

**“There is No Flexibility Like the Flexibility of the Halakhah”
Rabbi Hayyim David Halevy on “Innovations” in Jewish Law**

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Rabbi Hayyim David Halevy (1924-1998) is a fascinating figure in the world of *halakhah*. On the one hand, his resume resembles that of any recognized *posek* (Orthodox halakhic authority). He studied at Yeshivat Porat Yosef, the most elite S’fardic *yeshivah* in Eretz Yisrael, and served as S’fardic chief rabbi of Tel Aviv-Yafo. He is the author of two collections of halakhic responsa, *Aseh L’kha Rav* (nine volumes, 1976-1989) and *Mayim Hayyim* (three volumes, 1991-1998).¹ At the same time, “He was in some respects a modern rabbi. Open toward reality and aware of the processes working within it, he saw no essential or intimidating contradiction between that reality and the Jewish tradition.”² This “modernity” expresses itself quite clearly in his forward-looking approach to the *halakhah*, one not usually associated with Orthodox *poskim*.

Rabbi Halevy’s record as a *posek* and halakhic theorist deserves a full and comprehensive treatment.³ As a contribution to that end, we offer a close reading of one of his responsa, *Aseh L’kha Rav* 7:5, entitled “The Need for ‘Innovations’ in the *Halakhah* to Solve Contemporary Problems” (הצורך ב”חידושי” הלכה לפתרון בעיות שהזמן גרמן). Unlike most halakhic *t’shuvot*, it doesn’t address a specific issue of Jewish law or practice. It is more a statement of Halevy’s philosophy of *halakhah* and of the role of the *posek*. We might call it his manifesto, an invitation to other *poskim* and, for that matter, to Jews in general to view the *halakhah* as he does.

Our interest in the piece should be evident from its title. As progressive halakhists, we, too, are most interested in the capacity of Jewish law to respond positively to the challenges of our time in a manner consistent with our liberal and progressive outlook. To put it in Halevy’s language, we believe that the *halakhah* has the capacity for “innovation.” This is not to claim that Hayyim David Halevy was a “progressive halakhist” or that he would agree with all or even most of our suggestions in the realm of *p’sak* (halakhic decision making) but simply that there is a significant overlap between his theory of *halakhah* and our own.

We present the responsum’s text with our own translation, interspersed with our comments.

לכבוד ידיין היקר והנכבד, הרב הגאון כמוהר”ר⁴..... שליט”א. ירושלים
השלום והברכה.

¹ Halevy is also known for his *M’kor Hayyim Hashalem* (five volumes, 1966-1974), a comprehensive guide to Jewish living that combines *halakhah* and *agadah* and is aimed (as are many of his responsa) at the general educated reader rather than an audience of fellow rabbis.

² Zvi Zohar and Avi Sagi, *Yahadut shel hayyim: iyunim b’y’tzirato hahagutit-hikhati shel Harav Hayyim David Halevy* (Jerusalem and Ramat Gan: Shalom Hartman Institute and Law Faculty of Bar Ilan University, 2005), p. 7.

³ In the meantime, see the articles by Ariel Pikar and Avi Sagi in Zohar and Sagi, note 2, above.

⁴ Halevy omits the name of his correspondent, whom he describes as a “close friend” (ידיד נפשי היקר).

הנני מאשר קבלת מכתב כת"ר מיום ז' כסלו תשמ"ו, שבא כתגובה למאמרי "בהצפה" מיום י"א סיון תשמ"ה (אשר לדברי כת"ר ראהו במקרה בימים אלה), ובו תמה כת"ר על כמה ביטויים במאמרי, כגון "יש בעיות קשות שנוצרות בחיינו שאין להן פתרון ברור וחותר בהלכה", או שרבותינו "לא הסתפקו באותן הלכות שהיו מסורות בידם וטרחו לחדש הלכות חדשות", וכן "אפילו גדולי האחרונים חידשו חידושי הלכה". ולבסוף על מסקנתי "יש צורך ברור לחפש פתרונות ברוח המקורות ובנאמנות מוחלטת להם ולחדש חידושים הלכתיים". ועל כל זה כת"ר תמה: וכי רשאים אנו לזוז כמלא נימא מההלכה הכתובה והמסורה שבידינו, ומה פירוש "לחדש" הלכות, שאם זה תואם את השולחן ערוך ממש, אין זה חידוש כלל, ואם אינו תואם מי מתיר לנו וכו'.

I have received your letter of 7 Kislev 5746 [November 20, 1985], reacting to my article in *Hatzofeh* of 11 Sivan 5745 [May 31, 1985] (which, as you say, you happened to come across recently.) You express surprise at some of my statements, such as: "There are problems that have been created in our life and times that have no clear and obviously correct halakhic solutions"; "(the Sages) did not content themselves with their received halakhic traditions but rather worked to innovate new *halakhot*" [*l'hadesh halakhot hadashot*]; "even the leading recent halakhic authorities [*g'dolei ha'aharonim*] innovated new *halakhot*"; and at my conclusion "there exists a clear need to seek out solutions in the spirit of the sources and with absolute faithfulness/loyalty [*b'ne'emanut muhletet*] to them and to create halakhic innovations" [*l'hadesh hidushim hilkhati'im*]. You express bewilderment at all this: are we entitled to depart as much as a hair's-breadth from the *halakhah* that has been written and handed down to us? And what does it mean to "innovate" *halakhot*? For if our ruling is supported by the *Shulhan Arukh*, it's no innovation at all, and if it is not supported by the *Shulhan Arukh*, are we permitted to arrive at that ruling?

