

Metahalakhic Principles in R. Meir Simḥah Hacohen of Dvinsk's Oeuvre

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Introduction

R. Meir Simḥah Hacohen (henceforth RMS) was born in 1843 in the village of Butrimonys, in the Vilnius district.¹ Having gained renown as one of his generation's leading scholars, in 1888 he was appointed rabbi of Daugavpils (Dvinsk), a post he held until his death in 1926.² RMS' lifetime coincided with the period in which Lithuanian yeshivot were ascendant in Eastern Europe.³ His literary output was varied and unique, for despite having spent most of his life writing a book on Maimonides' *Mishneh Torah* (henceforth, *Code*), titled *Or Sameah* (henceforth, *OS*), he also authored the outstanding *Meshekh Hokhmah* (henceforth, *MH*), a Torah commentary that was published about a year after his death in Riga.

OS, which many regarded as analytical-scholarly interpretation of the *Code*, also manifests many typical characteristics of a practical-adjudicatory work. Elsewhere I have shown that the primary goal of this composition

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1 Benzion Eisenstadt, *Dor Rabbanav Vesofrav*, vol. 6 (New York: S. Feinberg, 1904), 39.

2 Natan Goren et al., eds., *Yahadut Liṭa*, vol. 3 (Tel Aviv: Am Hasefer, 1966), 65.

3 Shaul Stampfer, *The Lithuanian Yeshiva*, rev. ed. (Jerusalem: The Zalman Shazar Center, 2005), 12 (Hebrew).

was to refine the first codification of Jewish law, Maimonides' *Code*.⁴ *OS* primarily focuses on adjudication, and even if such rulings rank lower on the normative scale than those of the *responsa* literature,⁵ this work still plays a crucial and central role in halakhic adjudication. Therefore, *OS* may be classified as belonging to the genre of Jewish law and adjudication, not to that of the *novellae* and commentaries,⁶ and not even to that of Maimonides' commentators (often called his "armor bearers"). Its goals are practical, not merely intellectual or theoretical. RMS refined the *Code* in three main ways: First, he asked questions that probed the borderline cases. In these, he used inductive reasoning to expand Maimonides' legal rulings and determine whether they also applied to cases beyond their explicit, factual parameters. Second, but also inductively, he added elements to the law itself, not to the facts of the case at hand. Third, he revealed the underlying rationale of the law and rendered it in consonance with its own abstract level by reformulating casuistic phraseology in a normative form.

In this article, I will investigate whether there are broad-based juridical principles underlying RMS' legal decisions and approach to Jewish law; whether certain metahalakhic principles affect RMS' legal creativity, and to what extent; whether there are certain metahalakhic principles that guide RMS in addressing changing historical and social realities; and whether the same juridical principles affect the adjudication of laws that seem completely unrelated.

- 4 Yitshak Cohen, "The Or Sameah's Objectives and Their Halakhic and Jurisprudential Implications," *Shenaton ha-Mishpat ha-Ivri* 25 (2008): 97 (Hebrew).
- 5 See Berachyahu Lifshitz, "The Legal Status of the *Responsa* Literature," *Shenaton ha-Mishpat ha-Ivri* 9 (1982): 289 (Hebrew), which addresses another dimension—that transcending local considerations—which plays a role in every actual *responsa*.
- 6 This, in contrast to R. Ḥayyim of Brisk and R. Simeon Shkop who developed analytical methods that probed the depths of the matter, but distanced themselves to some degree from the everyday world. Their writings reflect the spiritual worldview of the yeshiva deans, who were less involved in practical adjudication. See Immanuel Etkes, "Bein Lamdanut Lerabbanut Beyahadut Liṭa Shel Hame'ah Hatesha Esreh," *Zion* 53 (1988): 402.

Section One:
The Metahalakhic Principle in RMS' Oeuvre:
Taking Human Nature into Account

The essence of RMS' approach derives from his metahalakhic belief that the Torah, as a legal system, takes into account man's nature and temperament, and tries not to overburden him with norms that are beyond his natural abilities. Thus, for instance, the Torah shies away from mandating a uniform performance level (*shi'ur*) for those precepts which it doubts everyone can perform equally. This insight guides RMS when he rules on borderline cases and considers the addition of elements to the law. This is not merely a question of ethical thinking on his part, but the adoption of a meta-norm that influences his interpretation and implementation of the halakhah.⁷ The inclusion of such a legal institution in RMS' oeuvre is in consonance with his fundamental perception of the law, which also opposes legal formalism.⁸ Establishing a minimal requirement for Torah study is but one of RMS' halakhic utterances that stress this principle.⁹ There is no better place to witness RMS taking into account human nature than in his *MH*. While this work certainly contains classical elements of halakhic adjudication, since without question it is a biblical commentary, it also possesses philosophical

- 7 See Eliezer Goldman, *Exposition and Inquiries: Jewish Thought in Past and Present*, ed. Avi Sagi and Daniel Statman (Jerusalem: Magnes Press, 1996), 13 (Hebrew), in which Goldman distinguishes between normal, logical insights (*sevarot*) and metahalakhic principles that express principled positions, such as "by the pursuit of which man shall live" and "her ways are ways of pleasantness." See also Avraham Sagi, "Halakhah, Discretion, and Responsibility and Religious Zionism," in *Between Authority and Autonomy in Jewish Tradition*, ed. Avi Sagi and Zeev Safrai (Tel Aviv: Hakibbutz Hameuhad, 1997), 195–217 (Hebrew). On p. 203, Sagi wrote as follows: "The consideration 'her ways are ways of pleasantness' expresses the notion that the Torah is in consonance with ethical principles... these considerations guide the hermeneutic methodology, and sometimes provide the strength to reject the text in favor of the privileged halakhic goal."
- 8 On this approach, see my article, "Juridical Ideology and Its Influence Upon the Or Sameach's Halachic Decision Making Process," in *Halakhah: Explicit and Implied Theoretical and Ideological Aspects*, ed. Avinoam Rosenak and Dafna Schreiber (Jerusalem: The Van Leer Institute, 2012), 78–96 (Hebrew). See also Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'agale Da'at, 1993), 62 (Hebrew).
- 9 OS, Laws Concerning Torah Study 1:2.

dimensions. In his commentary on the verse “by the pursuit of which man shall live, I am the Lord,”¹⁰ he writes:

And by the way of the intellect, perhaps the meaning of the passage is ... that the Torah did not mandate precepts that would incur difficulty for the combination of the body and the soul to observe as general ordinances For the Creator made man with integrity so that his parts would be in consonance with the parts of the Torah ... the Torah did not construct a fence [advocating] complete abstinence from the food, more than the human temper can endure ... therefore, He said to them “I am the Lord, Your God,” for I am your Creator and I know your nature that it is not strong enough to withstand lust ... “by the pursuit of which man shall live” that they should exist to vitalize the soul of man and guide it in a manner that will be beneficial for it in this world and happy may its lot be in the World to Come—not matters that cause death.¹¹

I will now demonstrate how this metahalakhic principle influenced and shaped RMS’ approach on several halakhic matters.

1. Preventing the Salvation of the Entire Nation of Israel

In keeping with his perception of Torah law as a system that takes into account mankind’s human nature, instead of opposing it, RMS privileges the decision not to restrain the blood avenger over the salvation of the entire nation of Israel. Thus, he rules that the exile to the city of refuge must never leave the city even for the purpose of saving the entire nation of Israel. RMS argues for this ruling in three different places in his oeuvre.¹² In a fourth place, he writes the following:

Why doesn’t the king or the court of law promulgate an enactment that no man may murder him, and if someone murders him, he is to be executed. Since the Torah has declared that

10 The translations of passages from the Hebrew Bible cited in this article are based on NJPS. Unless otherwise specified, translations of other texts in this article are the author’s own.

11 *MH*, Lev 18:2–5.

12 See *MH*, Num 35:28; *MH*, Exod 4:19; *Code*, Laws of the Murderer and the Protection of Life 7:8.

human nature is revealed to the Creator of all, if he [the murderer] will not be imprisoned in his [city of] refuge than his [the blood avenger's] heart will wax hot and he will strike him, and, therefore, the blood avenger who struck him would not be liable to judicial execution ... furthermore, neither the king nor the High Court of Law have the power to oppose human nature and its waxing hot [in anger].¹³

Thus, RMS ruled that even if the entire nation of Israel needed the exiled murderer to save it, he must not leave the city of refuge, lest the blood avenger harm him. RMS wonders why a new legal norm preventing the exile from being harmed by the blood avenger was not promulgated by rabbinic enactment or implementation of “the king’s law.” He rejects this approach because of his principled understanding that the Torah does not oppose human nature, even the hot-blooded response of the blood avenger. He believes that we cannot order the blood avenger not to take revenge because this would go against human nature—if the blood avenger takes revenge, he may not be prosecuted.

