

Halakhic Values: Pesaq or Persuasion

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Abstract: This essay outlines a contemporary debate regarding the role of Torah values in halakhic decision-making. R. Mayer Twersky and others argue that rabbis have a responsibility to analyze not only legal technicalities, but also axiological concerns of the Torah. Such concerns have halakhic weight and can engender formal halakhic prohibitions (*issurim*.) R. Saul Berman and others agree that rabbis must look beyond mere technical points of *halakhah*, but argue that such concerns do not yield halakhic requirements or prohibitions. In addressing these concerns, rabbis are to use persuasion rather than authority with their constituents. Manifestations of this dispute are noted in the area of *hilkhot shabbat* and women's prayer groups. Responsa literature is traced to find antecedents for both positions.



Halakhic Values: Pesaq or Persuasion

Reuven Matityahu Singer*

For centuries scholars have recognized that our tradition is made up of more than just its technical obligations and prohibitions, *issurim* and *hiyyuvim*.¹ The *mesorah* has overarching values that can be referred to as the tradition's *telos* or *élan*. The Torah conveys to us its values in a number of ways. Some are explicitly mandated. For example, the value of compassion is taught through the rabbinic teaching "just as He [God] is gracious and compassionate so to you [must be] gracious and compassionate" (*Shabbat* 133b). Some values are stated explicitly yet not formulated as mandates. For instance, Rabban Shimon ben Gamliel states, "all my days I grew up among the sages and I never found anything for the body better than silence" (*Avot* 1:7). Clearly, Rabban Shimon ben Gamliel values silence, but he does not formulate this value as a directive of "be silent," or "limit speech." He simply informs us that silence is indeed to be valued. Other values are not stated explicitly. They may be imbedded implicitly in a narrative.² For example, the Torah never mentions any preference for monogamy over polygamy. Nevertheless, the Torah's description of the problems resulting from the polygamous relationships of the patriarchs might lead one to conclude that the Torah values

monogamy.

If rabbinic decisors believe a particular behavior, permitted on a technical level, is not in consonance with the overarching objectives of the Torah, does that activity become halakhically forbidden? Would we apply the term "asur" to it?

These Torah values, whether mandated or not, explicit or implicit, stand behind the technicalities of the *halakhah*. And while *halakhah*'s formal legal requirements are manifest expressions of these values, these formal structures do not exhaust the possible expressions of these values. Therefore Jewish tradition has directed us to behave in accordance with both the technical formulations of law and the values for which they stand. The Torah expects us to go beyond compliance with its technically directed guidelines.³ The Torah counts on us to understand its values and implement them in conduct that lies outside its formalities.

A debate has emerged recently in the Orthodox community over the legal force of the *mesorah*'s instruction to

* Many thanks to those who read over this essay and offered their comments. I am particularly grateful to R. Dov Linzer and my wife Emily for their important comments.

¹See R. Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakhah?" in *Contemporary Jewish Ethics*, ed. M. Kellner (New York 1978); R. Yitzchak Twersky, "Make a Fence Around the Torah," *The Torah U-Madda Journal* 8 (1998-1999) pp. 25-42; and Eugene Korn, "Legal Floors and Moral Ceilings: A Jewish Understanding of Law and Ethics," *The Edah Journal* 2:2.

²Clearly, values of this sort are more difficult to pin down. Because they are implicit, great subjectivity is involved in determining what they are. (For a good example of how the same narrative can be used to draw widely divergent value lessons see Yitzchak Blau, "Ploughshares Into Swords: Contemporary Religious Zionists and Moral Constraints," *Tradition* 34:4 (Winter 2000):42-43, 51-52.) Nevertheless, the difficulty in determining their nature does not preclude their existence.

³See n.2

reach beyond the formalities of the law. We are asking: what is the halakhic status of this need to go beyond the technical parameters of *halakhah*? If rabbinic decisors believe a particular behavior, permitted on a technical level, is not in consonance with the overarching objectives of the Torah, does that activity become halakhically forbidden? Would we apply the term "*asur*" to it? Or, perhaps, do individuals have the discretion at a legal level to disregard rabbinic apprehension over such behaviors? Two leaders of contemporary Orthodoxy have articulated opposing views in answering these questions. As we will see, R. Mayer Twersky has staked out a position claiming that halakhic values have binding force in the halakhic system and can engender legal prohibitions of behaviors that are permissible on a formal and technical level. For R. Twersky, analysis of halakhic values is part of the process of rendering *pesaq halakhah*. R. Saul Berman claims that the mesorah's directive to go beyond formal legal requirements does not have legal authority. Behavioral compliance with the implicit values of *halakhah* is voluntary, and the rabbinic role is to persuade individuals to comply with the *telos* of the law, rather than to pronounce non-compliance legally forbidden. For R. Berman, analysis of halakhic values must remain separate from *pesaq halakhah*.