Rabbi Halevy calls for halakhic *hidushim* (חידושים). The word derives from the root ה-ד-ש, "new," and the temptation is to translate it as "changes." We have resisted that temptation. The idea of change in the *halakhah* is a fraught one for many (most?) Orthodox Jews who hold the *halakhah* to be perfect and eternal. To call for "changes" would suggest that the *halakhah* as it stands is flawed and in need of correction – *tikun* – a word associated in the last two centuries with the notion of "reform." For that reason, we presume that Halevy as a good Orthodox rabbi would also reject the notion of "change." We've chosen instead the word "innovations," which conveys the sense of "newness" (*l'hadesh halakhot hadashot*) without severing the connection to the ongoing tradition of Talmudic and halakhic study, where the word *hidushim* is the term commonly used to denote "new ideas" ("novellae") that a student derives to resolve problems and contradictions in the text. A *hidush* is "new" only in that it has not been verbalized or expressed until now. Despite its newness, such a *hidush* does not "change" anything; the insight is already there, an element of the unfolding comprehension of the text. Proven by way of textual evidence and persuasive argument, it exists in potential, waiting to be discovered - not "created" – by the student.⁵ Thus, when Halevy calls for halakhic *hidushim*, he likely doesn't mean out-and-out "change" but rather the discovery of answers that exist in potential within the thought-

⁵ See below for our discussion of the text concerning the "diligent student" (*talmid vatik*).

world of Jewish law.⁶ Thus he can speak of “new *halakhot*” in a way that an Orthodox readership might be able to swallow – although, as we’ll see, it isn’t always easy to distinguish between “innovation” and “change.”

Two other terms in this introductory section deserve mention. The first is *ne’emanut*: halakhic innovations are acceptable if and only if they are made “with absolute faithfulness/loyalty” to the spirit of the halakhic sources. This is, on one level, a no-brainer; a halakhist certainly wouldn’t advocate new understandings of Jewish law that are *unfaithful* to the sources and their spirit. But how precisely do we define this quality? Halevy doesn’t tell us; presumably, he relies upon his readers to know faithfulness – and its opposite - when they see it. Perhaps, though, there is no obviously correct definition. The concept of faithfulness is a matter of deep debate in the literature of both legal theory⁷ and halakhic theory.⁸ To venture into those discussions here would take us far from our focus on this responsum. But by introducing the subject, Rabbi Halevy compels us to think about what “faithfulness” to the “spirit” of *halakhah* actually entails.

The second term is *hahalakhah hak’tuvah v’hamesurah*, “the *halakhah* that has been written and handed down.” The phrase evokes a related term: *m’sorah* (sometimes spelled *masorah* or *mesorah*), which is related to “tradition” (*m’soret*) and is used in contemporary Orthodoxy to denote among other things “a process of transmission, of learning and teaching.” The *m’sorah* exerts a powerful conservative force upon the direction of *p’sak*: in cases of doubt, when the halakhic sources support more than one interpretation and therefore more than one plausible answer, the *right* answer is identified by the *g’dolei hador*, the greatest scholars of the generation, who receive their knowledge and wisdom through the chain of Torah learning that stretches back to Moses and Joshua.⁹ This does not necessarily rule out all halakhic innovation; as one leading Orthodox *posek* writes, “Despite this emphasis on tradition, Judaism is not frozen in place.” Innovations are permissible, *provided* that they are instituted by the great Torah scholars who embody the *m’sorah*.¹⁰ The problem, of course, is that those scholars have until now *resisted* the innovations that Rabbi Halevy believes are crucial. Given that he directs his argument to an Orthodox audience, Halevy confronts a serious rhetorical problem: how does one advocate for “innovation” without running afoul of the *m’sorah* that defines propriety in the Orthodox world?

ועל זה אשיבנו תשובה מאהבה, כי זו היא לענין כל האמת לאמתה, וכמו שכתב ר' כותב, שאין אנו רשאים לזוז כמלוא נימא מההלכה, אבל איני מסכים שחידושי הלכות ברוח ההלכה הכתובה

⁶ See R. Herschel Schachter quoting his teacher Rabbi Joseph B. Soloveitchik: “The Rav would often say that Judaism allows for *chiddush*, innovation, but not *shinuy*, change”; “Preserving Our Mesorah in Changing Times,” *Jewish Action* (Winter, 2010), https://jewishaction.com/religion/preserving_our_mesorah_a_symposium/.

⁷ Where it is termed “fidelity in interpretation.” See James E. Fleming, “Fidelity to Our Imperfect Constitution,” *Fordham Law Review* 65 (1997), pp. 1335-1355 (on the clash between “originalism” and “the moral reading” as exemplars of fidelity in constitutional interpretation). That latter phrase is associated with Ronald Dworkin; see his “The Arduous Virtue of Fidelity,” *Fordham Law Review* 65 (1997), pp. 1249-1268.