2. Is an Individual Obligated to Risk His Limb in Order to Save Another’s Life?

After discussing the prohibition concerning the exiled murderer leaving the city of refuge, RMS adds the following:

And that which I have seen some citing in the name of the Radbaz, that an individual is required to cut off a limb in order to save his fellow man, seems incorrect to me.¹⁴

It is unclear who cites this ruling, and RMS does not reference the Radbaz’s responsa.¹⁵ However, the Radbaz’s responsum that I have found, surprisingly indicates that the Radbaz did not maintain the opinion cited in his name. After rejecting the position of those who allowed one to amputate a limb to save another, the Radbaz concludes his responsum with the following:

13 OS, Laws of the Murderer 2:4.

14 OS, Laws of the Murderer 7:8.

15 This is not the only case in which it seems clear to the reader that RMS did not have a copy of the Radbaz’s responsa before him; cf. *Responsa Şiş Eli’ezer*, 2:18: “And apparently this responsum of the Radbaz’s was not seen by the illustrious Or Sameah.”

And furthermore, as it is written 'its ways are ways of pleasantness, and the laws of our Torah must agree with intellect and logic, and how could we possibly entertain the notion that a person should allow his eye to be put out or his hand or leg be amputated so that they do not murder his fellow man? Therefore, I see no rationale for this law and [declare] that it is an act of piety, beyond the letter of the law (*middat ḥasidut*), and fortunate is the lot of he who can withstand [performing] this [act]; however, if there is a question of risk to his life, he is a pious fool (*ḥasid shoteh*).¹⁶

After weeding out this apparent error, Radbaz is in agreement with RMS.¹⁷ RMS did not provide the underlying reason for his halakhic stance, but we may adduce its logical foundation from the Radbaz's explanation: the laws of our Torah are in consonance with intellect and logic and its ways are ways of pleasantness.¹⁸ The Torah takes human nature into account and would certainly not demand that someone take out his eye or amputate his hand to prevent his fellowman from coming to harm.

RMS' adjudication in this case is one instance of his application of a broad-based legal principle, whose discovery allows us to resolve several thorny issues in his thought. First of all, in light of this principle, RMS' adamant refusal to allow the exiled murderer to leave the city of refuge becomes more understandable. His stance stems neither from his devaluing the notion of "the entire nation of Israel" nor from his dismissive attitude towards "mutual responsibility" (*areivut hadadit*)¹⁹; rather, these principles come into conflict with another one: the Torah's refusal to legislate against human nature. The latter, according to RMS, takes precedence. Secondly, we may explain that this balancing act between two competing interests is the foundation for RMS' halakhic ruling that one is not commanded to amputate one's own limb in order to save one's fellowman.²⁰ Thirdly, by addressing these issues

16 *Responsa Radbaz*, III, 1052.

17 There are those who disagree. See, for instance, *Responsa Yaḥel Yisra'el* 74, which cites Rabbi M. Recanati, who maintained that just as it is obvious that an individual may be saved by amputating his limb so too an individual must make this sacrifice for his fellow man.

18 Prov 3:17.

19 See *MH*, Deut 34:8.

20 See Mautner, n. 8 above, p. 158.

in an abstract manner and searching for their underlying metaprinciple, we have managed to discover the link between the prohibition forbidding the exiled murderer from leaving the city of refuge and the halakhic decision not to obligate an individual to risk his limb to save another. Now, we can also understand why RMS chose to address the latter issue at the same time as he addressed the former. While, in the former case, the norm is applied to the individual because of the nature of the other (the blood avenger), in the latter case, the norm is applied to the individual because of his own nature. In both cases, the metahalakhic principle underlying the norm is the same—the Torah will not make a decree that goes against human nature.

3. The Reason Women Are Exempted from the Precept to Procreate

In *MH*'s discussion of the reason why women are exempted from the precept to procreate, we find the aforementioned norm's influence on actual practice. RMS interprets the verse "be fruitful and multiply, fill the earth and master it" (Gen 1:28) as follows:

The fact that the Torah exempted women from procreating and commanded the men alone is because the laws of the Lord and his ways [are] "ways of pleasantness and all her paths are peace," and it did not burden the Israelite with that which his body could not accede to ... because of "its ways are ways of pleasantness." And given this, women who are at risk during pregnancy and birth ... the Torah did not decree that women should be commanded to procreate. And furthermore, they are permitted to drink a potion that renders them infertile ... With regard to the reason why the Torah exempted women from procreation, we might also say that lust is imprinted on [human] nature, how much more so in the female ... and, therefore, the essence of the precept is that a man may not excuse himself from procreation unless he has sons, so if he has married and [she has] not given birth, he must marry a woman who has sons. For it is the way of the Torah, not to unduly restrain [human] nature ... and, therefore, to decree that a woman who marries a man, who is unable to foster children, should leave her soul mate (current husband) and take another man—this is against

nature. And only to the man who can marry an additional woman did the Torah give the precept.²¹

This passage explicitly makes our point. In it we see how central the notion that the Torah takes into account human nature is to RMS' thought as he bases his explanation for women's exemption from procreation on it. This citation also demonstrates that RMS did not merely subscribe to this concept on an abstract level, but rather on a practical one as well.²² This foundational principle explains why a woman is permitted to render herself infertile and why a woman is not obligated to separate from her husband if they have no children.

4. Should a Minor Exempt Her Sisters from Levirate Marriage?

Of the Laws of Levirate Marriage and *Ḥaliṣah*, Maimonides writes, "...many *yevamot* who come from the same household, once one of them has consummated the marriage [with the levir] through sexual intercourse or has undergone an efficacious *ḥaliṣah*, all are permitted [to marry other men] and the connection with the levir is abrogated."²³ Maimonides continues concerning a female who is below the age of majority:

A girl below the age of majority who may leave her husband through the rite of refusal (*mi'un*) and a deaf-mute, both of whom are betrothed by rabbinic fiat, [nevertheless] undergo two different types of betrothal. The minor was betrothed so that she not be treated [by men] in a profligate manner (*be-šurat hefqer*) and her betrothal is contingent until she comes of age. And the deaf-mute was betrothed by rabbinic decree, so that she would not remain unmarried forever. Therefore, if all the *yevamot* from one household are below majority or are deaf-mutes, if the levir has sexual intercourse with one of them, all are exempted [from their obligation].²⁴

21 *MḤ*, Gen 9:7.

22 See also Yona Ben Sasson, *Mishnato ha-Iyyunit Shel Ba'al Ha-Meshekh Ḥokhmah* (Jerusalem: Lifshitz College, 1996), 132, 147. For further discussion, see Jeremy Cohen, "Be Fertile and Increase, Fill the Earth and Master It": *The Ancient and Medieval Career of a Biblical Text* (Ithaca: Cornell University Press, 1989), 8–66.

23 *Code*, Laws of Levirate Marriage and *Ḥaliṣah* 5:11.

24 *Ibid.*, 5:23.

RMS attacks this ruling harshly:

I am astonished at this law, for the established foundation stone of the received tradition is that “her ways are ways of pleasantness,” for which reason they exempted her from undergoing *ḥaliṣah* if the sons died ... How could the Sages have gone against a fundamental axiom like this [stating] that if he [the levir] has sexual intercourse with one of the minors (one of two sisters), the other is exempted? For, indeed, if the other were to marry a man and reach the age of majority, black-letter law dictates that she would not undergo the rite of refusal if two hairs have sprouted, even though she had never had sexual intercourse, and this is all the more so true if she marries after she reaches majority, for then one certainly cannot claim that her marriage was conducted with the knowledge that she might refuse the marriage later (*mi’un*). For then the former in performing the refusal-rite for the levir will abrogate her earlier marriage and her sister (*ḥavertah*) will become connected to the levir and be forbidden to her husband and she will need to have *ḥaliṣah* performed afterwards and this is not the ways of pleasantness ... and this matter requires much study.²⁵

RMS is astonished by the tannaitic law, which asserts that by performing a levirate marriage with a girl who has not reached the age of majority, one exempts her sisters. If the girl refuses the marriage when she reaches the age of majority, the other sisters’ marriages will be uprooted and they will have to undergo the levirate marriage. RMS is shocked that the Sages would institute a law that might come into conflict with the meta-principle “her ways are ways of pleasantness.” He therefore rejects the words of Our Sages, of blessed memory, and remains with a very troubling unanswered question.

