepted as authoritative by the community of Israel were accepted as such by virtue of divine providence.” The determining phrase is “by virtue of compelling reasons” (emphasis mine-D. S.) in the passage. The definition of “compelling reasons” is based the considerations of the posq, i.e., it is subjective and neither objective nor absolute.

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presumed in cases of doubt, and we rule stringently only in cases were prohibition is presumed.

Cf. the comments of Rema, in his responsum no. 60 (ed. Ziv, p. 164): “…and he said that one who rules leniently is no worse off, and one who rules stringently should do so for himself but not for others, for this causes monetary loss to Jews, and the Torah protects their money. (And see above, in the discussion of “the Torah protects the money of Jews.”)

In this same spirit, I cite Rabbi Y. L. ha-Kohen Maimon, Toledot ba-Gra [Life of the Ga’on of Vilna] (Jerusalem, 1970), p. 7, on the Vilna Ga’on’s contemporary, ha-ga’on R. Abraham-Abusch, rabbi of Frankfurt:

It is told that the kosher slaughterers of Frankfurt once came before him with a question about the lung [of an animal that had been slaughtered], concerning which Rema and the other Polish and German sages were very strict. It was the eve of a festival, and the issue posed a risk of substantial financial loss to a poor person. The members of the court wanted to rule stringently and declare the animal non-kosher, but Rabbi Abraham-Abusch began to seek ways to rule permissively. The judges stood by their opinions, for it was impossible to rule leniently against the view of Rema and his colleagues; but R. Abraham-Abusch argued with them and debated this halakhah with them, and ruled the animal kosher. Surprised, the members of the court asked how it was possible to rule permissively, and find the animal to be kosher, against the view of Rema and the other great decisors who agreed with him. R. Abraham-Abusch responded, “At my advanced age, I would rather argue with Rema and his colleagues than with this poor butcher. The butcher is a simple man, and it will be difficult for me to argue against him before the heavenly court if he sues me for having held his animal to be non-kosher, thereby causing him a substantial loss and cutting off his income right before the holiday. As for Rema and his colleagues, however, I am confident that once I present my ideas, I will be able to reach agreement with them….

To similar effect is Jacob Rimon and Zundel Wasserman, Shemu'el be-Doro: Rabbi Shemu'el Salant zagal, Rabbah shel Yerushalayim, 5701-5769, Hayyat u-Po`alo [Samuel in his generation: R. Samuel Salant, may the memory of the righteous be for a blessing, Rabbi of Jerusalem, 1841-1929, his life and works] (Tel-Aviv, 1961), pp. 122-126:

Once the scholars came and argued with him over what he had declared to be kosher. Of course, he prevailed over them. One of them turned to him and said “You triumphed over us, but what will happen in the True World, when you will have to respond to the words of the Bet Yosef and Rema [authorities according to whom the food would might be ruled non-kosher]?” He replied, “They will agree with me that it is better that I be summoned to the foregoing court by them, confident that I have fully understood their views, than that I be summoned to court by the ox that I improperly ruled non-kosher…. [and see above, n. 35].

He became known as one who ruled leniently, always seeking a way to hold that the item at issue was kosher, but when people pointed that out to him, he would

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54 As an example, we may cite an instance recounted in Shemu’el be-Doro (cited above in the text), pp. 132-133: A certain woman came to Rabbi Samuel's house on a Friday afternoon, her face drawn and trembling with grief. “Rabbi,” she wept, “I prepared a meat dish for my family in honor of the Sabbath, and, to my misfortune, a bit of milk got mixed in with the dish; and what can I do? It's already too late to prepare another dish.”

Rabbi Samuel questioned her about the size of the cooking pot, the amount of meat, the water, the seasonings, and the amount of milk that became mixed in. When her responses left him uncertain
reply angrily that “I rule in accord with halakhab. A decisor must learn much and understand what he is learning. To rule stringently does not require much learning.”