⁸ See Avi Sagi, *Ne’emanut hilkhaitit* (Ramat Gan: Bar-Ilan, 2012), especially at 7-26 and 43-66.

⁹ See Gil Student, “Symposium on Masorah: Introduction,” *Torah Musings*, May, 2016 (<https://www.torahmusings.com/2016/05/symposium-masorah-introduction/>) and the literature he cites.

¹⁰ Schachter, note 5, above.

והמסורה, ובנאמנות מוחלטת לה היא סטיה, אף אם חידושים אלה משנים באותו מקרה את ההלכה כפי שהיא כתובה בידינו.

Let me respond to you, in the spirit of friendship,¹¹ that in my humble opinion you are absolutely right: we are not entitled to depart as much as a hair's-breadth from the *halakhah*. But I don't agree that halakhic innovations, in the spirit of the written and handed-down *halakhah* and in absolute faithfulness to it, count as divergences from it, even if in a particular case those innovations change the *halakhah* as it stands written in our sources.

We mentioned above that the line between permissible “innovation” and impermissible “change” can be blurry, and Halevy seems to trip over that line here. On the one hand, he denies any intention of diverging from “the *halakhah*,” insisting that the innovations he’s talking about are entirely coherent with the *m’sorah*, “the spirit of the written and handed-down *halakhah*.” Yet he concedes that these innovations would by their very definition *change* the state of *p’sak*, “the *halakhah* as it stands written in our sources”; he even uses the Hebrew משנים (*m’shanim*, “change”). Is this a fatal contradiction? Not if he can demonstrate that *hidush* is not “change” but an eternally existing feature of the halakhic tradition.

ואנכי הוא שצריך לתמוה על כת"ר, מדוע התעלם לגמרי מכל תוכן מאמרי הנ"ל. הלא שם הוכחתי בפירוש שר' יהושע בן חנניה חידש חידוש הלכתי גדול, לפי פירוש התוס' והרא"ש, וכפסק השו"ע, שגדול בחכמה "פודין" אף יתר על כדי דמיו בניגוד לסתמא דמתניתין ששנינו, "אין פודין את השבויים יתר על כדי דמיהם". או לפי תירוצם השני, חידש, שבשעת חרבן הבית לא שייך וכו', וגם זה חידוש גדול בניגוד לסתמא דמתניתין. או מה שהבאתי מתשובות הרדב"ז, שטרח למצוא טעמי היתר לקהלות ישראל שנהגו בניגוד מוחלט להלכה הפסוקה, ופדו שבויים יתר מכדי דמיהן, והוא חידוש גדול. וכת"ר התעלם מכל זה ואינו משיבני דבר. ואם נרצה להוסיף דוגמאות כהנה וכהנה תקצר היריעה מהכיל.

On the contrary: I am the one who is bewildered, for you have completely ignored the substance of my article. There, I show explicitly that R. Y’hoshua ben Ḥananiah made a significant halakhic innovation, as explained by Tosafot and R. Asher b. Y’ḥiel and codified by the *Shulḥan Arukh*, namely that we may “redeem” a kidnapped Torah scholar even for more than his monetary value, which contradicts the rule as stated in the Mishnah (*Gitin* 4:6): “Captives are not to be redeemed for more than their monetary value.”¹² As for *Tosafot*’s second explanation, namely that the reasoning

¹¹ Halevy’s wording is *t’shuvah me’ahavah*, which usually means “repentance out of love for God” (as opposed to *t’shuvah mi’yir’ah*, “repentance out of fear of divine punishment.” Of course, there’s no “repentance” in this letter; as the next sentence makes clear, Halevy believes that he’s right. He’s using the word *t’shuvah* in its sense as “responsum,” a letter sent to answer a question, as in *T’shuvah Me’ahavah*, the title of a responsa collection by R. Eliezer Fleckeles (Prague, 18th-19th centuries).

¹² The case of R. Y’hoshua b. Ḥananiah is reported in a *baraita* in *B. Gitin* 58a. See *Tosafot, Gitin* 45a, *s.v. d’la; Hilkhot Harosh, Gitin* 4:44; and *Shulḥan Arukh Yore De’ah* 252:4. On how we might measure a captive’s “monetary value,” see *Pitḥey T’shuvah, Yore De’ah* 252, no. 5.

behind the Mishnah's prohibition did not apply during the days of the Temple's destruction, that is also a significant innovation, contradicting the rule in the Mishnah.¹³ I also cited the responsum of Radbaz,¹⁴ who went to great effort to find reasons to allow Jewish communities to redeem captives for more than their monetary value, again in absolute contradiction of the codified *halakhah*. That, too, was a significant innovation. You ignore all this; you offer no response. If we wanted to find other examples [of innovations] like this one, the number would be overwhelming ["the written page could not include them all"].