5. Coercing Someone into Observing Religious Norms

RMS’ insistence on the Torah’s concern with human nature also inspires his approach to coercing people into observing its precepts. In the fourth chapter of the Laws concerning Rebels, Maimonides asserts that a rebellious elder (*zaqen mamre*) who disagreed with the High Court regarding a serious matter—in fact, one whose willful transgression makes one liable for divine extirpation

25 OS, ad loc.

(*karet*), and whose unintentional transgression requires one to bring a sin offering—and, furthermore, instructs others to follow his opinion, is liable to receive capital punishment. This penalty is the same for any dispute that may eventually cause someone to transgress a law with the aforementioned consequences. However, if the dispute will not lead to such results, the rebellious elder is exempt, except in the case of the commandment to wear phylacteries. Thus, for instance, if he disagrees with the other sages and rules that a fifth *ṭotefet* (commonly translated as “frontlet”) should be added to the phylacteries, he is liable for judicial execution; however if he disagrees about other commandments, such as in defining one of the elements of the commandment to take the palm frond, he is exempt from the death penalty. RMS attempts to expand this law to include a borderline case by applying one of the methodological principles. He signifies this through his linguistic coinages, which is typical of such expansion:

We should wonder about that which is recorded in [tractate] *Ketubbot*: “In what case is this said? With regard to negative precepts, but with regard to positive precepts, such as if he is instructed to build a *sukkah* and does not do so, we beat him until his soul leaves him (he goes unconscious)”... and let us look at this more carefully, that they beat him until his soul leaves him is because he might perform the precept and take the palm frond, but if it is clear to us that this beating will not lead him to perform the precept, we may not even touch a hair [on his head]... for what shall we gain, the precept will not be observed! Only in a case where we are in doubt whether he might renounce the forbidden or observe the precept in order to spare himself from suffering is it appropriate to beat him and this seems to be the correct explanation, although the Rabbi in the *Qeṣot* [*Haḥoshen*] and in the *Meshovev* [*Netivot*] did not adopt this approach. I have written that which, in my humble opinion, seems [correct] to me.²⁶

The beating is neither a punishment nor a form of revenge. It is solely a method for coercing someone into changing his mind. If it will not bring about the desired result, it is to be avoided. RMS’ stance is cited in the scholarly literature and in public discourse to bolster the argument that coercing a

non-believing public into observing religious norms, even if such coercion is accomplished via parliamentary legislation, is problematic.²⁷

6. We Do Not Force an Individual to Circumcise Himself

Maimonides writes the following in the Laws of Circumcision:

We may not circumcise a man's son without his knowledge unless he transgressed and did not circumcise him, for the court of law circumcises him [the child] against his [father's] will. If the court of law is ignorant of the situation and he [the child] was not circumcised, when he reaches the age of majority he must circumcise himself. And every day that passes without him circumcising himself once he has reached the age of majority, he negates a positive precept, but he is not liable for divine extirpation until he dies, for then he is [defined as] willfully uncircumcised.²⁸

RMS usually used the term *mistappaqna* (I am unsure or doubtful) in order to address a borderline case that Maimonides did not deal with. However, in this case, RMS uses this term to clarify Maimonides' ruling and supplement it.

And according to this, I am very unsure, for it is established for us that if they instruct him to build a *sukkah*, [take a] palm frond, and he does not do so, they beat him until his soul leaves him [he faints]. If with regard to a positive precept that calls for the punishment of divine extirpation, they beat him until his soul leaves him, Who says that if he is instructed to perform the paschal sacrifice and he does not do so, that since he is liable for divine extirpation, and will have to pay for his sins through divine punishment while he is yet alive; therefore, the court of law is not under advisement to coerce

27 Thus wrote Eliav Shochetman, "Kohah de-Hetera Adif," *Maḥanayim* 5 (1993): 83: "In a liberal society it is unacceptable to base laws on purely religious norms, and therefore the unique authority given to the rabbinical courts by the state is [the result of] an exceptional piece of legislation. It seems that Jewish law itself maintains that, in principle, coercing non-believers in matters of religion is inappropriate." He references OS in the footnote ad loc.

28 *Code*, Laws of Circumcision 1:2.

him?For every positive precept whose reward is specified in the Torah (*she-mattan sekharah be-šiddah*), we do not coerce [a person to perform] it. And even if we were to argue that since we do not coerce [one to perform] the paschal sacrifice, we should be irresolute about coercing circumcision, for he is liable divine extirpation after death, and if so, during his lifetime he goes unpunished; therefore, the court of law would be under advisement to coerce him and beat him so that he circumcises himself.... However, because of this we are unsure of ourselves regarding circumcision, and our Rabbi (Maimonides) did not mention that when he reaches the age of majority he should be coerced to circumcise [himself] until his soul leaves him. Or, perhaps, he is not coerced because one cannot be considered an apostate (*mumar*) with regard to one's foreskin, for he was reticent [to be circumcised] because of the pain of circumcision....²⁹

RMS debates whether the court of law must coerce the uncircumcised man to circumcise himself once he reaches the age of majority. He attempts to define the legal rationale that distinguishes between a case in which the court is obligated to coerce a person to perform a precept and a case in which the individual is released on his own recognizance. Thus, for instance, if a person was instructed to build a *sukkah* or take a palm frond and he did not do so, he is beaten until his soul leaves him. In contrast, if a person was instructed to perform the paschal sacrifice and he did not do so, he is not beaten. In the latter case, the sinner undergoes divine extirpation (*karet*) during his lifetime, so the court is not obligated to coerce him. This ruling is consistent with the fundamental principle that every commandment whose reward is specified in the Torah is not coerced. The transgressor, who has foregone observing a positive precept, is punished by the loss of the reward, so there is no further need to coerce him. Logic would dictate that this also be the law in the case of negative precepts whose punishment is divinely meted out during the transgressor's lifetime. This rationale, which RMS provided for the laws, reflects a liberal approach that allows an individual to choose whether he would like to perform the commandment and receive the reward or whether he would like to transgress and receive divine punishment; either way the court of law does not get involved. RMS questions how to classify the

29 OS, Laws of Circumcision 1:2.

circumcision commandment because one who negates this commandment does not receive his punishment during his lifetime. Given this state of affairs, it would be appropriate for the court to coerce the uncircumcised man into performing this commandment. Maimonides, however, did not address this particular issue. Relying upon R. Jacob ben Meir's (popularly known as Rabbeinu Tam) insight, RMS suggests that the reason the court does not have to coerce the man is because he is not an apostate as far as the commandment of circumcision is concerned; he is reticent about performing it because of the pain involved, and not because he is inherently opposed to performing the commandment. In RMS' opinion, we must take his pain into account, and his pain is sufficient reason not to beat and coerce him. RMS does not tender a ruling on this matter, even though Maimonides did, rejecting coercion of the uncircumcised man. This finding, once again, emphasizes that RMS did not consider Maimonides' rulings to be final, as he was even open to debating matters on which Maimonides had ruled, especially those where human nature was concerned.

7. May a Common Priest (*Kohen*) Allow Himself to Become Ritually Impure?

The aforementioned principle also comes into play in the laws of mourning. RMS addresses the basis for permitting a common *kohen* to become ritually impure through contact with his deceased brothers. RMS offers two rationales for this dispensation, one involving matters of inheritance, and the other described in the following passage:

Because man's soul is suffused with bitterness and if he does not become ritually impure and immerse himself in his close relatives' burial, there is no greater distress than this; therefore, the Torah did not enjoin (lit., fence in) the common *kohen* [to act] against human nature ... however, Our Rabbi explained that the reason that the Torah permitted impurity through contact with close relatives was to allow mourning for relatives.³⁰

RMS chooses to provide a different rationale than Maimonides for why the Torah permitted the common priest to become impure through contact with his close relatives. He maintains that this dispensation stems from the fundamental principle that the Torah takes human nature into account.

30 See OS, Laws of Mourning 3:8.

To conclude this section, I would like to shed some light on the issue from two additional vantage points. First, it seems that the halakhic approach depicted here is a function of the historical circumstances in which RMS lived and wrote. The Enlightenment, modernization, and the Jews' rampant assimilation into their Gentile surroundings only reached Eastern Europe at the end of the nineteenth century, long after they first appeared in Central and Western Europe. Orthodoxy and a Judaism constantly on the defensive, which arose in reaction to these phenomena, were less characteristic of Eastern Europe in RMS' era. In contrast to his predecessors and contemporaries throughout Europe, RMS did not perceive himself to be fighting a holy war, giving his all to fortifying the walls of the citadel of Torah.³¹ Perhaps this historical reality led to RMS' emphasis on taking human nature into account and establishing a basic level for performing the commandments. Furthermore, perhaps this reality contributed to his tolerance, both for those who threw off the yoke of the commandments,³² and for those who wished to accept them.³³ It is also possible that this reality, in which he was not forced to fight the Enlightenment, nor to make the Torah world an attractive, intellectually challenging place, influenced not only his final rulings but also his choice of a practically focused, bottom-line-oriented methodology, as opposed to an analytical-pilpulistic or a formalist one.