This extraordinary stress on interpersonal matters and remarkable sensitivity to the poor come to the fore in halakhab related to matters of kindness, such as charity, care for the underprivileged, and visiting the sick (discussed above). Concerning charity, one is obligated to give money and provisions to the poor and hungry, but the halakhab (Maimonides, Mishneh Torah, Hilkhhot Matanot Evyonim 7:3) also states as follows: “Even if this poor person had been accustomed, before losing his fortune, to riding on a horse with a slave running before him, one buys him a horse to ride on and a slave to run before him, as it is said, ‘sufficient for his need in that which he wants’ (Deut. 15:8)—you are obligated to make up what he is missing.” (Cf. Ketubbot 67b). The sages strove valiantly not to dishonor or humiliate a poor person.56

I recall as well in incident recounted to me by my father, of blessed memory, who once noticed that his father, the ga’on R. David Sperber, may the memory of the righteous be for a blessing, was not about whether the milk amounted to one-sixtieth of the total, he asked as well for the name of her dairyman. He told the woman to go home and return in an hour, so that he could consider the matter.

After she left, he sent his assistant to bring the dairyman before him as soon as possible. The dairyman appeared, and Rabbi Samuel, in his wisdom, extracted from him information on how much water he adds to the milk he sells. On that basis, he calculated that the amount of the milk was far less than one-sixtieth of the amount of the dish the woman had prepared.

The woman returned as scheduled and Rabbi Samuel greeted her, saying “It’s kosher, it’s kosher. Go home and enjoy the Sabbath meal together with your family. The woman wept with joy and rained down endless blessings on the rabbi.

The slogans “the Torah is concerned about Jews’ property” and “the force of permissive ruling is paramount” were his guiding lights and he always sought a way to rule permissively and found it. He often said to his questioners, “This way, I will be certain that I will not be punished in the True World for stringent rulings, just as I will not be punished for lenient rulings. (Israel bar-Zakai, grandson of R. Samuel Salant, may the memory of the righteous be for a blessing.) And I have heard other versions of the story told of another great sage.

55 R. Israel Shehepansky recognized the importance of sensitivity in his article “Ha-Hithashvat im ba-Sensitiyut shel ba-Adam u-Hadoshatot” [Taking account of human sensitivity and weaknesses], Or ba-Mitzvot 21,2 (Tevet 5732 [1972]), pp. 65-68.
56 See N. Rakover, Gadol Ketod ha-Beriyot [Human Dignity in Jewish Law] (Jerusalem, 1999), chapter 5, pp. 145-150. (His list of examples may be supplemented with others, but space does not suffice to do so here.) See also Yehuda Bergman, Ha-Zedaqah bi-Yisra’el: Toledotehah u-Mosedotehah [Charity in Israel: its history and institutions] (Jerusalem, 1975), pp. 138-140 (on donating in secret, etc.).

Also worth noting here is the halakhab’s attitude toward slaves. In biblical times, when slavery was accepted and the slave was regarded as physically owned by his master, the master was obligated to allow the slave to rest on the Sabbath, as we know from Ex. 20:10 (“your slave, your maidservant…”). Moreover, the slave went free if his owner brought about the loss of his tooth or eye (Ex. 21:26-27), or of other limbs (Qiddushin 24a); in other words, the owner was forbidden to beat his slave, and if he caused him significant harm, the slave went free. A Hebrew slave is required to be afforded the same standard of living as his master enjoys: “It is taught [in the case of a Hebrew slave who does not wish to leave his master after the prescribed six-year period], ‘because he fares well with you’ (Deut. 15:16)—‘with you’ in eating and ‘with you’ in drinking. You may not eat refined bread while giving him coarse bread; you may not drink old wine while giving him new wine; you may not sleep on soft down while he sleeps on straw. It therefore is said, ‘One who acquires a Hebrew servant is acquiring a master for himself.’” (Qiddushin 22a.) (And see my article “Pat Qiber” [Coarse bread], Tarbiz 36 (1967), pp. 189-201, where I cite an Egyptian papyrus, dating from between 323 and 317 BCE [P. Rylands 633], in which Theophanes, a visitor to the Land of Israel, keeps track of his expenses. The entry at lines 410-413 states: “Bread for our breakfast, 200 drachmas. Coarse bread for our slaves, 800 drachmas.” And see further, P. Rylands 637, lines 437-438.) The subject is quite broad; see, for example: I. Epstein, Social Legislation in the Talmud (London, n.d.), pp. 10-13; I. H. Weisfeld, Labor Legislation in the Bible and Talmud (New York, 1974), pp. 13-41; H. Z. Reines, Ha-Po’el be-Miqra ve-Talmud [The worker in Scripture and Talmud] (New York, 1935), pp. 37-50; E. E. Urbach, “Hilkhhot Avadim ke-Maqrer ha-Historiyot ba-Ha-Mishnah ba-Hebrew ti-Yemei ba-Bayit ha-Sheini u-vi-Tegufat ba-Mishnah ve-ba-Talmud [The law of slavery as a source for social history during the time of the Second Temple and the period of the Mishnah and Talmud], Zion (1961), pp. 141-189 (reprinted in his Mei-Olamot shel Hakhamim [From the world of the sages] [Jerusalem, 1988], pp. 179-228).
wearing the large silver watch that always hung on his waist, suspended by a silver chain. (My grandfather was a poor man, getting by on very little, but the watch had been given to him as a gift by a member of his community.) My father said nothing of the matter, but, after a while, saw the watch in the possession of one of the wealthy residents of our village. He asked my grandfather why he had given the watch to him, and my grandfather explained that the man had lost his money and had had to sell his own watch in another town. He would have been humiliated had people become aware of his impoverishment by seeing him without his watch, so my grandfather gave him his watch. My father, surprised, asked whether it was really necessary to help someone to that extent, and my grandfather explained it was expressly required by the halakhah, citing the passage from Maimonides quoted earlier regarding the provision of a horse and slave if that was what the newly impoverished person had been used to.

