Simcha Fishbane’s *The Method and Meaning of the “Mishnah Berurah”*

In his book *The Method and Meaning of the “Mishnah Berurah,”* Simcha Fishbane has provided an alternative view of the halakhic methodology of the *Mishna Berura*. He states that the *Mishna Berura* will seem to rule leniently in order to implicitly convey the message that it is not difficult to remain observant in order to prevent people from joining liberal movements in Judaism, yet in reality it is predominantly strict in its adjudication.¹ He writes as follows:

In his desire to combat secularism [the author of the *Mishna Berura*] sought to strengthen and regulate the spiritual boundaries of the Orthodox Jew. Therefore in regard to contemporary issues he felt compelled to inculcate stringent behavior. At the same time he could imply to observant readers that Jewish law allows an accommodative attitude and that there was no need to turn to liberal or secular Judaism.²

This view, however, adopts two difficult assumptions. First is that the *Mishna Berura* believed that strict rulings would protect those already flirting with secularism from leaving the Orthodox camp. Second is that already-observant readers would not turn to secularism because of the text’s accommodative lenient attitude.

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¹ Simcha Fishbane, *The Method and Meaning of the “Mishnah Berurah”* (Hoboken: Ktav Publishing House, 1991), 8.
² Ibid., 169.
With respect to when the *Mishna Berura* takes an accommodative stance, Fishbane argues that this occurs only as long as the ruling remained within the halakhic boundaries set by the *Aharonim*. In particular, they must be previously formulated by the majority of the *Aharonim*. Also, regarding his contemporaries, Fishbane writes that the *Mishna Berura* would not allow itself to incorporate their opinions and rulings unless it had no alternative, and then it would incorporate them only to rule stringently.³

We believe that this view is incorrect, and we will give one example to demonstrate why. (For other examples, one may look to the next section where we bring 250 examples.) According to Fishbane, lenient rulings would be directed to the observant, and stringent rulings would be directed to those “on the fence.” Also, the *Mishna Berura*’s lenient ruling will be in accord with a majority position among the *Aharonim*. Contemporary positions will have no influence. However, this schema does not concur with how the *Mishna Berura* reconciles the ruling in the *Shulhan Arukh*, i.e., that from Rosh Hodesh Av until the fast people should reduce their business activities,⁴ with the fact that due to economic circumstances and social changes, Jews were not reducing their business activities in the *Mishna Berura*’s time.

Regarding this matter, the *Mishna Berura* states that there are some *poskim* who hold that the obligation to refrain is with respect to business activities that give a person happiness, such as buying silver objects or things needed for a wedding, but a person does not need to reduce his regular business activity at all. Others, on the other hand, hold that all business activity must be reduced, and only that which a person needs to do in order to make a living is permitted. The *Mishna Berura* remarks that today we have the custom to be lenient, since we consider everything today as being needed to make a living.⁵ This lenient ruling is presented in its main commentary both for the observant Jew and for the fence-sitter.

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³ Ibid., 169.
⁴ *Shulhan Arukh, Orah Hayyim* 551:2.
⁵ *Mishna Berura* 551:11.
In the *Sha’ar HaTziyun*, it is stated that there are communities which have the custom of not conducting any business at all, yet it is also noted that this is a stringency that is not in accord with the law. He indicates that it is possible that the custom was made as a protective measure, and, therefore, if a person wants to conduct business in such a place he must receive permission to do so.  

By calling the stringent custom contrary to the law, the *Mishna Berura* in fact rules against how Fishbane proposes it would.

Also, with respect to the lenient custom, the *Mishna Berura* writes in the *Sha’ar HaTziyun* that it seems from the *Magen Avraham* that a person should nevertheless refrain from conducting those business activities which make him happy, though the *Taz* and the *Elya Rabba* seem to be lenient even in this type of activity, since a person might not be able to procure what he wants afterwards. The *Mishna Berura* concludes, saying that even if it is true that one might not be able to procure the goods afterwards, it is good to be stringent. The *Mishna Berura*’s recommendation to be stringent is placed in a section of its commentary that observant readers would read more often than fence-sitters. Moreover, according to Fishbane’s schema, we should have expected the *Mishna Berura* to be lenient like the *Taz* and the *Elya Rabba*, and not stringent like the *Magen Avraham*, since the lenient opinion has a majority among the *Aharonim* that he brought. Therefore, it seems that his strict recommendation is to the observant and his lenient one is to those who need to be spiritually strengthened.