Second, we must consider the extent to which a rabbinic scholar must exercise caution when introducing a metahalakhic principle that impacts the entire halakhic-judicial methodology. RMS expressed this concern in a correspondence he had with another legal scholar. This scholar wished to argue that RMS was mistaken to be concerned over a girl who had not yet reached the age of majority making a levirate marriage, and thus exempting her younger sisters from such an obligation.³⁴ RMS responded as follows:

And know my friend that when we invoke "ways of pleasantness" we mean that we are unsure of the Torah's intent [in

31 On bolstering the commandments' status in society as a rationale for stringency, see Benjamin Brown, "Stringency: Five Modern Era Types," *Diné Israel* 20–21 (2001): 134 (Hebrew).

32 See Asher Bergman, *Ha-Or Sameah: Toledotav, Orkhot Hayyav, Hanhagato u-Mishnato* (Benei Berak: n.p., 2001), 267.

33 For instance, those who wish to convert for matrimonial purposes. See *Responsa Or Sameah* II 32, p. 118.

34 Israel Dusovitz, *Ha-Shabbat le-Qaddesho* (New York: Shulsinger Bros., 1942), 95.

stating] “without a son.” Are we only scrupulous to ensure that at the time of his death he had a son, and if he [the son] died later she is exempt, or is it [the commandment incumbent] at any time that he does not have a son, and if he (the son) dies, the commandment reasserts itself and she is required to enter the levirate marriage? ... We say that “her ways are ways of pleasantness” and we interpret this in the following manner that they should be ways of pleasantness, and he should not be able to come to err and the ordinances should not be those that cannot be lived by. And the Torah means in the present, at the time of death... And so too, with regard to the palm frond and myrtle we explain in a manner that enables there to be ways of pleasantness. However, in contradistinction, there is no basis for uprooting anything from the Torah because “her ways are ways of pleasantness,” and furthermore every enactment decreed by the rabbis is like that decreed by Scripture, and to say that if she undergoes the rite of refusal we will annul the connection [to the levir] because of “ways of pleasantness” has no substance and is in error.³⁵

RMS asserts that the aforementioned metahalakhic principle is only to be used when the interpretation of the halakhic norm is in question. However, if the halakhic norm is clear, requiring no elucidation, not only is it forbidden to annul the norm based on this principle, we may not even introduce it into the discussion. His reticence in employing a metahalakhic principle fits in nicely with his overall oeuvre, especially his preference for straightforward, simple legal certainty, along with the mitigation and sometimes rejection of legal constructions and fictions,³⁶ as well as his preference for minimizing the influence of public law and rabbinic enactments on private law.³⁷

RMS also demonstrated this reticence in the following case brought before him:

35 Ibid., 194.

36 See, for instance, *OS*, Laws of Original Acquisition and Gifts 5:1. When the law’s very essence is a fiction, this indicates the desire to privilege policy over the normative rule of law. See David Glicksberg, “Kiddushin by Loan’ — A New Proposal,” *Diné Israel* 19 (1997): 137 (Hebrew).

37 See, for instance, *OS*, Laws of Original Acquisition and Gifts 5:1; *Code*, Laws of Robbery and Loss 10:3.

What (the question) I was asked regarding the ruling of a famous scholar who permitted an Israelite to play a musical instrument on the second day of the pilgrimage festival on the birthday of the king in his honor, whether he ruled appropriately? And I responded that the concern for human dignity is great, in that it overrides a biblical prohibition, what is the biblical prohibition? Do not stray (*lo tasur*) ... And it seems to me that this would not apply in our case, for concerning the honor due kings, the rabbis did not enact decrees except in cases where the Torah did too, [such as] making a decree permitting him to become ritually impure in the case of gross human indignity, such as the burial of a corpse that has no one else to bury it (*met mišvah*), but in a case where the Torah did not make a distinction and did not forego its precept because of human dignity, so too the Sages would not be lenient [giving license] to override their commands because of the honor due to kings.³⁸

According to RMS, even though the principle of human dignity is of great weight, in a case where the Torah did not forego observance of its precepts, the rabbis would also not waive the obligation to fulfill their decrees.

Section Two: Changing or Deviating from Societal Norms

During the 1980s, at the same time that the concept of essentialist or value-centered law gained ascendancy in the Israeli legal system, another process took place as well: the legal obligations in various areas of life were increased.³⁹ The rise of values as a key legal motivation led the court to project its morals onto society, expanding its role into that of a pedagogical institution tasked with providing its charges with an unequivocal sense of the values it championed. The expanded role of the judiciary coerced the citizenry into acting in a manner that brought the values inherent in these legal principles to life. In my opinion, this expansion of the judiciary's realm of responsibility and the concomitant increase of legal obligations appears

38 See Nahum Rakover, *Gadol Kevod ha-Beriyot: Kevod ha-Adam ke-Erekh Al* (Jerusalem: Moreshet ha-Mishpat ha-Ivri, 1998), 135.

39 Mautner, *supra* n. 8, at 101.

in RMS' oeuvre as well. Unlike in the previous section, for this section, I was not able to find explicit, broad declarations to this effect in *MH*, so it is more difficult to draw sweeping conclusions from my findings. However, without a doubt, several unequivocal conclusions can be drawn.

RMS emphasizes the personal responsibility that each individual must shoulder. Thus, for instance, RMS was stringent in tort law, with regard to one who placed his produce in another's domain without permission and with regard to one who covered a pit with another's bucket.⁴⁰ Given that this is RMS' approach towards those who transgress normative tort law, we are not surprised by his attitude towards those who transgress in the realm of contract law, breaking agreements that they themselves had made. Thus, for instance, RMS was stringent with an artisan who deviated from a contract ("the artisan who spoiled the work"),⁴¹ and he provided a maximalist interpretation of contractual obligations (for instance, demanding that a husband provide sustenance for a mother and daughter even after their divorce).⁴² In all these cases, RMS chose the most stringent of the likely halakhic approaches. In balancing between the one who breaks his commitment or transgresses the social order and the one who is injured by these actions, RMS preferred to judge the transgressor stringently, even going beyond Maimonides' *Code*. I will now discuss a few more examples of this mentality in greater detail.

1. Dealing Stringently with a Woman Who Calls Off an Engagement to Marry

In the Laws of Original Acquisition and Gifts, Maimonides asserts that a woman who decides to call off her engagement must return all the presents her fiancée gave her, including food and drink. The monetary value of the food and drink is to be determined by their lowest market price. In striving to reach his own legal decision, RMS questions why Maimonides fixed the value at the lowest market price, and in light of this sentiment tends to interpret Maimonides' text stringently:

Where have we found that the value of the meat should be established at its cheapest price? In cases where one is exempt from paying damages but obligated to pay for the benefit

40 *OS*, Laws of Hiring 7:7.

41 *Code*, Laws of Hiring 10:4.

42 *OS*, Laws of Sale 11:17.

derived, as one has benefited from his fellow man's property, one must pay according to the lowest market value, as we say 'take it for cheap, for he did not consume it expecting to pay.' And, therefore, in the public domain where he is exempt from liability for damages classified as *shen* ("tooth") and *regel* ("leg"), only paying the amount benefited, it makes sense that he should pay the cost of the meat at a low market price... however, in our case wherein the rabbis ruled that she must even pay for the feast that the groom made for his friends, as in all cases of *garmi* [indirect damages]; therefore, she must repay him, not [merely] what she benefited but the damages she caused, and she must repay what the food was worth, not at the lowest market price for the meat... and this requires further investigation.⁴³

Elsewhere RMS addresses the question of whether a woman who retracts her agreement to marry reimburses the groom for the cost of the feast he held for his friends and acquaintances.⁴⁴ In contrast, our passage addressed the woman's obligation to repay the cost of the food and drink her prospective groom sent her. RMS argues that since Maimonides obligates reimbursement based on the laws of *garmi*, he must consider this woman to be tantamount to one who causes direct damage. Therefore, her liability should be assessed under the tenets of tort law, and not under the norms of the law of unjust enrichment.⁴⁵ Therefore, she must repay him the cost of the food and drink he sent her based on their highest market value, not their lowest. RMS' does not manage to resolve his difficulty with Maimonides' ruling and remains with a gigantic question mark.

43 OS, Laws of Original Acquisition and Gifts 6:23.

44 OS, *ibid.* at 4:24.

45 See Jonathan Blass, "Unjust Enrichment," in *Hoq le-Yisra'el*, ed. Nahum Rakover (Jerusalem: Jewish Law Heritage Society, 1992), 14 n. 63 (Hebrew): "One who adduces liability based on unjust enrichment is more likely to require restitution based on the amount of the acquisition, not on the resulting loss. On the other hand, if the legal basis for restitution is tort law then perhaps the resulting loss should be the determining factor. Second, if tort law is applied then the creditor should collect his debt from 'the best of his [the debtor's] field'" (my translation). On this matter, Blass cites OS, Laws of Monetary Damages 1:2.