It is not only Hasidim who think this way. Rabbi J. B. Soloveitchik, of blessed memory, in his classic Ish ha-Halakhah, Galui ve-Nistar [Halakhic Man], stated:

My uncle, R. Me’ir Berlin [Bar-Ilan] told me that once R. Hayyim of Brisk was asked what the function of a rabbi is. R. Hayyim replied: “To redress the grievances of those who are abandoned and alone, to protect the dignity of the poor, and to save the oppressed from the hands of his oppressor.”

The relationship between rabbi and general community is interestingly described by R. Simeon ben Laqish at Hulin 92a:

This nation is compared to a vine: its branches are the gentry; its clusters of grapes are the sages; it leaves are the common people; its tendrils are the

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ignoramuses. Let the grapes therefore plead for mercy on behalf of the leaves, for without the leaves, the grapes could not exist.

Rashi explains (id.): 

*Its branches are the gentiles—just as branches give forth twigs and leaves and fruit, and form the centerpiece of the vine, so, too, the gentiles, who perform acts of kindness, sustain the poor, and pay taxes on behalf of their brethren, who endure thanks to them.

Leaves—on the vine, they endure the wind and protect the grapes against hot winds and sun; so, too, the common folk plow, plant, and reap what the sages eat.

This parable and its referent imply that there is a certain mutual dependence between the rabbi and his community and, even more, that the rabbi is responsible for all segments of his community. He must therefore plead for mercy even for the common folk, without whom he would not be privileged to exist.

In reliance on this talmudic passage, Rabbi Hayyim Hirschensohn demands that rabbis strive to find solutions, via enactments, for people who, finding themselves “under desperate economic pressure,” had begun to violate Sabbath “prohibitions of rabbinic [as distinct from biblical] origin because of the compulsion to earn a living... Such people deserve to have some remedy sought for them, for they are our brethren, our flesh and blood, and should not be seen, God forbid, as one who is dead with half his flesh consumed [cf. Num. 12:12]. Let the grapes plead for mercy for the leaves, for without the leaves, the grapes could not exist.”***(Responsa Malki ba-Qodesh, part 2 [St. Louis, 1921], Responsum 3, p. 129.**

Rabbi Hirschensohn here reinterprets the passage in the gemara to mean not that the sages should seek divine mercy for the common people, without whom the sages could not exist, but that the sages themselves should recognize the anguish felt by breadwinners forced to violate the Sabbath and pursue the need halakhic enactments that could ease their situation halakhically.***

He blames the rabbis for not doing enough in that regard:

If the rabbis in America fifty years ago were as great as today’s halakhic

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59 I came upon something similar in the introduction to *Responsa Har Zvi*, part 1, *Even ha-Ezer* (Jerusalem, 2004), pp. 14-15, citing remarks of R. Zevi Pesah Frank, may the memory of the righteous be for a blessing, in a paragraph entitled “Bi-zeman she-ittah rabanan, ba-maqom yerualem alekhah [When you are compassionate, God will be compassionate to you]

At the beginning of the record of responsa with regard to agunot, our master notes the statement in Yerushalmi Bara Qamma 8:7 that “when you are compassionate, God will be compassionate to you.” “Of course, this does not mean, God forbid, that one should distort the law for the benefit of the unfortunate, for compassion is not part of the law itself. It means, rather, that if you are compassionate and prepared to engage in all-consuming efforts, forgoing sleep and rest, endangering your own place in the world to come and forgoing your place in this world—that is, your studies—and instead dedicate all your time to exploring the hidden corners of earlier halakhic works until you find the clear halakhab [that produces the merciful result], then God will have compassion on you and help you find the way to unite those who are bound and proclaim liberty to the prisoners.