**Benjamin Brown’s “Soft Stringency”**

Benjamin Brown, the brilliant historian of another great rabbinical authority, the *Chazon Ish*, has also provided an alternative view of the halakhic methodology of the *Mishna Berura*. He claims it is founded upon the principle of “soft stringency” and not the complex...
analysis we put forward in this book. Much as we admire Professor Brown’s work, we think this approach is mistaken.\(^8\)

Brown argues that, as opposed to “hard stringency,” which demands that everyone follow the more stringent opinion, the principle of “soft stringency” allows the individual to decide for himself whether to adhere to the stringent or to the lenient opinion, both of which are effective. Stringent suggestions are exactly that; they are optional norms whose adherence stems from an extra-halakhic motive and an attempt to democratize Jewish law. Of course, the *Mishna Berura* encourages its readers to adhere to the stringent opinion, yet encouragement falls far short of requirement. Before defending his claim that the *Mishna Berura*’s intention to use the principle of “soft stringency” is to democratize the halakhic process, Brown gives a possible alternative explanation. His alternative answer is that the *Mishna Berura* was deliberately ambiguous in terms of providing normative conclusions out of a sense of deference to its predecessors.\(^9\) It could not render a decision that would be in opposition to the ruling of a posek it thought greater than itself.\(^10\) Brown rejects this conjecture based on the fact that the *Mishna Berura* does at times make definitive recommendations, and because the *Mishna Berura* states in its introduction that its purpose is to provide clarity with respect to what to do in practice when differences of opinion exist about a given matter.\(^11\)

We think this approach is incorrect: because the *Mishna Berura*’s multifaceted recommendations are not the result of avoiding decision, but rather are deliberately constructed decisions in themselves, Brown contends that the *Mishna Berura*’s halakhic methodology is not strictly juridical. Rather, it has the underlying premise that within the Halakha, there are preferred behaviors that are not

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8 See generally Benjamin Brown, “Soft Stringency in the Mishnah Berurah: The Jurisprudential, Sociological and Ideological Aspects of Halakhic Formulation,” *Contemporary Jewry* 27 (2007): 1-41.

9 Ibid., 7.

10 Ibid.

11 Ibid.
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Universally obligatory, but rather are ideals toward which individuals should aspire. As Brown describes it, “This is an approach that perceives two levels of halakhic norms: a uniform norm that is equally obligatory for all Jews without exception, and a hierarchical norm that merely is suggested, designed for those who wish to serve God on a higher level.” The principal of “soft stringency” informs those who wish to aspire toward the higher level to know how to act and provides an opening for everyone else to follow the legitimate lenient opinion.

In claiming that the Mishna Berura deliberately gives ambiguous rulings in order to accommodate various degrees of legitimate religious observance, Brown asserts that the Mishna Berura’s methodology demonstrates the notion of “open texture,” as understood by H.L.A. Hart. In reference to the Mishna Berura, Brown writes, “[Kagan], too, tried to clarify the differences of opinion and display their variety [in the Mishna Berura], but in all the many cases where he did not decide between them, he actually was willing to accept the open texture caused by that variety. The final decision between them was not made through an intellectual coping with the text, but through the choice of the layman, which was based on other considerations.” While his commentary does demonstrate the notion of open texture, contrary to Brown’s assertion, the Mishna Berura attempts to adjudicate given the open texture of the Shulhan Arukh; it does not deliberately create vagueness in the law in order to give the layman autonomy for self-legislation.

Benjamin Brown explains Hart’s notion of open texture to be the ambiguity of a law which thereby requires interpretation. Based upon this understanding, he claims that the Mishna Berura’s halakhic methodology presupposes that a ruling need not be categorical. In his discussion of the open texture of a law, however, Hart explicitly defines open texture in terms of uncertainty in matters of

12 Ibid., 8.
13 See supra note 9.
14 Brown, supra note 98, at 10.
fact.\textsuperscript{15} Given a particular piece of legislation, written in a manner that provides for a general rule to be followed, a particular situation may arise in which there is uncertainty as to whether the rule applies. The particular case shares some features with the general description given in the rule, yet has other features that distinguish it. The difficulty lies not in understanding what is required by the rule; rather, the ambiguity lies in determining whether the rule applies in this situation.

Because uncertainty is based upon deviation from a general norm, ambiguity in a law must, by definition, lie at the extremes of its authority and not at its foundation. Hart’s example to describe the open texture of a given rule is, regarding a rule about vehicles, how far the meaning of vehicle can be stretched: it includes a motor-car, but does it also include an airplane, a bicycle, or roller-skates?\textsuperscript{16} To give an example from the Halakha, given the rule that a person must pray in the morning, does the morning include only the first three hours of the day, the first four, or until noon? Just as one citizen cannot choose to include roller-skates within the definition of a vehicle while another includes an airplane, if a Jewish law community is to maintain any social stability, community ties would deteriorate if any layman can determine the meaning of morning for himself. In both cases, the authority of interpretation is vested in the adjudicators. As Hart writes, “The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts of officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.”\textsuperscript{17} As a text that admits it is interpreting laws, the Mishna Berura’s commentary should be seen as an attempt to resolve the tension resulting from the open texture in the Shulhan Arukh, as it relates to varying situations which all seem to fall

\textsuperscript{15} The Concept of Law, supra note 9, 128.
\textsuperscript{16} Ibid., 126.
\textsuperscript{17} Ibid., 135.
under the same Halakha. This would explain why the *Mishna Berura* calls the *Shulhan Arukh* a closed book, and gives as justification for its commentary that the *Shulhan Arukh* writes one ruling in terms of an *ab initio* perspective and another in terms of an *ex post facto* perspective. These perspectives relate not to the desire of different adherents but rather to differing details of a given situation in which observance is necessary.