Rabbi Halevy uses this example to show that *halakhah* has a history. He argues that the exception to the rule setting limits on ransom made by R. Y'hoshua b. Hananiah was not written into the law from its beginnings but emerged as his *hidush* upon the earlier rule codified in *M. Gitin* 4:6, the "written and handed-down *halakhah*" of its time. Thus, a good *hidush* is not a departure from the *m'sorah* but rather an expression of *halakhah*'s capacity to yield new meanings. The problem, though, is that Halevy gets his history backwards. Since Rabbi Y'hoshua b. Hananiah (usually called simply "Rabbi Y'hoshua")¹⁵ predates the Mishnah by three generations, he cannot be making a *hidush* upon it; a traditionalist might hold that he is simply expressing a different understanding of the *halakhah* than the one that would eventually be formulated in *M. Gitin* 4:6. Alternately, Tosafot and R. Asher, sources cited by Rabbi Halevy, suggest that Rabbi Y'hoshua's conduct is not the result of a *hidush* but rather evidence that the Rabbinic *takanah* setting limits upon ransom never applied to Torah scholars. If so, there's no "innovation" here, no development; the exception for the Torah scholar was already included in the Mishnah's general rule. In other words, Halevy's example doesn't prove his point. He'd have done better to cite another of the "overwhelming" number *hidushim* to which he refers.

אבל ירשה נא לי כת"ר להאריך קצת ביסודם של דברים ויראה ויוכח כמה צודקים דברי.

Rather, if you permit me to expand a bit on the fundamentals of this question, you will be persuaded that my words are indeed correct.

גדר "הלכה" הוא משורש הלך, והוראתו דבר שהולך ובא מקודם ועד סוף, היינו דבר המקובל בישראל והולך מסיני ועד עתה, או שישראל מתהלכים בו, היינו הדרך המקובלת שילכו בה ישראל, כמו שכתוב: והודעת להם את הדרך ילכו בה ואת המעשה אשר יעשו. אמנם המושג "הלכה" קבל משמעויות שונות ומגוונות ברבות הימים, אך ההגדרה הנ"ל היא הראשונית והמקורית, "דבר שהולך ובא מסיני ועד עתה". אך מקום אתנו לשאול, כיון שברור ביותר, שכל חוק או תקנה אינם יכולים להחזיק מעמד זמן רב מפאת השינוי בתנאי החיים, וחוק שהיה טוב לשעתו, אינו מתאים אחרי דור או

¹³ The Talmud (*B. Gitin* 45a) explains the Mishnah's rule limiting the amount of ransom on the grounds that we do not want to incentivize potential kidnapers. This reasoning didn't apply during the days of the Temple's destruction, presumably because during the chaos of that war the Romans and their allies needed no incentive to kidnap Jews.

¹⁴ Rabbi David ibn Zimra (16th-century Eretz Yisrael-Egypt), *Resp. Radbaz* 1:40.

¹⁵ He was a *tana* of the early 2nd century C.E., a colleague of Rabbi Eliezer and a teacher of Rabbi Akiva.

יותר, וטעון תיקון או שינוי וכדומה, כיצד תוה"ק נתנה לנו חוקים ומשפטים צדיקים וישרים, מלפני אלפי שנים ואנו ממשיכים לנהוג לפיהם עד היום, ואף נמשיך עד סוף כל הדורות. כיצד קרה שאותם חוקים היו טובים לשעתם וטובים עד עצם היום הזה. אמנם ודאי שהקב"ה נותן התורה, הוא צופה ומביט עד סוף כל הדורות, ונתן לנו תורה שתתאים עד סוף כל הדורות, אבל ודאי שחובתנו להבין "כיצד".

The word *halakhah* derives from the root ה-ל-ך ["to walk, to go"], and its meaning is "that which comes and goes from beginning to end," i.e., that [teaching, matter] which has been continually accepted among the Jews from Sinai until now.¹⁶ Alternatively, it is [the manner] in which the Jews have conducted themselves (*mithalkhim*), i.e., the accepted/traditional¹⁷ way in which the Jews should go (*yeilkhu*), as in the verse (Exodus 18:20) "Make known to them the way they are to go (*yeilkhu*) and the practices they are to follow." Over time, of course, the concept "*halakhah*" has acquired a range of different meanings, but this one – "that [teaching, matter] which has been continually accepted among the Jews from Sinai until now" – is its earliest and original sense. But this begs the question: since it is painfully obvious that no statute or enactment can survive over time in the face of the changing conditions of life, and that a law that was good in its time will not be appropriate within a generation or so and will require amendment or alteration, how could our holy Torah bestow upon us just and righteous laws some two thousand years ago that we still follow today and that will endure to the end of time? How did it come about that those statutes were appropriate for their own time and remain appropriate today? True, the Holy One, the Giver of the Torah, who foresees all that will occur throughout history, made sure to give us a Torah that would fit the needs of all generations. But we certainly are obliged to understand "how."

ומכאן, שדבר זה היה אפשרי רק משום שניתנה הרשות לחכמי ישראל לדורותיהם לחדש חידושי הלכה עפ"י שינויי הזמנים והמקרים, ורק בזכות זה נתאפשר קיומה של תורה בישראל, ויכולים היו "ללכת" בדרך התורה והמצוה, כאמור הדוגמאות הן רבות, ואנו נסתפק במקצת, ונתחיל מחידושי הלכה בגופה של תורה.