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This essay moves to exploring the legitimacy of each approach after outlining and clarifying the extent of this debate. It examines the use of the mandated halakhic value termed "*shabbaton*" in responsa literature, revealing precedents for both R. Twersky's and R. Berman's positions. Finally, it considers the implications that may be drawn regarding the force of other Torah values.

I. The Debate and its Dimension

A good place to begin to trace the dispute is an article by Rabbis Aryeh and Dov Frimer outlining the halakhic positions regarding women's prayer groups.⁴ In that article they include a position that claims that while women's prayer groups are technically permitted, they should not be instituted:

Rabbi Joseph B. Soloveitchik, like R. [Moshe] Feinstein, was of the view that a women's prayer service, if properly structured, could be conducted in accordance with *halakhah*. Nonetheless, the Rav was most hesitant about women's *tefillah* groups as a general practice and felt that they should not be encouraged. Consistently, he would recommend to his students not to hold such services...⁵

The Rav felt strongly that the line between strict *halakhah* and public policy must not be blurred.⁶

They [R. Soloveitchik and other halakhists] do not perceive these issues as matters of strict *halakhah* per se, but rather of *hashkafah* and public policy... Within the broad framework of the halakhic system, the classification of the rationale is not merely technical; it has significant ramifications and implications as to their mutability and flexibility in reaction to time and place...⁷

It is clear that these authors claim that the Rav and others made a distinction between *hashkafah* or public policy and *halakhah*. According to their understanding of R. Soloveitchik, women's prayer groups are ill advised, yet permitted. Women who would engage in them would be making a bad decision, but not violating *halakhah*.

⁴Aryeh and Dov Frimer, "Women's Prayer Services – Theory and Practice, Part 1 – Theory," *Tradition* 32:2 (Winter 1998): 5-118.

⁵Ibid., p. 40.

⁶Ibid., p. 43.

⁷Ibid., p. 47.

In the following issue of *Tradition*, R. Mayer Twersky (without explicitly referencing their article) takes issue with the Rabbis Frimer's understanding of Rav Soloveitchik's stance. He laments:

The discussion regarding women's *tefillah* groups has regrettably focused excessively on technical issues and legalities... Undoubtedly such technical perspectives and narrow questions are necessary to ensure our compliance with all minutiae of *halakhah*. Torah, however, consists, not only of halakhic details, but also of halakhic values. Unfortunately the latter have been neglected in the discussion concerning women's *tefillah* groups.⁸

R. Twersky claims that hashkafic concerns are actually halakhic values that impinge upon halakhic decision-making

And he counters:

Halakhah is a two-tiered system consisting of concrete, particularized commandments governing our actions as well as abstract, general imperatives governing the matrix of our actions... The Torah legislates not only actions, but also *de'ot* (ethical-moral-religious-intellectual dispositions). It prescribes ritual but also establishes boundaries for the concomitant religious experience.⁹

The dual focus of Torah law has important repercussions for the methodology of *pesaq*. Any contemplated action or course of action must be evaluated on two levels. We must investigate if it is technically correct and permissible - viz., are any particulars of Torah violated. In addition, we must determine if the proposal is consistent with Torah principles, attitudes, values and concepts. The permissibil-

ity or appropriateness of any particular action or initiative can only be determined after such a two-pronged analysis-practical and axiological.¹⁰

R. Twersky rejects the distinction between "strict *halakhah*" and "*hashkafah*" drawn in the Frimer article. He claims that the hashkafic concerns referred to are actually halakhic values that impinge upon halakhic decision-making. To demonstrate how halakhic values influence legal halakhic decision-making, R. Twersky looks to the comments of Ramban on the word "*shabbaton*":

It appears to me that this interpretation intends to state that we are commanded by law of the Torah to have rest on a festival day even from activities that are not in the category of *melakhah* (work). Thus we are not to be engaged the whole day in wearisome tasks measuring out crops of the field, weighing fruits and gifts, filling the barrels with wine and clearing away the vessels, and moving stones from house to house and from place to place [although none of these activities is "work" in the strict sense of the term]. Similarly, if it be a city encompassed by a wall and its gates are locked at night, [and it is therefore according to law of the Torah treated as one domain, and the prohibition against taking out aught from one domain to another is inapplicable there], they would be loading heaps on asses, and also wine, grapes, and figs and all manner of burdens they would bring on a festival; and the market place would be full for all business transactions, the shops standing open and the shopkeepers giving credit, the money-changers sitting before their tables with the golden coins before them and the workers would rise early to go to their work and hire themselves out for such works just as on weekdays, and so on! And since all these matters do not entail *melakhah*, they would be permissible

⁸R. Mayer Twersky, "Halakhic Values and Halakhic Decisions: Rav Soloveitchik's *Pesaq* Regarding Women's Prayer Groups," *Tradition* 32:3 (Spring 1998): 5.

⁹Ibid. 8.