2. Dealing Stringently with a Tortfeasor - Paying According to the Time of Damage

In the Laws of Hiring, Maimonides addresses the case of a porter who shattered a shop owner's cask of wine. On market day, the cask is worth four gold pieces and on other days, three. Maimonides rules that if the porter reimburses the owner on market day he must pay four, but if he pays on any other day, he only needs to pay three.⁴⁶ Basing his opinion on the perorations of the *Maḥaneh Efrayim*, RMS raises a borderline case regarding this ruling, analyzing the law with regards to a case in which the market value changes in favor of the tortfeasor:

Behold the *Maḥaneh Efrayim* extensively investigated the case of a tortfeasor, wherein at the time of damage the damaged object was worth four but at the time the case came to court it is only worth one: Should he be analogous to a thief (*gazlan*) who pays according to [the value at] the time of the theft and cannot exempt himself by returning the article itself ... But, this itself is difficult [to understand]: Why does he [the porter] repay a cask of wine or three gold pieces on other days when he is already obligated to pay four gold pieces, the cost of the cask on market day? And so we must conclude that this is because of the law of laborers... thus the Sages decreed and evaluated the mindset of the owner who just wants to make sure that he has a cask of wine like he had before, and therefore the Sages exempted him [the tortfeasor]—[demanding] that he pay what it was worth at the time of the court case and the reimbursement. And the owner is satisfied with this... but if he broke it intentionally, he must certainly pay the value at the time of damage, that is to say four, and he cannot erase his debt by returning a cask of wine, which is only worth three now, and this is clearly the law.⁴⁷

Thus, RMS wishes to deal with the porter more stringently than Maimonides did. While he eventually rejects this possibility, he still adjudicates stringently in the borderline case in which the tortfeasor shattered the cask, declaring

46 *Code*, Laws of Hiring 3:3.

47 *OS*, Laws of Hiring 3:3.

that he must pay like a thief would, that is to say, based on the cask's worth at the time of damage, even if the value later decreased.

3. Dealing Stringently with One Who Steals from a Thief

In the Laws of Theft, RMS addresses the case of one who steals from a thief and, in so doing, he continues to judge stringently those who transgress the social order. RMS rejects the position of those Later Authorities who judged this thief leniently, instead choosing to classify him as analogous to a thief who is even required to reimburse the owner for unavoidable losses:

That which the Later Authorities interpreted in the *Qeṣot* [*Haḥoshen*], that in the case where there was a theft and the owners did not despair of regaining the stolen object, and someone else came and consumed the object, that individual is liable as a tortfeasor, but not under the laws of theft or robbery. If the object broke due to unavoidable causes, since he took it from the domain of a thief, he is not considered a thief, in which case he would, indeed, have been liable for unavoidable losses. This is in accord with Naḥmanides' position. However we have already proven everywhere that [the truth] is not like him, that even one who steals from a thief is deemed a thief in so far as the principal (*qeren*) and the obligation to pay for unavoidable losses is concerned... as one who steals from a thief is only excluded with regard to a double repayment, behold he is obligated to repay the principal and he transgresses the biblical precept of "thou shalt not steal."⁴⁸

RMS disputes the Later Authorities, the *Qeṣot*, and Naḥmanides, ruling stringently that one who steals from a thief is deemed a thief and must even reimburse the owner for unavoidable damages.

Section Three: Is Intention or Action the Determining Factor?

In adopting a pragmatic-adjudicatory approach, RMS prioritizes addressing overt actions (the physical and factual elements), which can be determined

without evidentiary difficulty, instead of focusing on intentions and thoughts (the mental element).⁴⁹ In Latin, the physical element is known as the *actum reus* and the mental element is known as the *mens rea*.⁵⁰ As my analysis reveals, RMS' approach is also expressed in additional laws wherein he consistently and methodically focuses on the individual's actions and not on his thoughts or intent. This approach is similar to the ontological stance, which states that the absence of intent to commit an act does not preclude a legal appraisal, whether or not the act was the observance of a precept or the commission of a transgression and whether or not the act exempts one from liability or obligates one. On the other hand, the deontological position declares that an appraisal of the act as the performance of a precept or commission of a transgression is of necessity based on the nature of the intent accompanying the act.⁵¹ I will analyze RMS' approach on this matter in the following few laws.

The question to what degree an individual's actions reveal his intentions is a weighty juridical one, especially in criminal law. In order to secure a conviction on certain charges, both the factual element and the mental element must be established.⁵² Thus, for instance, in order to convict a man of homicide, it is not enough to ascertain that he killed someone. In this case, the intent to kill must also be proven. The mental state of the man at the time he committed the crime is difficult to prove conclusively through factual evidence. In order to ascertain the defendant's mental state, the legal system relies on legal presumptions. Thus, for instance, we may presume

49 These elements come to the fore in the complex talmudic discourse pertaining to *garmi* and *gerama* (cases of indirect damage), as RMS established a completely objective test which is not contingent on the tortfeasor's intent but on the proximity of the damage occurring to the damaging event, see *Code, Laws of Original Acquisition and Gifts* 6:24. This is also the case in the discourse pertaining to a covert gift, in which RMS requires an objective, explicit, and clear revelation of the gift-giver's frame of mind, and is unwilling to rely on any interpretation of his intentions, see *Code, Laws of Original Acquisition and Gifts* 5:1 and on.

50 See, for instance, Shneur-Zalman Feller, "Is There No General Basis for the Mental Element of Crime in Israeli Law?" *Hapraklit* 23 (1967): 308 (Hebrew).

51 See Yohanan Silman, "The Significance of the Relation between Intention and Behavior in Halakhah," in *Studies in Jewish Law and Halakhah*, ed. A. Enker and S. Deutsch (Ramat Gan: Bar Ilan University Press, 1999), 263–64 (Hebrew).

52 See, for instance, Yuval Levy, "Volition and Criminal Responsibility," *Hapraklit* 29 (1974): 385 (Hebrew); Ruth Kanai, "Mens Rea and the Circumstances of the Offence," *Bar-Ilan Law Studies* 11 (1994): 147 (Hebrew).

that an individual intends for the most likely consequence of his actions to occur.⁵³ That is to say, one's actions can testify to one's mental state. The transgressive performance of a forbidden labor on the Sabbath also requires intent—*melekheth mahashevet* (purposeful or intentional labor) is forbidden by the Torah—and one cannot be found guilty of performing a forbidden labor on the Sabbath unless one had the intent to do so.⁵⁴ When it is necessary to determine a man's state of mind in order to convict him, sometimes an examination of the act itself can prove to be vital.

1. Adjudicating the Laws of Shabbat: Determining by Intention or Action

Both the Babylonian and Jerusalem Talmuds discuss whether one who builds a temporary structure (*binyan le-sha'ah*) on the Sabbath has transgressed the forbidden Sabbath labor called *boneh* (building). In other words, does the intent to build a structure that will only last a brief period of time violate the prohibition of building? The Jerusalem Talmud deduces this question from a similar discussion regarding the forbidden labor called *qosher* (tying a knot):

What act of tying [forbidden on the Sabbath] occurred in the Tabernacle? That they fastened the tent strings. Was this not a temporary knot? Rabbi Yoseh said: "Since they encamped and journeyed by God's command, it was like someone who dwells permanently." R. Yose the son of R. Bun said: "Since God promised that he would take them into Israel, it was like someone who dwells temporarily."⁵⁵

- 53 See, for instance, Miriam Gur Aryeh, "The Psychological Component and Forethought in Capital Offenses," *Mishpatim* 5 (1973): 181 (Hebrew); D" N [Diyun Nosaf] 11/65 *Gadisi v. the Attorney General*, P.D. 20(1), p. 61; C.A. 125/50 *Jakobovitz v. the Attorney General*, P.D. 6 519.
- 54 See *b. Shabb.* 41b, the dispute between R. Simeon and R. Judah pertaining to "that which was unintended"; *b. Shabb.* 103a and *Tosafot*, s.v. *lo*; pertaining to the law of *pesiq reisha* (an inevitable, though unintentional, consequence); *Shulhan Arukh*, OH 320:18.
- 55 *Y. Shabb.* 15:1 (15a). Rabbi Yoseh's words read: "like someone who dwells (temporarily) [permanently]." Rabbi Yose the son of R. Bun's words read: "like someone who dwells (permanently) [temporarily]." This notwithstanding, in *y. Shabb.* 7:2 (10d), a slightly different version appears.