It follows that this happened only because the authority was granted to the sages of Israel in every generation to innovate *halakhah* according to changing times and circumstances. It is solely through that authority that the Torah has survived among the Jews and that they have been able to "walk" in the path of Torah and *mitzvah*. As I have mentioned, there are many examples of this, and we must content ourselves with but a few. We begin with halakhic innovations that we find in the Torah itself.

Halevy raises a central theological question: how is it that "our holy Torah," our divinely ordained and eternal *halakhah* stands in need of "innovation?" He answers with a reality-based argument: "no statute or enactment can survive over time in the face of the changing conditions of life." But if that is true of law as an endeavor of human experience, can we say the same about

¹⁶ As Halevy notes, he takes this definition from the entry "*halakhah*" in *Encyclopedia Talmudit*, vol. 9, col. 241.

¹⁷ Hebrew מקובלת, which carries the sense of both "acceptance" and "tradition" (*kabbalah*).

divine law, “a Torah that would fit the needs of all generations”? How can a perfect law require additions or improvements? Halevy’s response is that Torah’s perfection lies precisely in its capacity, by way of the *hidushim* derived by “the sages of Israel,” to yield new meanings when the times call for them. He might have cited as supporting evidence the commentary of Ramban to Deuteronomy 17:11¹⁸ discussing the establishment of the *beit din hagadol*. The Torah is a written document (כי התורה ניתנה לנו בכתב),¹⁹ which means that its text will not speak explicitly to every question that arises. Opinions will inevitably differ as to the proper interpretation of *halakhah* with respect to these “new issues” (הדברים הנוגדים). The Torah therefore bestows upon a human agency – “the judges who will be in those days” – the authority to decide the law and answer those new questions. While the rabbis of our own time are not to be compared to the *beit din hagadol*, it is they who must apply the Torah’s legislation to “new issues.”

Evidence of this capacity for *hidushim*, says Rabbi Halevy, exists in the Torah itself.

אהרן הכהן חידש הלכה

משה רבינו קצף על אהרן ביום חנוכת המשכן, מדוע שרפו את בשר קרבן חטאת שעיר ראש - חודש, באמרו: מדוע לא אכלתם את החטאת... אכל תאכלו אותה בקודש כאשר צויתי (ויקרא י"ח). ואהרן השיבו: הן היום הקריבו וגוי ותקראנה אותי כאלה (מות בניו) ואכלתי חטאת היום הייטב בעיני ה' (שם י"ט). ופירשו רבותינו שטענת אהרן היתה "אם שמעת בקדשי שעה אין לך להקל בקדשי דורות", כלומר אכן כן צוית אותנו, וכפי שבדאי כך צוות מפי הגבורה, אבל הציווי היה לקדשי היום שקרבו לצורך שעה בחנוכת - המשכן, ולא בשעיר ראש - חודש שהוא קדשי דורות ואינו נאכל באנינות, וכל זה ידוע במקורות (ועיין פירוש רש"י בחומש). והנה עתה, אהרן נצטוה בסתם, והוא מסברת עצמו "חידש" הלכה שציווי זה אינו חל על קדשי דורות. ומשה רבינו הסכים עמו כאמור: וישמע משה וייטב בעיניו. ואף לפי דברי רבותינו שמשה רבינו שמע מפורש כך ושכח, והודה ולא בוש, הנה אהרן לא ידע מאומה, והציווי היה סתמי, והוא דן בהלכה וחידש והוטב בעיני משה. והנה אהרן נטל לעצמו סמכות לחרוג מהאות "המסורה" לו כמות שהיא, ואחרי האסון שחל שינוי במצבו, דרש קל - וחומר וחידש הלכה. כל זה בא ללמד לכל חכמי ישראל לדורותיהם, שבכל "שינוי" במצב, יש לדון בהלכה ולחדש.

Aaron the High Priest as Halakhic Innovator

On the day the Tabernacle was dedicated, our teacher Moses was angry at Aaron for having allowed the burning of the goat that served as the sin-offering for Rosh Hodesh. He said (Leviticus 10:18): “Why didn’t you eat the sin offering?... You certainly should have eaten it in the sanctuary, as I commanded.” Aaron replied (v. 19): “Look! Today they brought their sin offerings... and such things (i.e., the death of his sons) have happened to me! Had I eaten the sin offering today, would Adonai have approved?” The Rabbis explain Aaron’s claim as follows:²⁰ “You did command us thusly, as God had commanded you. But that instruction applied only to the sacrifices offered for the [one-

¹⁸ S.v. v’*hatozrekh bamitzvah hazot gadol me’od*.

¹⁹ See also Ramban to Deuteronomy 6:18, s.v. v’*zeh inyan gadol*: as a written document, the Torah is necessarily limited and cannot speak to every conceivable situation.