¹⁰Ibid., p. 9.

on a festival day and even on the Sabbath itself! Therefore the Torah said that [the festival should be a day of] *shabbaton* (solemn rest), meaning that it should be a day of rest and ease, not a day of labor [and weariness].¹¹

R. Twersky comments:

In observing *shabbat* our behavior must be technically correct – i.e., we must not perform *melakhah*. But we are also obligated to maintain the élan of *shabbat*. This requirement, as detailed by Nahmanides, precludes a wide range and array of non-*melakhah* activities. A contemporary addition to Nahmanides' list of prohibited non-*melakhah* activities would be taking advantage of an *eruv* to dress in shorts and t-shirts and engage in sports on *shabbat*. Such anomalous behavior does not involve any technical violations of the particulars of *shabbat*, but it certainly conflicts with the principle of *shabbaton*, the élan of *shabbat*; such behavior is therefore unequivocally wrong.¹²

R. Twersky's line of reasoning may be summarized as follows. Behind all the technical prohibitions of labor on *shabbat* stands a halakhic value to create a day of rest and repose termed *shabbaton*. Ramban demonstrates how this halakhic value engendered prohibitions that the technicalities of *hilkhot shabbat* left permitted. This value prohibits activities unmentioned by Ramban like engaging in sports on *shabbat* because such activities violate the value of *shabbaton*.

R. Twersky uses a similar logic to prohibit (or explain R. Soloveitchik's prohibition of) women's prayer groups. He seems to acknowledge that women's prayer groups violate no technical halakhic *issurim*. He declares that the

fundamental problem with such services is an axiological one. He begins by demonstrating that the *mesorah* values the eschewing of active leadership in communal prayer. He builds this perspective on the following passages written by R. Soloveitchik.

If genuine prayer is performed in the heart, there is no need for a master of ceremonies who will mediate between the congregation and the Creator... There is no need for the rabbi to stand on a platform, bedecked in "priestly vestments," and conduct services. He and the simple Jew are of equal lineage before the Omnipresent and it is incumbent upon [both of] them to pray on the lower level of the synagogue without any distinction...¹³

Furthermore:

Standing in a place above that of the congregation is at odds with service of the heart, which expresses the sentiment of "from the depths."¹⁴

R. Twersky additionally notes that

Hanna, the quintessential supplicant, seeks neither approbation nor active participation, nor leadership; instead she seeks and beseeches God to find solace for her troubled soul.¹⁵

Based upon these sentiments, R. Twersky avers the following axiological principle: "Desiring and emphasizing active participation and leadership are antithetical to authentic service of the heart, which expresses the sentiment of 'from the depths.'" Given that "advocates of women's *tefillah* groups reason that these gatherings provide women with active, participatory roles in prayer,"¹⁶ R. Twersky concludes that they are impermissible based

¹¹Ramban on Lev. 23:24. Translation from Chavel English edition.

¹²Twersky, "Halakhic Values and Halakhic Decisions," p. 6.

¹³R. Joseph Ber Soloveitchik, "*Tefillatam shel Yehudim*," in *Ma'ayanot*, vol. 8, p. 11.

¹⁴*Ibid.*

¹⁵Twersky, "Halakhic Values and Halakhic Decisions," p. 12.

on his analysis of halakhic values.

While at first glance, R. Twersky's analyses of sports on *shabbat* and women's prayer groups seem equally forceful, there is a significant difference between the two. As noted above, the Torah informs us of its values in different ways. Some are implicitly embedded in the tradition, others are explicit, and still others are directly mandated. One could argue that not all values have equal force.¹⁷ Certainly the explicitly mandated values would be the most forceful while values that are not mandated would be less forceful – and even weaker if they are only implicit.

Hannah may have prayed "from the depths," but that is not equivalent to an explicit directive that all Jewish prayer should be characterized as such.

Such a gradation in the force of Torah values would have an important impact on this discussion. The Torah itself explicitly directs us to characterize our *shabbat* experience as one of *shabbaton*. On the other hand, neither the written Torah nor the rabbinic tradition clearly mandates that our prayers be characterized by the adage of "from the depths." To be sure, the term "from the depths" is a phrase from the Bible. But its context constitutes a description of how the psalmist happens to be crying out to God, not necessarily a directive to others as to how they should pray to God. R. Soloveitchik's beautiful words seem to be a description of the phenomenology of prayer, not an explicit halakhic directive that prayer must be categorized as "from the depths." Indeed, if one is consistent and takes R. Soloveitchik's words as prescriptive rather than descriptive, one might claim that his position would forbid the services of a professional *hazzan* – a conclusion that seems unlikely. Hannah may have

prayed "from the depths," but that is not equivalent to an explicit directive that all Jewish prayer should be characterized as such.