That is our master’s secret, for he was a man whom God helped to find the clear halakhab that enabled him to bring salvation and relief to the broken hearted. In almost every case brought to him, he was able to rebuild ruins in Jerusalem, as the Bah wrote in his new responsa (sec. 64), “one who frees an agunah [enabling her to remarry] is as if he had rebuilt one of the ruins in the heavenly Jerusalem.”

And our sage said in *Masekhet Shabbat* (151b): “Rabban Gamaliel ben Rabbi said: ‘He shall have compassion on you and multiply you’ (Deut 13:18)—One who shows compassion to people is shown compassion from heaven, and one who is not compassionate to people is not shown compassion from heaven.”

A truthful judge has a problem. On the one hand, he wants to activate the quality of compassion, and he hopes his ruling will be acceptable. On the other hand compassion is not a part of the law itself, and yet justice be done though the mountains be overturned. Our master fulfilled the words of Solomon, wisest of men, who wrote (Prov. 8:20) “I walk in the way of righteousness, in the midst of the paths of justice,” that is, he blended the quality of compassion into the quality of justice, and the two walked on together [cf. Gen. 22:6].

The prophet Micah says (6:8): “It has been told you, O man, what is good, and the Lord requires of you: only to do justly and to love mercy.” Our master wrote in his journal “I interpret this as meaning not two separate things, ‘do justly’ and
authorities, able to see clearly and anticipate developments, they would have found ways to permit, on the basis of the Shulhan Arukh and the decisors…and we would not have come to the sorry situation that prevails today. (id.)

His halakhic concept is based on classical rabbinic sources. For example, we read in Mishnah Shabbat, 24:1:

One finding himself [still] on the road at nightfall [the start of the Sabbath] gives his purse to a gentile. If there is no gentile with him, he places it on the donkey. When he reaches his outer courtyard, he takes the equipment that may be taken on the Sabbath and, as for the remainder, he releases the cords and the saddle bags fall by themselves.

The gemara (id., 153a) explains:

Why did the rabbis permit giving his purse to a gentile? The rabbis recognized that a person does not stand idly by, allowing his money to be lost. If he were not allowed to give the money to a gentile, he might have come to carrying it a distance of four cubits in a public domain [a Torah-based, and hence more serious, Sabbath violation].

Rabbi Hirschensohn comments:

Our rabbis understood human nature, recognizing a person could not stand idly by and lose his money even when confronted by a Torah-based prohibition. Not because the person is wicked or scorns the words of the Torah, but because of his weakness, which will not allow him to relinquish his money. And so the rabbis sought a remedy, allowing him to violate a rabbinic prohibition to avoid violating a Torah-based prohibition. (Malki ba-Qodesh, id.)

Rabbi Hirschensohn may have carried his proposal too far, trying to find ways to permit violations of rabbinic prohibitions, but his remarks convey the extent to which he shared in Israel’s sorrows, his degree of love for those unfortunates who violated the Sabbath because of economic compulsion, the magnitude of the responsibility he felt for them, and the need he saw to find a way to ease their anguish.60 We are reminded of the words cited in the name of R. Hayyim: “to redress the grievances of those who are abandoned and alone, to protect the dignity of the poor….” And what courage it took to issue his radical proposals and buck the accepted halakhic trends!

A sage who is not hard as iron is no sage.