²⁰ See B. Z’*vahim* 101a.

time] dedication of the Tabernacle and not to the sin-offering for Rosh Hodesh, which is a *mitzvah* observed for all time and which is not to be eaten by those who have yet to bury their dead” (see Rashi *ad loc.*). We see that Aaron was given a *mitzvah* phrased in general terms and that through his own reasoning he “innovated” the *halakhah* that this commandment did not apply to regular sacrifices [as opposed to the dedication of the Tabernacle, a one-time occurrence]. And Moses agreed with him (v. 20): “When Moses heard this, he approved.” True, the Rabbis explain that Moses had heard all these details [from God] and forgotten them, and then acknowledged that fact without shame. But Aaron didn’t know this. The instruction he received was phrased in general terms; he studied that *halakhah*, came up with his innovation, and Moses approved. You see that Aaron claimed the authority to diverge from the letter of the law as it had been “transmitted”²¹ to him. And following the calamity that brought about a change in his situation, he innovated a *halakhah* by way of a *kal vahomer*. This teaches the sages of Israel in all generations that, whenever there is a “change” in a situation, they are empowered to use halakhic reasoning to make innovations.

Aaron makes a *hidush*, a halakhic rule different from the one Moses had given him. Aware of the problem this poses – how was Aaron entitled to depart from an instruction that Moses received from Heaven? – the Rabbis explain that Moses in fact had heard, but had subsequently forgotten, the rule as Aaron understood it (שמעתי ושכחתי; *B. Z’vachim* 101a). Thus, Aaron did not in fact “innovate” a new rule. But Rabbi Halevy asks us to consider the events of Leviticus 10 as Aaron, who was unaware of what Moses had heard, would have seen them. The *m’sorah* as Aaron knew it offered no ready-made answer to his question, so he derived the answer through his own halakhic reasoning. Aaron’s perspective, Halevy implies, is the same as that of any contemporary *posek* who confronts a problem for which “the written and handed-down *halakhah*” contains no clear and obvious solution.

הלכה עוקפת²² מקרא

עוד מצאנו (בסוטה טז, וירושלמי קידושין פ”א ה”ב), תני ר’ ישמעאל בשלשה מקומות הלכה עוקפת מקרא... התורה אמרה, וכתב לה “ספר” כריתות ונתן בידה, והלכה אמרה בכל דבר שהוא בתלוש. התורה אמרה, ואיש אשר יצוד... ושפך את דמו וכיסהו “בעפר”, והלכה אמרה, בכל דבר שהוא מגדל צמחים. התורה אמרה, ורצע אדוניו את אזנו “במרצע”, והלכה אמרה אפילו בקוץ אפילו בזכוכית ע”כ.

והדבר מתמיה מאד, שכן כאשר תורה סתמה לחלוטין, דוגמת סדר עשיית תפלין או ציצית או סוכה וכדומה כרוב מצוות התורה, ובאה הלכה לפרש זה מובן, וכך היא דרכה של תורה שבעל - פה לפרש תורה שבכתב ואכמ”ל, אבל שתורה תכתוב בבירור, “ספר” “עפר” “מרצע”, ותבוא הלכה להרחיב המושגים כנ”ל, לשם מה, והלא הקדוש ברוך הוא שהוא נותן - התורה הכתובה, הוא גם מסר את פירושה, ויכול היה לכתוב זאת מפורש בתורה. ואם כנים אנחנו, גם זו ללמדנו באה, ש”הלכה” לא יכולה להיות כפי הוראת “מלה כמות שהיא”, והרחבת המושגים מותרת, ולכן באו הלכות אלה ללמד זאת לחכמי ישראל מורי התורה.

²¹ *M’sorah* (מסורה), which carries the sense of “authoritative tradition” (*m’sorah*).

²² Thus reads the Yerushalmi. The Bavli (printed text and manuscripts) reads עוקבת, “supplants, goes beyond.”

Halakhah Supersedes Scripture

We read in *B. Sotah* 16a and *Y. Kiddushin* 1:2: A baraita of R. Yishmael: in three cases the *halakhah* circumvents [= supersedes] Scripture... The Torah says (Deuteronomy 24:1): “he will write her a *sefer* [literally “book”; a document committed to paper or parchment] of divorce,” but the *halakhah* says: he may write on anything that is detached from the ground. The Torah says (Leviticus 17:13): “he shall pour out its blood and cover it with earth,” but the *halakhah* says: he may cover it with any substance in which plants can grow. The Torah says (Exodus 21:6): “his master shall pierce his ear with an awl,” but the *halakhah* says: even with a thorn or glass. This is quite puzzling. It is understandable that when the Torah gives no details whatsoever – for example, the process of making *t’filin* or *tzitzit* or a *sukkah*, as with many other *mitzvot* – the *halakhah* comes to supply them. The way of the Oral Torah (*Torah sheb’al peh*) is to explicate the Written Torah (*Torah shebikhtav*); we need not dwell upon this. But when the Torah writes explicitly “book,” “earth,” or “awl,” why does the *halakhah* come to expand those concepts? After all, the Holy One who both gave us the Written Torah and transmitted (מסר) to us its explanation [the Oral Torah] could have written these explanations in the Torah itself. If we are honest with ourselves, we must conclude that this, too, comes to teach that the “*halakhah*” cannot be restricted to the sense of “the written letter” and that it is permissible to expand concepts [by way of interpretation]. Thus, these *halakhot* teach the sages of Israel, those who issue authoritative instruction, to do the same.