This is not to suggest that "from the depths" is not a legitimate halakhic value. Indeed, certain *dinim* of *hilkhot tefillah* seem to be based on the tradition's distaste for individuals desiring the limelight in *tefillah*. R. Soloveitchik understands the prohibition of standing on a platform during prayer to be based on such a principle. The *halakhah* instructing individuals to refuse initial requests to serve as *shaliah tzibbur*¹⁸ seems to be based on such an approach to prayer. While there is no explicit directive to characterize our prayers with the sentiment of "from the depths," the tradition implicitly through its descriptions of prayer and certain *dinim* articulates an implicit value. While the tradition appreciates the value of "from the depths," it never explicitly informs us that we must characterize our *tefillot* according to its spirit. Unlike *shabbaton*, "from the depths" is not a halakhic value that is articulated as a directive. One can argue that *shabbaton* has halakhic weight because it is mandated, whereas "from the depths" has no halakhic force because it is not. Yet R. Twersky holds that this value of "from the depths" must be implemented and has a legal force in the halakhic system. In short, R. Twersky's position is that both explicitly mandated and non-mandated halakhic values can affect the legal system and produce halakhic ramifications.

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In contrast to R. Twersky's position, R. Saul Berman gave a lecture at the 2000 Feminism and Orthodoxy confer-

¹⁶*Ibid.*, p. 10. This is R. Twersky's understanding of the motivation behind the implementation of women's *tefillah* groups. He does not mention other possible motivations such as: a desire for proximity to the Torah and *bimah*, the educational experience derived from becoming familiar enough with the *tefillot* to lead them, or the enhancement of *kavanah* that some women may accomplish in an exclusively female context. Nevertheless this study will not pursue an argument against R. Twersky's understanding of the motivation behind women's *tefillah* groups. For the purpose of exploring the issue of the place of halakhic values in *pesaq halakhah*, we will presume that indeed women's *tefillah* groups violate the axiom of "from the depths."

¹⁷R. Dov Linzer pointed out this important distinction to me.

¹⁸*Berakhot* 34a; *Shulhan Arukh, Orach Hayyim* 53:16.

ence entitled, "Power, Authority or Persuasion: The Rabbinic Role in the Halakhic Rights and Duties of Women." R. Berman states that Torah includes a "vital and critical dimension, [the] discretionary spiritual judgment of individuals." This dimension includes a realm of behavior that is neither forbidden nor mandated. Therefore, *pesaq halakhah* plays no role in this realm. The rabbinic responsibility in this dimension is not authoritative legal decision making, but rather persuasion. Rabbis may see fit at times to encourage behaviors that the law does not require. Likewise, rabbis may discourage behavior that the law allows. R. Berman maintains that the phrase "*ein ruah hakhamim nohe mimmenu*" is used by *Hazal* to indicate rabbinic censure of permissible yet unrecommended behavior. He asserts that the intent of *Hazal* in their use of this phrase is, "This [act] is *mutar*, but we think you shouldn't be doing this." It is striking to compare R. Berman's use of the word "*mutar*" as characteristic of this phrase with R. Twersky's understanding. The latter writes:

Hazal in many instances highlighted the difference between technical and axiological infractions by delineating different categories of impermissible behavior. Whereas the former are always labeled *asur*, the latter though categorically wrong and impermissible, are classified as *ein ruah hakhamim nohe mimmenu*, or alternately without classification unequivocally censured.¹⁹

Just as they disagree over *ein ruah hakhamim nohe mimmenu*, Rabbis Berman and Twersky disagree over Ramban's understanding of Lev. 19:2, "*qedoshim tihyu*." Ramban claims there that the laws of the Torah are insufficient; that it is possible to be a scoundrel within the limits of the Torah. He therefore states that the Torah instructs us to be holy by going beyond the formal explicit requirement of the law. R. Twersky seems to understand this charge of *qedoshim tihyu* to engender actual obligations

and prohibitions. R. Berman, on the other hand, understands Ramban to say that "*qedoshim tihyu*" is the vehicle through which we are urged toward the use of our autonomous understanding of God's role in the world.

For R. Berman, *qedoshim tihyu* does not authorize *poseqim* to forbid behavior. Compliance with *qedoshim tihyu* is left to the individual's "autonomous understanding." R. Berman holds that the whole discussion of women's prayer groups belongs in this category. The debate over women's prayer groups moves away from the categories of permitted and forbidden to the categories of advisable and inadvisable.