The rabbi must, then, be an independent thinker and must have the courage to take a stand for his opinions; in the words of the sages blessed memory, “R. Ashi said: A sage who is not hard as iron is no sage” (Ta’anit 4a). We learn this as well from the responsa (Orah Hayyim sec. 208) of Hatam Sofer to R. Zevi Hirsch Chayes, who had expressed concern, in the introduction to his book Torat ha-Nevi’im (Zolkow, 1836), that “critics would seek and find” various flaws in the book. After expressing high praise for the book, Hatam Sofer addressed R. Chayes’s concern with the Talmud’s account (Beizah 38a-b) of R. Abba, who, before moving to the Land of Israel from Babylonia, prayed “May it be [God’s] will that the words I say be accepted” [Rashi ad loc: by the local sages, that I not be humiliated]. But, the gemara continues, when he arrived at the academy of R. Yoḥanan in the Land of Israel, the students mocked him for the proof through which he tried to derive a point related to the subject under discussion that day. In
contrast, the prayer of R. Nehuniah ben ha-Qaneh (Berakhot 28b) was “May it be Your will…that I cause no stumbling-block, that I not stumble in any matter of balakhab, and that my colleagues delight in me….” How, Hatam Sofer asks, do the two prayers differ? He responds that R. Abba sought approval and acceptance on the part of his audience, and accordingly did not merit it, for “what is it to Me if it is accepted or not? Say your words for the sake of heaven. Accordingly, he failed.” But R. Nehuniah ben ha-Qaneh prayed that he be directed to the true balakhab, and did not place great value on securing the agreement of his audience:

Let the discussion be to base my opinion on my reasoning in a manner that allows me to consider what my colleague argues against me, and if his arguments seem right, I will change my mind, but if his arguments do not seem right, I will stand by my opinion. And what is it to me if he yields to me or not, for it is not my purpose to persuade him of my opinion.

Accordingly, he prevailed. Hatam Sofer determines that:

One who knows of himself that his actions are directed only to God, may He be blessed, in order to aggrandize and glorify the Torah, and who holds something back only because of concern that critics will attack him, has committed a sin, and just as one will be punished for [improper] utterance, so will one be punished for [improper] restraint.

Also noteworthy here is R. David Pinto’s challenge to the position of R. Hayyim (ben Mosheh) ben Attar, who maintained that one must not dispute “the words of the great [authorities].”61 R. Pinto writes:

And may his honor forgive us for [not agreeing with him], for it is Torah, etc., and the crown of Torah rests on every Jewish sage. And who is greater than Rif, who was nevertheless criticized by the author of the Ma’or, or Maimonides, who was criticized by Ra’abad and other sages, or our master R. Joseph Karo, who was criticized by some abaronim. And let the truth be accepted from whoever may say it.62 Even regarding a student before his master, it is said “you shall not respect persons in judgment” (Deut. 1:17), and as long as it is done for His Name, may He be blessed, there is no concern; on the contrary, he is fulfilling an obligation [by expressing his view]. Accordingly, I shall say my piece…63

My grandfather of blessed memory, R. David Sperber, may the memory of the righteous be for a blessing, was a follower of the Hatam Sofer. My father of blessed memory, in his description of my grandfather’s qualities referred to earlier, wrote as follows:


62 Per Maimonides, Introduction to Tractate Avot: “accept the truth from whoever says it.”

63 Regarding the authority to dispute earlier sages, there are extensive discussions. Let me mention here the words of Maharshal, in his introduction to Yam shel Shlomoh:

Since Ravina and Rav Ashi, there is no tradition to rule in accord with any of the ge’onim or abaronim unless his words are clearly based on a statement in the Talmud [Bava’i] or the yerushalmi, or in the Tosafot where the matter is not resolved in the Talmud, etc.

Indeed, the Noda bi-Yehudab, R. Ezekiel Landau, writes in one of his responsa (Yoreh De‘ah, Tenina, sec. 63) of Maharshal “that we find him disagreeing even with the greatest of the ribonim, for his heart is like the heart of a lion,” etc. And the Noda bi-Yehudab himself writes (in a responsa, Yoreh De‘ah, Qamma, sec. 86):

It is not my way to study the responsa of contemporary sages or even of our predecessors going back a generation or two. It is enough to sink our eyes into the words of the Talmud and the early codifiers and
He had the quality of a sage, in that he was hard as iron when necessary. He was an expert judge in communal matters and property disputes, and he would be invited to sit on a court as an arbitrator or as the chief judge in complicated cases, both public and private. These adjudications would be tempestuous, and some would try to influence him in various ways or to refuse to accept his decision. I recall an instance when he had issued a judgment in a case involving a huge amount of money, and they had tried in various ways to stop him. He said, “Why did they choose me to chair this court? If because of my learning in Torah, there undoubtedly are those more learned. If because of my expertise in worldly matters, there undoubtedly are those more expert. But I have one quality: I fulfill “fear no person [for the judgment is God’s]” [Deut. 1:17].