RMS claims that both the Babylonian and Jerusalem Talmuds accept the latter opinion: building a temporary structure is forbidden.⁵⁶ RMS reconciles the dispute between the two Talmuds and challenges those rabbinic decisors who believe that the two Talmuds are conflicted on this matter.⁵⁷ RMS believes that both Talmuds conclude that the individual's intent is irrelevant. He believes that an individual who ties a permanent knot (not an impermanent one) has transgressed by performing the forbidden labor of tying—even if he intends to untie it in a short while—and that the same standard applies to the labor of building. The test for whether a forbidden labor has been performed rests in the action performed, not in the intent behind it. In order to further clarify this point, I would like to suggest employing the classical distinction between the object (*hefṣa*), that is, the object with which or upon which the act is performed, and the individual (*gavra*), who performs the act. RMS focuses on the object, the nature of the structure, and not on the intent of the individual performing the act.⁵⁸ In keeping with this, he writes the following:

And we have found in the case of building that if he lifted [it] and placed [it] upon the stones, he is liable for having transgressed (the forbidden labor of) building, and likewise one who attaches a handle to an axe. Upon this the Jerusalem Talmud asked: "Where can we find such a case?" And it answered that we have found [such a case] in the case of the Tabernacle beams that were inserted into the sockets, which were hollow, and one was adjoined to the other, and we have found this to be the archetypal labor... for, in truth, one is only liable if one builds on the ground, but upon vessels (*al gabei kelim*)... And likewise with regards to one who constructs a temporary structure, wherein the join is not strong (*shaqil ve-ṭari*); but, if in building, he creates a new object, like the case wherein he makes a hole in the chicken coop, he is definitely liable even if

56 RMS proves this with a similar utterance found in *b. Shabb. 74b*. See OS Shabbat 10:12.

57 See *Mishnat Ya'akov*, Laws of the Sabbath 10:12, n. 7, which questions RMS' proof.

58 For the Babylonian Talmud's use of this terminology, see *b. Ned. 2b*; see also *Sha'arei Yosher* 3–25, s.v. *ve-nir'eh*.

he built upon vessels, and even if the structure was temporary, there is no doubt that he is liable ... and this is as clear as day.⁵⁹

Thus RMS adopts an unequivocal position, even though there are rabbinic decisors who disagree with him.⁶⁰ In his opinion, only the nature of the structure needs to be considered. Therefore, if someone builds an impermanent structure he is not liable because he has not built a structure that is legally deemed a structure. His intent has no bearing on his culpability. On the other hand, if someone builds a stable, permanent structure he is liable even if he intends it to only be temporary.

RMS' position on building (*boneh*) took a central role in the twentieth century discussion about whether one can change a gas balloon on a festival day when purposeful labor is forbidden. In his responsum, the *Aṣeret Paz* cites RMS as the leader of the faction that forbids the construction of a temporary structure:

According to the Ḥatam Sofer and those who side with him, who believe that the laws of an impermanent structure even apply to a building that is inherently strong and stable, since the builder plans to destroy it; in such a case it is deemed an impermanent structure; so, we may say that in this case it is permitted [to change the gas balloon] because of the honor of the festival day ... however, according to the Or Sameaḥ, and those who agree with him ... as this case of building fulfills all the necessary criteria, he is culpable of violating a Torah prohibition. For it is not deemed an impermanent structure unless it is inherently shaky, and here (in our case), adjoining the gas pipe to the canister certainly creates an inherently strong and permanent structure, the only mitigating factor being that he is planning to take it apart in the future in order to exchange the canister. Such being the case, what can we say according to them?⁶¹

Here, RMS leads the faction that believes an inherently permanent structure is to be deemed an unequivocal infraction of the forbidden labor of

59 OS, Laws of the Sabbath 10:12.

60 RMS adds below in his commentary: "And the Ḥatam Sofer, with all due respect to this illustrious Torah personality, was incorrect regarding this matter."

61 *Responsa Aṣeret Paz*, Part I, Volume 1, OḤ 9.

building even when the builder intends for the structure to be temporary. In contradistinction, the Ḥatam Sofer leads the faction that believes such a structure would be deemed a temporary one. It is worth noting that RMS is not necessarily espousing a stringent position, since according to RMS, if someone built an impermanent structure, he would not be liable even if he intended the structure to last forever.

It seems to me that RMS consistently applies this fundamental intellectual approach, weaving it into other legal decisions. The debate over action and intention has its source in the Babylonian Talmud:

It was stated: 'If one is [seen] weeding or watering his seedlings on the Sabbath, under what category [of the offence] should he be cautioned? Rabbah said, [It comes] under the category of ploughing. R. Joseph said, under the category of sowing. Said Rabbah, my view seems the more reasonable, for what is the object of the plougher? To loosen the soil; here too, he loosens the soil. Said R. Joseph, My view seems the more reasonable, for what is the object of the sower? To promote the growth of the produce; here too, he promotes the growth of the produce.'⁶²

That is to say, Rabbah maintains that one who waters his seedlings should be culpable under the category of ploughing because he is loosening the soil. R. Joseph, on the other hand, maintains that one who is seen watering his seedlings should be culpable under the category of sowing because he intends to promote the growth of the produce. The Tosafists explain the dispute ad locum:

Loosen the soil – for we categorize based on the essential labor [performed] and it is similar to ploughing. But Rabbi Joseph, even though the essential labor is similar to ploughing, [notes that] his intent is not to loosen the earth. And this is the basis for their dispute: For Rabbah maintains that we categorize based on the similarity between the actions undertaken and not on what he is thinking, and Rabbi Joseph maintains that we categorize based on what he is thinking, for this is the essence

62 *B. Mo'ed Qat.* 2b. Translations of passages from the Babylonian Talmud cited in this article are based on *The Babylonian Talmud* (London: Soncino Press, 1935–48) with some minor changes.

[of the labor], and we do not categorize based on [superficial] similarity.

Rabbah maintains that we should focus on the act and Rabbi Joseph maintains that we should focus on the thoughts. Maimonides, in one of the laws of the Sabbath, agrees with Rabbah that the act is the determining factor.⁶³ However, elsewhere in the Laws of the Sabbath, Maimonides seems to agree with R. Joseph, according to whom the intent is the determining factor.⁶⁴ RMS contends that Maimonides agrees with Rabbah that the act is the determining factor:

And Our Rabbi ... ruled like Rabbah that he was not liable ... and this corroborates that our version of the text, which was the version of Our Rabbi, is the primary one, that Rabbah rules leniently and Rabba rules stringently, which is not the textual version of the *Hasagot*. And this is also corroborated by the Jerusalem Talmud.⁶⁵

RMS explains that both Maimonides and the Jerusalem Talmud contend that the actions are the determining factor, even though Maimonides contradicts himself in the *Code*.

RMS' argument that Maimonides maintains that actions are the determining factor plays a role in another ruling in the laws of Sabbath. The Babylonian Talmud asks why neither Rabbah nor Rabbi Joseph rules that one who is seen watering his seeds on the Sabbath is not liable twice, once for ploughing and once for sowing.⁶⁶ The Babylonian Talmud suggests that an individual cannot be found liable twice for the same action; however, it rejects this suggestion since R. Kahana stated that one who prunes and uses the branches for fuel is liable twice, for planting and for reaping. Ultimately, the Babylonian Talmud leaves the matter unresolved. However, RMS believes that this lack of resolution does not mean that the concept was not included in the canons of practical jurisprudence. He maintains that the one who

63 *Code*, Laws of the Sabbath 2:16: "If he intended to catch fish and he caught fish and a child, he is not liable, even if he had not heard that it had drowned, since he caught a baby along with the fish, he is not liable"; cf. *b. Menah.* 64a where Rabba and Rabbah debate action vs. intent.

64 See *Code*, Laws of the Sabbath 8:2; see too *Responsa Yabi'a Omer*, part 4, Oḥ 35.

65 OS, Laws of the Festivals 2:4.

66 *B. Mo'ed Qaṭ.* 2b.

prunes is liable twice, since he has transgressed and performed two of the thirty-nine archetypal Sabbath labors. However, ploughing and planting are both derived from the same archetypal labor, so he is only liable once. RMS explains the basis for this distinction, as follows:

Since this labor is not an archetypal one, rather it is similar to an archetypal one, such that it is only derived from it; therefore, it is attributed to the archetypal labor that it is most similar to; and this is where they disagree—whether we consider his thoughts or his actions the determining factor. And the labor which is merely somewhat similar [to the archetypal labor] is not deemed a labor; rather it is subsumed under the archetypal labor to which it has the greatest similarity, and this is clear.⁶⁷

That is to say, when the labor that was performed is physically similar to an archetypal labor, it is subsumed by it. The individual who performs the labor will only be liable once since the deed is the determining factor, and the two deeds can be depicted as one, even though the transgressor intended to perform two distinct archetypal labors. Had we chosen to make the transgressor's intentions the determining factor, he could have been deemed liable for ploughing and planting, two distinct archetypal labors.