Thus it is clear that R. Berman holds that what we have termed "non-mandated values" have no legal force. What about explicitly mandated values like *shabbaton*? The extent of R. Berman's position becomes clear in his article entitled "Playing Ball on Shabbat and Yom Tov."²⁰ In this article, he analyzes the issue of ball playing on *shabbat* and concludes that ball playing on *shabbat* is discouraged by *poseqim*, but nevertheless is technically permitted: "Ball playing on *shabbat* and *yom tov* is a vacuous, pointless activity, almost as useless as sleeping hours on end. But it is halakhically permissible..."²¹

In the reader response and author interchanges to *The Edah Journal*,²² two readers criticize R. Berman for not taking into account the issue of *shabbaton*. Echoing R. Twersky's position, Terry Novetsky states, "*Hilkhos shabbat* encompasses a much larger tapestry than mere technical observance of negative precepts. Thus, when considering those as well as many other factors involved in *pesaq halakhah*, I do not believe that Rabbi Berman's absolute and unequivocal position is sustainable." Like R. Twersky, Novetsky relies on the passage in Nahmanides. He writes, "Ramban stresses that the corpus of *halakhah* is comprised of the combination of the specifics (the *issurei melakhah*) plus the gaps to be filled in by the themes

¹⁹Twersky, "Halakhic Values and Halakhic Decisions," p.13.

²⁰R. Saul J. Berman, "Playing Ball on Shabbat and Yom Tov." *The Edah Journal* 1:1

²¹Ibid.

expressed therein."²³

R. Berman maintains that the Torah includes a vital and critical dimension, [the] discretionary spiritual judgment of individuals. The rabbinic responsibility in this dimension is not authoritative legal decision-making, but persuasion.

Novetsky correctly notes the absence of any discussion of *shabbaton* in R. Berman's article. Even the mandated *telos* of *shabbaton* finds no place in R. Berman's discussion. R. Berman's position appears to be that even mandated values do not have halakhic import. Their role is to inspire voluntary behavior beyond what the law requires.

II. The *Poseqim* and Their Use of *Shabbaton*

Rabbis Berman and Twersky lay out their divergent positions without pointing to precedents in the halakhic literature that support their positions. It seems that the next logical step in this discussion is to explore the role of halakhic values in recorded *pesaq halakhah*. This is a complex task given the possibility, noted above, that different types of values may have different halakhic weight. A full exploration of this question needs to take account of this subtle point. The weight of mandated values must be explored in isolation from non-mandated values and *vice versa*. The remainder of this study's goal is to explore the role of the mandated value *shabbaton* in the *responsa* literature. It will be shown that both positions have precedents in the *poseqim*. Some tentative deductions will be added regarding what might be drawn from the *shabbaton* discussion to non-mandated values.

Apparently the first major *poseq* to use this passage in Ramban was the R. Moses Sofer (*Hatam Sofer*). In two *responsa*, the *Hatam Sofer* uses this passage to reach

halakhic conclusions. R. Sofer was asked about the status of Jews who do commercial business in their stores on *shabbat*.²⁴ He responds that such individuals are to be considered violators of biblical *shabbat* prohibitions. They are in violation of the command to be at rest on the Sabbath day as outlined by Ramban. While the Torah itself never mentions a prohibition of commerce, the spirit of *shabbat* as expressed by *shabbaton* produces an *issur*. R. Sofer detects a possible objection to his stance. He notes that the Talmud considers business transactions to be forbidden rabbinically, not biblically. How then can he claim that those who keep their stores open are to be considered violators of *shabbat de-oraita*? R. Sofer explains that occasional business transactions would not violate any biblical command. Ramban's comments only yield a prohibition of habitual and routine commerce on the Sabbath. The rabbinic enactment was an extension to prohibit even occasional transactions. Here R. Sofer uses this passage as R. Twersky understands it. Even though we find no technical prohibition in the Pentateuch forbidding business activity, the *Hatam Sofer* understands the *elan* of *shabbaton* to engender an actual biblical *issur*.

In another *responsum*,²⁵ the *Hatam Sofer* was asked whether train travel is permitted on *shabbat*. After a long discussion, he concludes that train travel would violate the prohibition of *tehum shabbat* (the boundary, generally 2,000 cubits from the city limits, beyond which movement on *shabbat* is forbidden). He then notes a striking discrepancy in the *halakhot* of *shabbat*. Travel by boat on *shabbat* is generally forbidden the rabbis, yet they make an exception for travel to perform a *devar mitsvah* includes travel to make a livelihood. Similarly, *mahshikhin al ha-tehum* (beginning a journey on *shabbat*, going only as far as the boundary, in order to facilitate going further once *shabbat* ends) is forbidden, but an exception can be made for those whose journey's purpose is for burying the dead

²²Edah.org/backend/coldfusion/Journal_res.cfm?id=13 and Edah.org/backend/coldfusion/Journal_res.cfm?id=20

²³07/25/01 Reader/Writer responses to *The Edah Journal*

²⁴*She'elot Hatam Sofer* 5:195.