And consider what my mother of blessed memory, Rabbanit Miriam Sperber, wrote in her Mi-Sippurei ha-Savta [Grandmother’s Stories] (Jerusalem, 1986), pp. 70-71 (“Ma’aseh be-Va’al ha-Itliz” [The Tale of the Butcher-Shop Owner]). After a rock had been thrown against my grandfather’s window following his revocation of the kashrut certification of a certain butcher-shop owner, almost injuring a baby lying near the window, my father asked my grandfather, “Is it worthwhile being a rabbi, dedicating many years to a community and then having a rock thrown through your window?” My grandfather answered, “It is certainly worthwhile. Know, my son: a rabbi who has no disputes, who is under no pressure, is no rabbi; and a rabbi who submits to that pressure is no human being.”

And that was, in fact, the practice of the rishonim. See, for example, the comments of R. Isaiah di Trani (cited in his Responsa, sec. 62; see also id., sec. 1; cited also in the introduction to Shibbonei ha-Leqet and in the introduction to the commentary on Megillat Esther and to Sefer ha-Mizvot, and cited recently in the important article by Rabbi Eliyahu Soloveitchik, “Hirburim al Mahapeikhat ha-Sifrut ha-Toranit ha-Hadashah” [Reflections on the contemporary revolution in religious literature], Ha-Ma’ayan 43,2 (Tevet 5763 [2003], p. 78): It is my way not to submit to that anything that does not appear to me to make sense, even if it was said by Joshua bin Nun, and I do not hesitate to express my view about the matter in accord with my limited understanding….And I judge for myself, in the manner of the philosophers….And if one should ask whether the giant or the dwarf on his shoulder sees further, those close to them, until the author of the Shulhan Arukh, who set for us a table filled with God’s blessings.

And beyond that, there is no reason to rely more on the determinations of others than on our own determinations. See Aryeh Leib Gelman, Ha-Noda bi-Yehudah u-Mishnato le-Or Pesagav u-Derashav [Noda bi-Yehudah and his teachings in light of his rulings and his discourses] (Jerusalem, 1966), pp. 32-34. The subject is treated extensively in Eliau Schochetman, “Ha-Hafti‘ la-Meggilat Esther ha-Rishonim ke-Shiqul be-Fesiqt ha-Halakhah” [Concern about disparaging earlier authorities as a factor in halakhic decision making], Bar-Ilan 18-19 (1981), pp. 170-195.

See the statement of R. Hisda in Ketubot 27b: “So shall I rule for you and all your violent colleagues.” See also I passage I came upon in the introduction to Responso Har Zevi, pp. 13-14, describing Rabbi Zevi Pasek Frank, may the memory of the righteous be for a blessing: “In communal matters, he forcefully stood his ground, in the manner of ‘you shall stand upon the rock’ [Ex. 33:21], and he did not shy away from going forward with a loud, mighty, and powerful voice. He fought against the mighty, against rulers, and against communal leaders, and when the hour demanded it, he feared nothing.” See also Torah Temimah on Parashat Slokevim, Deut. 16:20, n. 62 (p. 209), commenting on Mishnah Pe’ah 8:9—“It seems clear to me that when Scripture says ‘blessed is the man whose trust is in the Lord’ (Jer. 17:7), it is referring as well to a judge who judges truthfully, not respecting persons among the litigants and not fearing them, and sometimes suffer harm and sorrow as a result [emphasis supplied—D. S.]”
answer would be the dwarf, for his eyes now are higher than those of the giant. So, too, we dwarfs ride on the shoulders of giants⁶⁵….Where we find them disagreeing with one another, one holding something forbidden and the other holding it permitted, whom shall we rely on?⁷⁴…All we can do is analyze their words, for both are the words of the living God, and debate and probe the direction of the law on the basis of the force of each side’s views; for that is what the sages of the Mishnah and the Talmud did—the later authorities were never prevented from commenting on the earlier authorities, deciding between them, and contradicting their words….⁶⁶