2. Adjudicating the Laws of the Four Species Based on the Action Taken

The Laws of the Four Species also attest to RMS' consistent privileging of actions over intentions. The rabbinic decisors debated whether one who plucks an *etrog* (citron) off a tree could fulfill the precept of taking the four species with it if the law of *ṭevul* (forbidden untithed produce) was in force. Rabbi Samuel ben Moses de Medina (henceforth, Maharashdam) believed that since the individual in question did not pluck the *etrog* in order to consume it, he may fulfill the precept with it, even though it is untithed. In ruling this way, the Maharashdam bases himself on Maimonides, who ruled that the Torah only requires a person to tithe his produce when he completes the labor of preparing it for the tithing phase with the intent of consuming it.⁶⁸ In commenting on Maimonides, RMS writes as follows:

67 OS, Laws of the Sabbath 7:4, s.v. *ulam*.

68 Code, Laws of Ma'aser 2:1.

And behold, even though this is a brilliant observation; his ruling that this [*etrog*] has not been prepared for the tithing phase with the intention of consuming it requires much thought because of that which Our Rabbi wrote,⁶⁹ one who plants with the intention of performing a precept, such as one who plants an *etrog* tree in order to perform the precept of [taking] the palm frond... is obligated to observe *orlah* [one is forbidden to benefit from produce that grows in the first three years after planting], and this is taken from the Jerusalem Talmud.⁷⁰ Behold, when he plants in order to perform a precept this is considered the same as when he plants in order to consume the produce, as it is written in Scriptures "And plant etc. fruit tree" (Lev 19:23), but not when he plants to create a fence or a covering. In this case as well, he is considered to have prepared the produce for the tithing phase with the intention of consuming it, so how are these different?⁷¹

RMS argues from one of Maimonides' other rulings that one who plants a tree with the intention of performing a precept with the produce is considered to have planted in order to consume the produce. Therefore, an individual who plucks an *etrog* for the purpose of fulfilling the precept of taking the four species will be considered as one who had plucked the *etrog* in order to consume it, and he will be unable to fulfill the precept as long as the fruit is untithed. RMS' comment here stresses the fact that he privileges the deed over the intent. The intent of those who plant a palm tree or pluck an *etrog* in order to fulfill the precept of the four species only exists in the realm of thought. In the physical world, these people have planted a fruit tree and so they are required to observe the laws of *orlah* and tithe the fruit. The fact that the tree was planted in order to perform a precept does not change the nature of the actual act because we do not take intentions into account.

RMS attempts to resolve Maimonides' two contradictory rulings by turning to the Mishnah that discusses the hyssop. The Tanna'im argue over whether one who collects hyssop in order to perform the precept it is used for is considered analogous to one gathering it for eating or for fuel.

69 *Code*, *ibid.* at 10:7.

70 *Y. Or.* 1:1 (60c).

71 *OS*, Laws of Shofar, Sukkah, and Lulav 8:2.

The sources cited by RMS indicate that in the case of the hyssop, intent is the determining factor. Of course, this finding is not in keeping with RMS' consistent privileging of deeds over thought. He resolves this contradiction in the following manner:

Indeed, it [the case of the hyssop] is not similar, for there the hyssop is not considered food until he perceives it to be so; therefore, his intent to gather it in order to fulfill a precept does not transform it into food, but here [in our case] the *etrog* is certainly considered food; it is his intent to perform a precept with it that removes it from the category of one planting for consumption, this we do not say.⁷²

RMS explains that the laws of the hyssop are unique because the hyssop is presumed not to be food. The individual's intent would be necessary to transform it into food. Therefore, as long as the individual gathering it intends to only perform a precept with it, it will not be considered food.⁷³ In contrast, the *etrog* is intrinsically considered to be food. The intent of the individual planting the tree cannot remove it from this category. That is to say, thoughts cannot change the essence of an object. We do not consider his intent, only his actions, and, therefore, he is obligated to treat the *etrogs* that grow as *orlah* for the first three years after planting, and he may not use the *etrog* to fulfill the precept as long as it is untithed. After resolving the contradictory passages in Maimonides' *Code* in keeping with his approach, RMS addresses the passage in the Jerusalem Talmud. The Jerusalem Talmud cites the verse "and [you shall] plant every fruit tree" (Lev 19:23) as the source for the law of *orlah*. RMS asks why a person who plants an *etrog* tree should be obligated in *orlah* when he has no interest in the tree itself, only in the fruit, which is essential to performing the precept? RMS answers his own question by declaring that one cannot fulfill the precept of taking the four species with an *etrog* that may not be eaten. Thus, in planting an *etrog* tree in order to perform the precept, one is also planting the tree in order to consume its fruit because the two purposes are intertwined. Or to phrase it differently, the *etrog* tree must be planted in such a way that its produce is edible, for the precept of taking the four species can only be fulfilled with an *etrog* from such a tree. This being the case, the produce of the tree is

72 Ibid.

73 See *Minḥat Shelomo Tinyana* 2-3: 123.

considered *orlah* for the first three years. In offering this answer, RMS resolves his difficulty with the Jerusalem Talmud without giving up on his approach deeming actions the determining factor.

3. One Who Digs Pits, Ditches, and Caves for the Purpose of Idolatry

I believe that RMS' privileging of action over thought also appears in the Laws of Idolatry. Maimonides writes that "one may not derive benefit from a tree that was originally planted for the purpose of being worshipped."⁷⁴ Maimonides asserts that from the moment a tree is planted for the purpose of being worshipped, one is forbidden to derive benefit from it. The very intent to worship the tree turns it into a tree consecrated for idolatry, even though it has never been worshipped. RMS, *ad locum*, cites Riṭba and Ṭur, who maintain that in the case of one who digs pits for idolatrous purposes, the pits only become forbidden if he actually bows. They opine that the digging itself, like the planting itself, does not make the object forbidden, even though the intent of the digger was to use the pits for idolatrous purposes. Intention is not enough to ban the object. RMS notes the dispute between Maimonides and Riṭba and Ṭur, and postulates that Tosafot took the same approach as Riṭba and Ṭur, although Tosafot wrote that if one chops down a tree and sculpts it for idolatrous purposes, one is forbidden to derive benefit from the tree even though no one has actually bowed down to it.⁷⁵ RMS is forced to explain that Tosafot forbade anyone to derive benefit from the tree because he actually performed the deed—bowed—later. In other words, even though a straightforward reading of Tosafot indicates that they seem to agree with Maimonides, RMS argues that Tosafot can be used to explain the position of Riṭba and Ṭur, who maintain that intent alone cannot forbid the object, only an actual action can.⁷⁶ If so, RMS is definitely more staunchly committed to the notion that "we consider the deed the determining factor and not the

74 *Code*, Laws of Idolatry 8:3.

75 *B. Avod. Zar.* 47b, Tosafot s.v. *he'emid*.

76 Below, RMS continues dealing with another source in Tosafot which seems to contradict his purported guiding principle that thought alone is insufficient: "And concerning that which they wrote that if an idol worshipper intended to perform idol worship, it is definitely forbidden, since he is performing an act with the tree itself, and this is similar to one who digs pits etc. in which the rest of the ground is also forbidden because he performed a deed with it. See too *Responsum Aṣeret Paz*, part 1, volume 2, YD 5.

thought” than to ruling like Maimonides. In this case, he even demonstrates how Tosafot can be read in line with those disputing Maimonides’ position. Again, we should note that adopting this policy sometimes leads to leniencies (as in our case), not just to stringencies.

4. Conditions Pertaining to the Wedding Canopy and Betrothal

RMS’ fundamental approach also seems to me to be the basis for the ruling discussed in this section. Maimonides in the Laws on Marriage writes as follows:

Once the bride has entered the wedding canopy, he [her husband] is permitted to have relations with her whenever he desires, and she is [to be considered] his wife in all matters. Once she enters the wedding canopy she is considered married.⁷⁷

In his commentary on this ruling, RMS discusses a related borderline case, without explicitly addressing Maimonides’ ruling. RMS wishes to determine whether the marriage process completed by entry under the wedding canopy can be conditional:

Furthermore, I am highly doubtful that a marriage can be conditional, that is to say, after he has betrothed her and she has become his fiancée, he brings her into the canopy under the condition that if he does not give her this or that or fulfill some other condition, the marriage will not have been finalized—Is his condition applicable or not? And the reason for my doubt is that which we have explained, that in *ḥaliṣah* a condition cannot be applied to annul the act, and a *ḥaliṣah* made under false pretenses is valid ... I am very doubtful.⁷⁸

RMS questions whether we should distinguish between the betrothal, which can be conditional, and the marriage, in which men are not accustomed to make conditions. The widespread presumption in marital law is that “a man does not want to turn the relations that he had with his wife into promiscuous acts,” and that therefore we may surmise that no condition can annul a marriage.⁷⁹ RMS states that if this is true, we can now understand

⁷⁷ *Code*, Laws of Marriage 10:2.

⁷⁸ *OS*, *ibid.*, 10:2.