²⁵*Ibid* 6:97.

or arranging marriages. The Hatam Sofer wonders why a journey for livelihood is not sufficient to allow *hahshakhah al ha-tehum*. This question is even greater given that *hahshakhah al ha-tehum* does not involve a noticeable violation of *shabbat*. One might expect greater leniency with regard to it. R. Sofer explains that the reason for the greater stringency regarding *hahshakhah al ha-tehum* is that it involves a Torah prohibition. The individual who sets out on his journey on *shabbat* is in violation of the biblical command to observe a restful *shabbat* as explained by Ramban. Walking towards the *tehum* is in violation of the *shabbaton* of *shabbat*. Therefore it is permitted only in a case of *isqei ha-met* (tending to the deceased) or *isqei kallah* (marriage arrangements). However, boat travel is not a violation of *shabbaton*, for there is no exertion or movement of the body that violates the restfulness of *shabbat*. An individual on a boat may rest just as at home. Based on this reasoning, R. Sofer deduces another reason for forbidding train travel. On the train, one's body is jostled around and is therefore unable to achieve the restfulness that one is accustomed to at home. He therefore concludes that train travel is biblically forbidden according to Ramban. Here again the Hatam Sofer understands that the restful spirit of *shabbat* indicated by the word *shabbaton* yields a halakhic prohibition of train travel on *shabbat*.

Based on the Hatam Sofer's use of Ramban's comments, other *poseqim* have similarly forbidden activities that they felt to be contrary to the *élan* of *shabbaton*. In *Heikhal Yizhaq*,²⁶ R. Isaac Herzog builds on the *Hatam Sofer's* understanding of the prohibition of conducting business on *shabbat*. R. Sofer argues that habitual business activity is biblically forbidden because of *shabbaton*. R. Herzog similarly argues that habitual use of non-Jews to perform *melakhah* for Jews is a biblical violation of *shabbaton*. While *amirah le-nokhri* (requesting a gentile to perform an action on *shabbat* that is forbidden to a Jew) is usually

understood to be a rabbinic prohibition, R. Herzog explains that it is actually an extension of a Biblical prohibition. Based on the *Hatam Sofer's responsum*, R. Herzog claims that routine use of non-Jews to do *melakhah* is forbidden biblically, and that the rabbinic decree simply extends the prohibition to even sporadic use. R. Herzog understands the "élan" of *shabbat* as expressed in Ramban's comments to engender a biblical prohibition of routine *amirah le-nokhri*.²⁷

The weight of mandated values must be explored in isolation from non-mandated values and vice versa

R. Eliezer Waldenberg²⁸ also built upon the *Hatam Sofer's* responsa to forbid bicycle riding on *shabbat*. He concluded that the exertion and movement of bicycle riding is forbidden, on the basis of R. Sofer's understanding of Ramban's comments. Just as R. Sofer forbids the jostling of the body involved in train travel, so too such movement would preclude any permission to ride a bicycle on *shabbat*. R. Waldenberg also finds confirmation of his position in a *responsum* of the *She'eilat Ya`aqov*, which he cites.

While Rabbis Waldenberg and Herzog built on the position of the *Hatam Sofer*, R. Benzion Meir Hai Uziel limited the range of R. Sofer's position. R. Uziel was asked about taking local city public transportation on *shabbat*.²⁹ In the course of his discussion he brings up the *Hatam Sofer's* position on train travel and raises a difficulty with it. He cites R. Moses Isserles (Rema),³⁰ who states that riding in a wagon driven by non-Jews is forbidden. The Rema gives the reason for this prohibition, applying to it the rabbinic decree against riding animals lest one cut a branch to prod the animal.³¹ Based on this statement by Rema, R. Uziel challenges the position of the *Hatam Sofer*, wondering why Rema does not mention as well the jostling that R. Sofer regarding as contrary to the require-

²⁶*Heikhal Yizhaq, Orah Hayyim* #30.

²⁷See *Aseh Lekha Rav*, vol. 6 #27 pg. 88 where R. Chaim David Halevy comes to the same conclusion.

²⁸*Ziz Eliezer*, vol. 1 #21 and vol. 7 #30.

ment of *shabbaton*. R. Uziel goes even further, suggesting that the *Hatam Sofer's* argument prohibiting movement of the body should preclude even walking on *shabbat*! That absurdity leads R. Uziel to regard the *Hatam Sofer's* position as weak..

For R. Uziel, the halakhic telos has legal force only when its élan is egregiously violated

R. Uziel therefore suggests an alternate understanding of the *Hatam Sofer*.³² He suggests that R. Sofer's prohibition of bodily movement applies only in cases where the body is in constant motion all or most of *shabbat*. Such an occurrence, he claims, would indeed violate the *halakhah* of *shabbaton* as explained by Ramban. While R. Uziel does allow for a halakhic application of Ramban's comments, it is certainly more limited than that suggested by R. Waldenberg. Presumably R. Uziel would forbid bicycle riding that lasted most of *shabbat* as a violation of *shabbaton*. However, more limited riding would not violate *shabbaton*.³³ Similarly, prohibiting ball playing for even a few hours on *shabbat* would also seem according to R. Uziel to be an over-extension of the principle. For R. Uziel it seems that the halakhic *telos* has legal force only when its élan is egregiously violated. It has no halakhic status on more subtle levels.