A contemporary rabbi must possess many characteristics: pleasant relationships with people; purity of character; sensitivity and patience toward others; moderation in matters related to the community; empathy with others’ suffering⁶⁷ and joy; independence of thought; the ability to take a firm stand even in the face of pressure and criticism;⁶⁸ the capacity to decide doubtful cases; the profound, truly felt desire to benefit others, in sense of “repairing the world,” and to draw them

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⁶⁶ This is the approach taken by R. Moses Feinstein in Iggerot Mosheh, Yoreh De‘ah, sec. 88, p. 329. where he concludes a responsa with the following comment: “…and, if so, how much more should one not be concerned about questioning and quibbling with great, even the greatest, contemporary authorities, albeit courteously …,” and see id., his reasons for that conclusion. See also id., Yoreh De‘ah, part 2, sec. 45, p. 61: “regarding [his] apologies for disagreeing with me, I do not know why he needs to apologize. Certainly, everyone must determine the truth in accord with his own opinion, be it leniently or stringently, even if he is a student disagreeing with his teacher’s opinion, and certainly in other cases not involving students. And see my Iggerot Mosheh, Orah Hayyim, sec. 109 [p. 173], where I dealt with this at some length…” See also id., where, after examining this issue, he writes: “…and so, even if [he] considers me to be a great authority, he is permitted to disagree, and be is obligated to express his opinion [emphasis supplied—D. S.], and he need not apologize.” See also Iggerot Mosheh, Even ha-Ezer, part 1, sec. 63, p. 152: “And certainly there is no reason to be concerned about the honor of the great authorities, even if they are our greatest rabbis, to the point of restraining oneself from writing what appears correct in one’s humble opinion as a matter of law and a matter of practice…” See also Schochetman’s article, above, n. 63; and Rabbi H. D. Halevi, Aseh Lekha Rav, part 2 (Tel-Aviv, 1978), p. 219. And see the formulation of Rabbi Ben-Zion Uziel, Mishpatot Uziqi‘e, part 4, sec. 5, p. 33, who establishes the following necessary characteristics for a judge: “valorous, greatly learned and wise, rich in spirit, and able to fulfill ‘Fear no person, for the judgment is God’s’ [Deut. 1:17].”

⁶⁷ Another instructive paragraph form the introduction to Responsa Har Zevi, id., p. 19: In his eulogy for our master on the thirtieth day after his passing, in the sanctuary of the Me’ah She’arim Yeshiva,” his student and colleague on his court, Rabbi Abraham David Rosenthal, said Of Moses our master, the faithful shepherd of the House of Israel, Scripture says: “And he went out to his brethren…and looked upon their burdens” [Ex. 2:11]; Rashi interprets this to mean, “He set his eyes and his heart to be sorrowful for them.” There exist people who do not wish to look upon others in their times of trouble, lest it affect them and require them to provide help and support. But Moses our master looked upon their burdens, that is, he set his eyes on the straits in which his brethren found themselves but was not satisfied merely to look and to sigh; he set his heart as well, a heart filled with mercy, upon the sheep in his flock. When he was sorrowful for them, he found a way to help. Anyone who was in his presence found a heart that was sensitive to every human affliction. And with his pure heart, he strove ceaselessly to resolve all manner of individual and communal problems, not stopping or resting until he had done all he could. I recall one instance in
nearer to the Torah and its pleasant way of life; and deep and broad knowledge of the written and oral Torah. In Maimonides’ corresponding statement (Mishne Torah, Hilkhot Sanhedrin 2:7) reads as follows:

Each member of a court of three…must possess seven qualities, to wit: wisdom, modesty, piety, hatred of lucre, love of truth, love of people, and a good name. And all of these are stated expressly in the Torah.…” [And see the continuation of his remarkable comments.]

which someone stridently opposed his opinion and decision. Our master said to him: “Tell me truly, if this affected you and your life personally, would you hold the same opinion?”

For additional references, see Marc D. Angel, “Authority and Dissent: A Discussion of Boundaries,” Tradition, 25, 2 (1990), pp. 18-22. And see the article by P. Schifman, above, n. 26, which is devoted entirely to this subject.