A few examples follow to demonstrate that when the *Mishna Berura* mentions that a particular act is required *ab initio* and a different act suffices *ex post facto*, it does not imply that the individual may choose how to observe the particular command, but rather refers to the external circumstances in which a person must observe it. The *Shulhan Arukh* rules that one must make an *Eruv Tavshilin* (a mixing of cooked dishes that allows one to cook on a Festival for Shabbat when Shabbat immediately follows it) with bread and a dish of food, but if he only made it with a dish of food, it is effective.\(^{18}\) The *Mishna Berura* comments that if he remembers before it gets dark that he only made the *Eruv Tavshilin* with a dish of food, he must add bread to it and designate the bread as part of the *Eruv*. If the voluntary *ex post facto* observance sufficed, the *Mishna Berura* would have only suggested, and not required, the person to add the bread.\(^{19}\) It makes this requirement since the circumstances characterized the situation as *ab initio*; therefore, it must follow the *ab initio* requirement. Once it turns dark, the person cannot make an *Eruv*; therefore, this is a situation where *ex post facto* requirements suffice.

As another example, the *Rema* rules that we have the custom to pray *Maariv* (the evening prayer) beginning from *Plag HaMinha* (one and a quarter hours before sunset), and one should not pray *Minha* (the afternoon prayer) after *Plag*. He concludes, however, to say that *ex post facto* or in a time of difficulty, praying *Minha* then would still be effective.\(^{20}\) The *Mishna Berura* interprets the *Rema* to mean that since it is a time of difficulty, it would be permitted *ab initio* to pray

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18 *Shulhan Arukh*, *Orah Hayyim* 527:2.
19 *Mishna Berura* 527:7.
20 *Shulhan Arukh*, *Orah Hayyim* 233:1.
Minha at that time. To understand the Mishna Berura’s comment as Brown has described it, namely that *ab initio* is the ideal form of observance and *ex post facto* is the lenient way of the multitudes, does not make sense. One must understand the Mishna Berura’s use of *ab initio* to mean that given the difficult situation in which the person finds himself, what is normally considered an *ex post facto* fulfillment is now the *ab initio* requirement. The facts of the case and not the desire of the self-legislator determine the level of stringency necessary.

In other cases in which the Mishna Berura distinguishes between degrees of observance, he discusses *ex post facto* fulfillment in a situation where someone performs part of an act erroneously, or if the *ab initio* requirement would have the undesired consequence of great monetary loss, or of limiting one’s Simhat Yom Tov (holiday joy).

Despite the fact that we have shown that the Mishna Berura’s confrontation with open texture relates to questions of fact which raises doubts as to whether a given situation is under the influence of a particular law, its use of terms such as “it is good to be stringent” or “it is correct to be stringent” still seem to confirm its use of the principle of soft stringency and its acceptance of the autonomy of the layman. In the Sha’ar HaTziyun, the Mishna Berura at times gives an account for its use of these phrases, which may help determine whether they should be interpreted to imply soft stringency. A first example deals with saying the words, “May the expressions of my mouth and the thoughts of my heart find favor before you, God, my Rock and My Redeemer,” after the Amida prayer. The Mishna Berura writes that if a person has reached the point where he would say these words but has not yet said them, and the Hazan begins to recite the Kaddish prayer after his repetition, the person may answer the Kaddish; however, he should be cautious not to put himself in this situation. This type of language would seem to imply soft strin-
gency, since the *Mishna Berura* says that a person may answer, yet encourages him to be strict and ideally not to answer. In the *Sha’ar HaTziyun*, it is explained that the use of this language is because the *Rema* forbids a person to interrupt his prayer to answer the *Kaddish*, yet the *Gra* writes that the *Rema*’s ruling is, in fact, not compulsory. In order to give a suggestion that reduces the ambiguity of having conflicting opinions, the *Mishna Berura* writes that one should be cautious to avoid the situation entirely, thereby avoiding the question of whether this extreme case falls under the authority of a disputed law. However, when the situation is unavoidable, the *Mishna Berura* definitively sides with the *Gra* in opposition to the *Rema*, thereby giving clarity as to what one should do in practice if this extreme case occurs.\(^{25}\) In other places, the *Mishna Berura* explains its use of the phrase, “it is good,” for the same reason.\(^ {26}\) It similarly explains its use of the phrase, “it is correct to be stringent.”\(^ {27}\)