R. Mordechai Halevi Horovitz in his *Mattei Levi*³⁴ goes even a step beyond limiting the *Hatam Sofer*. He rejects Ramban's view outright as a source for issuing *issurim*. In

1906, R. Horovitz was asked by a rabbi in Paris if traveling on the subway is permitted on *shabbat*.³⁵ He begins his answer by quoting the *responsum* of the *Hatam Sofer* mentioned above regarding train travel. He writes that R. Sofer built his prohibition of train travel solely³⁶ on the issue of *tehumim*, which does not arise with respect to subway train travel since the train never leaves the city limits. He further argues that even if the subway left the city limits, it would not violate *tehumim*, since the train is always enclosed by underground walls. He nevertheless finds travel by subway problematic. He states if subway travel were permitted, then those who are not meticulously observant might become lax in other areas of *halakhah*. Furthermore, even those who are particularly God fearing might come to imagine that all train travel was permitted and might fail to see the subtle differences between subway and other train travel.

R. Horovitz goes on to say that at first he considered the passage in Ramban as a reason for prohibition. He had surely seen the *Hatam Sofer's* position in the very *responsum* from which he quotes. Yet R. Horovitz refrained from using the passage in Ramban to prohibit. Clearly, R. Horovitz felt that subway travel was not in the spirit or "élan" of *shabbat*. Why did R. Horovitz reconsider and refrain from relying on this Ramban to forbid subway travel?

He based his change of mind on a discussion³⁷ of the prohibition of *setam yeinam* (gentile wine). The question is

²⁹*Pisqei Uziel be-She'elot ha-Zeman*, #13.

³⁰*Shulhan Arukh, Orach Hayyim* 305:18.

³¹See *Bi'ur Halakhah* ad loc., s.v. Gam.

³²R. Dr. David Novak pointed out to me in a phone conversation that R. Uziel may not agree with the *Hatam Sofer's* position and may be offering an alternative understanding of it so that his own *pesaq* is *yozei kol ha-de'ot* (consistent with all views).

³³That is not to say that R. Uziel would not refrain from prohibiting bicycle riding for other reasons.

³⁴R. Horovitz was a *talmid muvhaq* of R. Esriel Hildesheimer. R. Hildesheimer referred to him as "an outstanding student and *zaddiq*, of whom among all the youth of this generation almost no one can be found..." (Hildesheimer Briefe, letter 47, quoted in David Ellenson, *Esriel Hildesheimer and the Creation of a Modern Jewish Orthodoxy* (Tuscaloosa, Alabama, 1990), p.97. R. Horovitz held correspondence with the great sages of his time. R. Isaac Elhanan Spektor in one such correspondence referred to him as "the Rabbi, the famous *gaon*, sharp and expert in his learning, pure and clean..." (*Mattei Levi*, vol. II, p. 123). For more on R. Horovitz see R. Isaac Unna, "Marcus Horovitz," in *Jewish Leaders*, ed. Leo Jung (Jerusalem, 1964), pp. 247-257 and Isaac Heinemann, "Marcus Horovitz," in *Jewish Leaders*, ed. Leo Jung (Jerusalem, 1964) 259-272.

³⁵*Mattei Levi*, vol. II, *Orach Hayyim* #19.

³⁶This is not accurate. The *Hatam Sofer* forbids train travel for two reasons, *tehumim* and his understanding of Ramban. By omitting R. Sofer's reliance on Ramban, R. Horovitz is already hinting at his ultimate rejection of its validity.

asked, why is cooked wine an exception to the rule prohibiting the drinking of *setam yeinam*? The reason behind the prohibition, to prevent socialization that may lead to intermarriage, applies just as much to cooked wine as it does to non-cooked wine. To rephrase the question in R. Twersky's terms, the axiological principles of the prohibition against wine apply equally to cooked wine and liquor. The answer quoted by R. Horovitz is that the sages forbade only uncooked wine and that we have no power to forbid other beverages even where the reasoning of the original prohibition applies.

The sages of the past are the ones who determined the prohibitions to which the Torah's command of "tishbot" apply. This suggests that only an authoritative body of sages has the power to determine the non-melakhah acts which tishbot or shabbaton restrict.

R. Horovitz sees in this answer a direct contradiction to R. Twersky's thesis. The axiological concerns cannot forbid something that has not been technically forbidden. He therefore resists employing Ramban's comments as a source to forbid,³⁸ even though he clearly sees subway travel as contrary to the spirit of *shabbat*. R. Horovitz articulates his position quite forcefully in the last paragraph of his responsum. There he states that "the seal of The Holy One Blessed be He is truth and in this matter it is good and urgent to declare the truth; and that is that fundamentally there is no foundation to forbid it (subway travel) but since it may lead to failings, those who fear [God] should distance themselves from ugly deeds and their like, and they should treat it as [an] *issur*." This posi-

tion is quite consistent with R. Berman's claim that certain behaviors are neither forbidden nor mandated, and in these areas rabbis are to use their powers of persuasion rather than authority to steer the community to do the right thing.