This argument, certainly on its face, is shaky. If in three instances the Oral Torah, which emanates from the same divine source as the Written Torah, departs “the written letter,” it does not follow that *we*, the interpreters of both *torot*, are empowered to do the same. Rabbi Halevy understandably seeks evidence in the Torah for our license to derive *hidushim*. After all, if Aaron derived a *hidush* and if (as the next text indicates) “diligent students” have *always* done so, that evidence must exist somewhere. But it’s far from clear that this *baraita* provides it.

הראהו הקדוש ברוך הוא למשה כל מה שתלמיד ותיק עתיד לחדש ומה כונת רבותינו באמרם (בבלי מגילה יט: וירושלמי פאה פ"ב ה"ד), מלמד שהראהו הקדוש ברוך הוא למשה דקדוקי תורה ודקדוקי סופרים, ומה שסופרים עתידים לחדש. ודאי שאין הכונה כפשוטה ממש שלימדו כל התורה שתתחדש עד סוף כל הדורות כדי ללמדה לישראל, שאם - כן לא נותר מה לחדש, אלא כפירוש הרב תוס' יום - טוב (בהקדמתו לפירוש המשניות) "שזה לא היה מוסר משה לאחרים כלל, ודקדוק לשונם כך הוא, שאמרו מלמד שהראהו, ולא אמר שמסר לו או שלמדו, שאילו אמר אחד מאלו הלשונות היה מתחייב מזה שהוא ימסרם ויתנם ג"כ ליהושע שהרי עינו לא היתה צרה... אבל אמרו שהראהו וזה בדרך ראייה בלבד לא בדרך מסירה, כאדם המראה דבר לחבירו לראותו ואינו נותנו לו, וזה דקדוק נאה וענין אמתי".

ועתה נבין לשם מה הראהו הקדוש ברוך הוא למשה בסיני מה שתלמיד ותיק עתיד לחדש (כלשון הירושלמי שם), לאיזה צורך ולאילו מטרה, אם אין רשאי ללמדה לישראל. ועל - כרחנו אמר משה

רבינו דבר זה לישראל (שראה כל מה שתלמיד ותיק עתיד לחדש), שאל"כ לא היה מגיע דבר זה לידיעתנו. אלא כדי לרמוז להם לישראל, על הרשות הנתונה להם "לחדש" בכל הדורות, וכי החידוש הוא חלק מן ההלכה שנמסרה למשה רבינו.

"The Holy One showed to Moses everything that any diligent student of Torah would someday innovate" [*Y. Pe'ah* 2:4]. What did the Sages mean when they said (*B. Megillah* 19b): "the Holy One showed to Moses all the details of the Torah and all the details derived by the Scribes and all that the Scribes would one day innovate"? We cannot take literally the idea that God taught Moses every interpretation of Torah that would be innovated throughout all generations that he might teach these to Israel, for if so, there would be nothing left to innovate. Rather, we should adopt the explanation of the *Tosafot Yom Tov*²³ (in the introduction to his commentary on the Mishnah): "Moses did transmit any of this to others, as we learn from the precise meaning of the Rabbis' language: God *showed* him (הראהו) rather than 'transmitted to him' (מסר לו) or 'taught him' (למדו). For had they used either of those other terms, Moses would have been obligated to transmit all that learning to Joshua, for he did not jealously keep the Torah to himself... Instead, they said "God *showed* him" – a matter of seeing, not of transmission, as one shows a thing to another person but does not give that thing to that person."

Now we can understand why the Holy One "showed to Moses everything that faithful students of Torah would someday innovate," as the *Yerushalmi* says; what purpose did this serve if Moses was not entitled to teach all of this to Israel? It must be that Moses told this to the people of Israel (that he had seen everything that diligent students would someday innovate) because we would not otherwise have known this [i.e., the fact that "innovation" is permitted]. It was his way of hinting to us that the authority to "innovate" is given to all generations, that innovation itself is an element of the *halakhah* that was handed to Moses our teacher.

The eternity of the Torah is a major theme of Rabbinic doctrine. Not only did the Torah exist prior to the creation of the world,²⁴ but the entirety of its content and meaning, including all future "innovations" derived by its students, was included in the "Torah" that was handed to Moses at Sinai.²⁵ In some respects, this teaching can be an inspiration to students of Torah who derive *hidushim*, assuring them that their interpretations of the *halakhah* carry the imprimatur of Heaven. But it's a problem, too, as both Rabbi Halevy and the *Tosafot Yom Tov* are aware, because taken literally it teaches that there *are* no *hidushim*, no innovations in the study of the *halakhah*, for all supposedly "new" ideas already exist in the Torah of Moses. Thus, the emphasis upon the word הראהו, God *showed* Moses all these *hidushim* but did not *teach* them to

²³ R. Yom Tov Lipmann Heller (Prague, 17th century).

²⁴ See the interpretation of Proverbs 8:22 in the famous opening passage of *B'reshit Rabah*, which goes on to claim that Torah served God as the blueprint for the work of creation.

²⁵ The *d'rash* in *B. Megillah* 19b is based on Deuteronomy 9:10, where Moses relates that God gave him the tablets of stone on which were inscribed אשר דבר ה' עמכם, "all the words God spoke to you." The word "all" is taken to include the unwritten words (i.e., the future *hidushim*) as well as the written ones.

him, leaving them for the scholars of subsequent generations to derive through their own diligent reasoning. Since those scholars, like Aaron, do not know these *hidushim* in advance, they count as real innovations from their perspective. And the very point of *showing* these *hidushim* to Moses was to demonstrate to him – and to us - that “innovations” are permitted in the first place.