The Rabbai (R. Moses of Trani) in his Responsa, part 1 (Venice, 1629, Lvov, 1861), sec. 280, took the view that all of these qualities were required and the absence of any one would disqualify a judge. Hida disagreed, stating (Birkhei Yoel, Hosen Mishpat, sec. 7, par. 33): “these are not stated as necessary requirements, as [explained by] Leleg Mishneh on [Hilkhot] Sanhedrin, chap. 2… but it is plain that all these qualities were not found in any of them, there is no impediment [to going forward]…. But I needed to say that in order to rule out the view of one who followed the Rabbai. And see Rabbi H. D. Halevi, Asb lekha ran, part 6 (Tel-Aviv, 1985), p. 269.

See Seder Eliyahu Rabba (Ish-Shalom ed.), chap. 14, p. 67: “From this they learned: A person should not teach Torah publicly unless he has read the Torah, Prophets, and Writings and studied mishnayot and midrash, as it is written, ‘who can speak of the mighty acts of the Lord, [or make all His praise to be heard]’ (Ps. 106:2)” And cf. Makkot 10a: “Who is fit to speak the multitude? One who possesses all the produce, as R. Elazar said: what is the meaning of ‘who can speak of the mighty acts of the Lord, or make all His praise to be heard’?—Who is fit to speak of the mighty acts of the Lord? One who can make all his praise be heard.” (And see, to similar effect, Horayot 13b.) And cf. Pirque de-Rabbi Eli’ezer, beginning of chapter 3, in the name of R. Eliezer ben Horqanos and the comment of Radal there, note 2; Yerushalmi Berakhot 9:1, in the name of R. Samuel ben Nagman; and Midrash Shochar Tor (Midrash on Psalms), chapter 9, etc. See also R. Issachar Tamar, Aleh Tamar, part 1 (Givatayim, 1979), pp. 279-280; but fuller consideration is beyond the scope of this article.

See Rabbi Ben-Zion Uziel, Mishpeiti Uzqi’el, part 1 (Tel-Aviv, 1935), introduction, pp. ix-x: “In all my responsa, I set out neither to be lenient nor to be stringent; rather, my intention was to seek and find the truth. As far as my understanding went, I was guided in my path by the light of my earlier rabbis, whose waters we drink and by whose light we are illuminated; and my eyes were illuminated by this holy light that shines forth from the hidden source of light….” And see Zvi Zohar, “Aznia ut ba-Poseq be-Yahas it-Pesiqah be-Amar” in Safrat and Saqi, eds., above, n. 26, pp. 308-310.

It is also worth noting the comments of Rabbi Reines (1839-1915), in his book Orar ve-Simlah [Light and joy] (Vilna, 1898), pp. 119-120: “The search for truth is beloved before God and as precious as truth itself. For truth is not bounded by natural boundaries and independent definitions, and no person can grasp truth in his hand; and his destiny in his world is only to seek truth….” And see Avi Saqi, Eilu ve-Eilo – Mashiha’uto shel ha-Sah ha-Hilkhati: Iyunon be-Sifrei Yizra’el [These and those – the meaning of halakhic discourse] (Tel-Aviv, 1996), chapter 9, pp. 143-148, “Ha-Erekh ba-Dati shel Baqashat ha-Emet” [The religious value of seeking the truth].

Later in the passage, he comments on the characterization of judges in Deut. 1:15 as “wise men and full of knowledge”— “those whom people regard highly.” This is based on Sanhedrin 88a—“One who is wise and humble and whom people regard highly is appointed a judge in his city.” And see R. Barukh ha-Levi Epstein, Torah Temimah ad loc., note 9 (p. 3a): “It is not clear how he took the word yedu’im [“full of knowledge” in this sense, particularly since the Sifrei [on Deut. 1:13, ed. Finkelstein, p. 22] interprets it otherwise. Nor does he cite the Sifrei’s interpretation, that it is necessary that it be known who the judge is. Perhaps he understands the Sifrei to mean that through knowing their qualities and good deeds, the people will come to admire the judges. And that is the point of the previously cited [in Torah Temimah] mishnah: what is the meaning of “men” [anashim]? Would we think that women would be appointed? But the meaning is “Get you wise men, etc.” [id., verse 13]. But then we would say that yedu’im meant “known for their wisdom and understanding. It therefore says anashim, known for their human qualities [emphasis supplied—D.S.], that is, that they are earnest, righteous, God-fearing, desired [kesufim] admired, and esteemed. Regarding the word kesufim, see Torah Temimah, id., note 5 (p. 3a) and Finkelstein’s annotations, p. 22.

See above, end of n. 50.