R. Horovitz does not explain how he understands this Ramban. Perhaps R. Horowitz felt that Ramban understood the Torah to empower the talmudic sages to legislate prohibitions against non-*melakhah* activity, though not permitting later, individual rabbis, in the absence of such legislation, to forbid activities they find out of spirit with *shabbat*. Indeed, such an understanding of Ramban is supported by the fact that all the examples of non-*shabbaton* activities that Ramban brings are activities against which the rabbis indeed declared decrees. In fact the *Maggid Mishneh* seems to understand Ramban in just this way. Rambam³⁹ suggests that the Torah's command *tishbot* (Exod. 23:12) instructs us that we are to refrain from acts that are not *melakhah*. He then states, "the sages forbade many things because of [the requirement] to rest (*shevut*)."
The *Maggid Mishneh's* comments there read as follows:

The intention of our master [Rambam] is that the Torah forbade the individual *melakhah* in the way that we have made clear their matters and measures. And still an individual could toil in things that are not *melakhah* the entire day. Therefore the Torah said "*tishbot*." Thus wrote Ramban *z"l* in his commentary on the Torah. And the sages came and forbade many things.

³⁷R. Horovitz quotes this entire discussion in the name of the Taz. The question was originally asked and answered by Rabbeinu Asher (Rosh) (*Avodah Zarah* ch.2, sec. 12). The Taz (*Yoreh De'ah* 123:3) merely quotes Rosh and explains some subtle difficulties in Rosh's articulation of the question. In fact, the answer that the Mattei Levi quotes in the name of the Taz is a gross oversimplification of the Rosh's answer. Rosh claims that the reason for the absence of any prohibition of cooked wine is that it is scarce. The Mattei Levi seems to build on this and suggest that since the rabbis excluded cooked wine from their prohibition (because it is scarce), it remains permitted no matter how good the reason to forbid it. Even if the reason for the original prohibition applies to it (i.e. the élan of the prohibition), cooked wine remains permissible in the absence of legislation against it.

³⁸R. Horovitz is similarly cautious in his responsum regarding organs in synagogues. See Mattei Levi, vol. 2, *Orah Hayyim* #6 and the analysis of this responsum by David Ellenson, "The role of Reform in Selected German Jewish Orthodox Responsa: A Sociological Analysis," in Ellenson, *Tradition in Transition* (New York: 1989), pp. 53-56.

Here the *Maggid Mishneh* implies that the sages of the past are the ones who determined the prohibitions to which the Torah's command of "tishbot" apply. This would suggest that only an authoritative body of sages has the power to determine the non-*melakhah* acts which *tishbot* or *shabbaton* are to restrict.⁴⁰ He seems to equate this explanation of Rambam with the position of Ramban as he states, "Thus wrote Ramban z"l in his commentary on the Torah." Indeed, R. Horovitz understands the act of prohibiting subway travel as a legislative ordinance. Regarding his hesitance to forbid, he writes "who can say now that he a great leader that the generation will heed his words if he gets up and declares a new decree which earlier generations never legislated."

III. Conclusion

The *Mattei Levi's* position that even the explicitly mandated *telos* of *shabbaton* has no legal force is a sound prece-

dent for R. Berman's approach. On the other hand, the *Hatam Sofer's* position is incompatible with R. Berman's omission of *shabbaton* from his halakhic discussion. For the *Hatam Sofer*, mandated values play an essential role in deriving *pesaq halakhah*. Nevertheless, even the *Hatam Sofer's* position is not necessarily a full endorsement of R. Twersky's position. As emphasized above, *shabbaton* is a mandated value, while "from the depths" is not. It is therefore conceivable that while the *Hatam Sofer* gives halakhic weight to the *telos* of *shabbaton*, he would not give the same force to values that the tradition does not explicitly mandate. An exploration of the status that non-mandated values have for *poseqim* such as the *Hatam Sofer* is a necessary next step in this discussion. My hope is that this study has shed light on this debate, and that it will contribute to the ongoing investigation of the place of the mesorah's values in its legal decision-making.

³⁹Rambam, *Mishneh Torah, Hilkhhot Shabbat* 21:1.

⁴⁰This understanding resembles the approach of the *rishonim* who claim that *melakhah* is forbidden on *hol hamoed min ha-Torah*. See *Be'ur Halakhah* 530 s.v. "u'mutar." The *Lehem Mishneh* ad loc rejects this understanding of the *Maggid Mishneh* because it suggests that the category of *shevut* then becomes *de'oraita*. Nevertheless the *Lehem Mishneh's* alternative interpretation is even less supportive of the *Hatam Sofer's* understanding of Ramban.