גמישות של ההלכה

וטועה מאד כל החושב שההלכה היא קפואה ואין לסטות ממנה ימין ושמאל, אלא אדרבא אין גמישות כגמישותה של ההלכה, שכן יכול מורה - הוראה בישראל, לפסוק באותה שאלה עצמה, ובאותה שעה עצמה, לשני שואלים, ולהטריף לאחד ולהכשיר לאחר, כידוע למורי הוראה באיסור והיתר, והדברים ארוכים.

The Flexibility of the Halakhah

Anyone who thinks that the *halakhah* is frozen in place and that we are forbidden to diverge from it either to the right or to the left is quite mistaken. On the contrary: there is no “flexibility” like the flexibility of the *halakhah*, for the halakhic authority is empowered to rule—simultaneously, on the same question submitted by two different people – in contradictory directions (“saying to one ‘this is *kasher*’ and to the other ‘this is *t’reifah*’”), as rabbis who deal with ritual questions know well. And much more could be said about this.

“There is no ‘flexibility’ like the flexibility of the *halakhah*”²⁶ (אין גמישות כגמישותה של ההלכה) could well serve as the slogan for all who believe – as we do – in the capacity of Jewish law to respond in a positive way to all the challenges of contemporary life. On the other hand, Halevy’s example is problematic. We’ve all heard the stories about the rabbi who rules that an obviously *t’reifah* chicken is *kasher* when it is brought to him by a poor person on Friday afternoon. But that sort of thing is purely *rachmones*, a compassionate ad hoc response; it’s not a *hidush*, an innovative interpretation that breaks new halakhic ground. *Sof sof*, the bird is *t’reifah*. The rabbi is certainly not going to write a responsum to the poor person arguing that the chicken is in fact *k’sherah*. The flexibility we’re talking about – indeed, the flexibility that Halevy has been talking about up till now – is the capacity of the rules and principles of *halakhah* to yield new meanings and interpretations that rabbis are willing to teach and commit to writing.

ורק בזכות גמישותה של ההלכה, יכול היה עם - ישראל בכח חידושים רבים ומועילים שחידשו חכמי ישראל לדורותיהם, “ללכת” בדרך התורה והמצוה אלפי שנים. ואם יעמוד להם לחכמי דורנו אומץ לבם “לחדש” חידושי הלכה לאמתה של תורה, בנאמנות מוחלטת לגופי ההלכה הכתובה והמסורה (וכמו שהוכחנו במאמרנו הנ”ל), תוסיף ההלכה להיות דרכו של עם - ישראל עד סוף כל הדורות.

²⁶ Or, as Ethel Merman might have put it, “there’s no flexibility like halakhic flexibility.” It sounds better in Hebrew.

That the Jewish people have been able “to walk” in the path of Torah and *mitzvot* these thousands of years is due solely to the flexibility of the *halakhah*, to the many helpful innovations that the sages of Israel have derived over the generations. And if the sages of our own day find the courage to make halakhic “innovations” in the true spirit of the Torah, with absolute faithfulness to the written *halakhah* that has been handed down to us, then the *halakhah* will continue to be the path of the Jewish people for all time.

Rabbi Halevy concludes with an argument from history. The very fact that the *halakhah* has survived as the path of Jewish observance testifies to its flexibility, its power to adjust to the needs of the day. An inflexible *halakhah*, one that meets some people’s definition of “perfection” and that resists anything resembling change, would have been abandoned long ago as irrelevant to the lives of the Jewish people.

In our introduction, we called this *t’shuvah* Rabbi Halevy’s “manifesto.” Manifestoes serve an important rhetorical purpose, but they are not academic essays. This manifesto, as we’ve noted, definitely falls short of academic standards of evidence and proof. Halevy’s case would have been stronger had he offered examples of halakhic *hidushim* from the post-Talmudic period, the last ten or so centuries. It’s one thing for Aaron the priest or a Mishnaic sage to come up with a *hidush*; it’s quite another thing for rabbis today, operating within a fully-articulated system of rules, principles, codes, and precedents to do the same. Orthodox halakhists often claim that “the *halakhah*” as it has crystallized in our time forbids any sort of significant innovation. It would have been quite interesting to see Rabbi Halevy engage them in intellectual battle. Alas, that opportunity is not granted to us, and we are definitely the poorer for it. As it is, we can appreciate his central insight, namely that the “perfection” of Torah is expressed in its capacity to change (we’re willing to use that word) with the times.

To repeat: Rabbi Halevy, an Orthodox *posek*, was no progressive halakhist. He might well have believed that *our* approach to *halakhah* is not characterized by the “absolute faithfulness” of which he speaks. We’ll have to agree to disagree on that point. But when he describes the *halakhah* as a legal tradition that is sufficiently flexible to respond to the needs of flesh-and-blood human beings in every generation, he is speaking our language and singing our song. That’s why, from across the ideological spectrum, we look upon him as one of our heroes, an ally in our advocacy for a flexible – dare we say “progressive”? - *halakhah*.