⁷⁹ *B. Yevam.* 94b.

the ruling in a particular case that appears in the Babylonian Talmud: the case of witnesses who testify that a woman was promiscuous during the betrothal period before her marriage, after which she married.⁸⁰ In this case, it becomes clear after the marriage that the marriage was concluded in error because the husband thought his bride was a virgin, when, in fact, she had previously engaged in sexual relations. Tosafot maintain that the marriage is annulled and the woman returns to her previous betrothed status. RMS, in contrast, believes that since there is no such thing as a conditional marriage, and, in this case, it is as if he married her conditionally, assuming that she would be a virgin under the wedding canopy, then her having entered into the wedding canopy is effective and she is considered to be married. RMS adopts a lone position, arguing that the marriage is not annulled since there is no such thing as a conditional marriage—the act of finalizing the marriage is the determining factor. Ultimately, however, he does not take a stand, instead writing that “All the rabbis prior to me did not interpret in the manner that I explained; therefore, in terms of practice, the issue requires further thought.”

This notwithstanding, RMS does state his opinion with regard to practical halakhah in this case, and this opinion is consonant with his principled belief regarding actions being the determining factor. However, he was reticent to rule in light of all the earlier scholars. Apparently, “all the rabbis prior to me” (presumably an allusion to Tosafot) led him to avoid ruling in this case. Thus, RMS leaves the question unresolved even though Maimonides ruled on this matter.

5. Providing a Post Facto Rationale When Action Was Already Taken

RMS’ principled approach also seems to me to be the basis for another ruling in marital law discussed in this section. Maimonides writes as follows:

A woman who violates the faith of Moses or the Jewish faith... we do not compel the husband to divorce ... and even though he did not divorce her, she does not receive the *ketubbah* (the sum guaranteed her in her wedding contract), as the *ketubbah* was enacted by the Sages so that he [the husband] would not consider it a light matter to divorce her [his wife]. But they only concerned themselves with modest daughters of Israel.

80 B. *Ketub.* 10a, Tosafot s.v. *ḥazaqah*.

However those wanton ones do not get the benefit of this enactment; rather, he [her husband] should consider it a light matter to divorce her [the wife].⁸¹

In his discussion of marital law, RMS cites *Ba'al Halakhot Gedolot* (henceforth, BaHaG), who writes that if a single witness came and told a husband that his wife had committed adultery, and the husband divorced his wife based on this testimony, he may not take her back. Since the man believed the witness as if he were two witnesses, she becomes forbidden to him (*shavyah aleiha ḥatikhah de-issura*).⁸² Since the husband decided to believe the witness and deem her forbidden to him, he may not take her back. RMS expresses surprise at this ruling because, to him, its conclusion is obvious since the husband believed the witness as if he were two witnesses. In an attempt to lessen his astonishment, RMS writes:

And therefore it seems that he [BaHaG] means that even if he [the husband] provided a post facto rationale (*amtala*) this accomplishes nothing, for since he performed an action, providing a rationale is no longer of any benefit ... and this is a new law, and see in Rama (R. Moses Isserles) a woman who tells her husband that she committed adultery etc., even though she is not considered a reliable witness, if he divorced her, he may not take her back⁸³ ... and the post facto rationale in the case where his wife said that she committed adultery is stronger, for one might suggest that he divorced her in order so that she would lose her *ketubbah*. However, this is incorrect, for even if he does not divorce her, she will still lose her *ketubbah* ... even though she is not trustworthy, and, therefore, why would he divorce her ... and this needs to be investigated thoroughly.⁸⁴

RMS believes that BaHaG has not provided a novel ruling, so he provides another one in its place. He contends that even if the husband provided a post facto rationale for his actions—that is to say, if he provided a rationale explaining why he acted as if he believed the witness even though he did not—he cannot change his mind and take back his wife. Since he acted on

81 *Code*, Laws of Marriage 24:16.

82 *Halakhot Gedolot*, Laws of Refusal, p. 64.

83 *Shulhan Arukh*, EH 115:6.

84 *OS*, Laws of Marriage 24:16.

the testimony of the witness, providing a rationale is of no use. RMS claims that this is a new law and directs his reader's attention to Rama. He then claims that in this case, there seems to be an even stronger reason for the husband to have pretended to believe her than in Rama's: he wished to divorce her without paying her *ketubbah*. However, RMS later rejects this rationale because she would lose her *ketubbah* even if her husband did not divorce her. Therefore, if this man divorced his wife, apparently he believed that she committed adultery. Since he actually acted upon her words, providing a rationale for his actions will be of no use. In conclusion, RMS does not rescind his novel ruling, but he does note that it needs to be investigated thoroughly, apparently because he can no longer use the Rama's position to substantiate his own. In my opinion, RMS' belief that the act is the determining factor is the basis for his novel ruling that providing a rationale for a completed action achieves nothing.

6. Do a Minor's Actions Testify to His State of Mind?

The issue which I will analyze in this section provides another perspective on RMS' consistently held belief in privileging actions over thoughts. This section will also reveal another one of RMS' fundamental conceptions pertaining to a minor's fitness to perform precepts. Maimonides, in *Laws of Marriage*, writes that a man who betroths a woman with a legal document (*shetar*) must write the document for the woman's sake, just as one writes a Jewish bill of divorce.⁸⁵ RMS, *ad locum*, discusses the passage in the Jerusalem Talmud that analyzes the mishnah asserting that a heave offering tithed by a deaf-mute, a *shoteh* (variously translated as an imbecile and as an insane person), or a minor is not considered a heave offering.⁸⁶ The Jerusalem Talmud asks why their actions do not prove their intent? That is to say, even though the deaf-mute, the *shoteh*, and the minor have limited intellectual capacity and cannot form legal intent, the act of lifting the heave offering should teach us about their states of mind. R. Abbahu responds that with regard to the heave offering, the Torah requires explicit intent, and therefore the act of lifting the heave offering is not sufficient to testify to their states of mind. This assertion differs from the law regarding readying a vessel so that it may become ritually impure, in which the act of the water falling on the vessel testifies to the minor's thoughts. The Jerusalem Talmud questions why in

85 *Code*, *Laws of Marriage* 3:4.

86 *Y. Ter.* 1:1.

the case of bills of divorce, in which the word “thought” is never used, the actions of the deaf-mute, *shoteh*, and minor do not prove their thoughts, and a minor is not allowed to write a bill of divorce. In response, the Jerusalem Talmud distinguishes between the various cases, declaring that in the case of the bill of divorce, the minor is only writing the document, but the adult is divorcing his wife. However, in the case of the heave offering, the minor does the thinking and the lifting and, therefore, his thoughts are not effective. Thus, the minor’s actions are only effective in the case of readying the vessel so that it may become ritually impure, not in tithing the heave offering, nor in writing a bill of divorce.

RMS draws a fundamental distinction between matters in which the intent behind the action is religious in nature and matters in which the intent is related to the realities of the empirical world. Thus, for instance, to become ritually impure, a vessel must have one of seven specific liquids drip on it. Presumably, this fact is religious in nature, not one of the realities of the empirical world. This notwithstanding, RMS maintains that there is a halakhic requirement stating that for ritual impurity to inhere, the owners must benefit from the liquid dripping on their vessels. Thus, for instance, if people want their vessels to be moist, then even if they are completely unaware of the concept of ritual impurity, when the liquid drips on their vessels, they will be ready to become ritually impure. Or in other words, the liquid’s fall is linked to the ways of the world. Therefore, even a minor’s actions may ready a vessel to become ritually impure since this act does not require any uniquely religious intent that is beyond the realm of the minor’s natural thought process. Here again, it seems to me that RMS’ principled privileging of actions over thoughts plays a role. The minor’s action is sufficient to ready the vessel to become impure even though he is not thinking any particular thoughts. Since there is no need for specific intent, his action is sufficient to testify to his state of mind. In contrast, with regard to the bill of divorce RMS writes:

... we require that the bill of divorce be written for the sake of *keritut* (dissolving the marriage), the concept of *keritut* is a matter of religious law, a matter that is not related to the vagaries of the empirical world, just the religious issues; therefore, of course I agree that the minor’s actions cannot testify to his thoughts.

In other words, even though a minor’s actions can testify to his thoughts in principle, this does not apply to the case of a bill of divorce since the writing

itself must be performed for the sake of dissolving the marriage. This is a religious law that is not related to the realities of the empirical world, and we must assume that the minor would not have this intent. Therefore, the minor's writing the bill of divorce cannot testify to his intent, unlike in the case of readying the vessels for ritual impurity. We may deduce from this that in principle, actions are indeed the determining factor, and that the minor's actions can testify to his state of mind, except for in a matter requiring unique religious intent. RMS continues his discussion by raising a question based on the Babylonian Talmud's assertion that a minor who slaughters a burnt-offering on the north side of the altar fulfills the obligation even though a burnt-offering should be slaughtered on the southern side of the altar.⁸⁷ This assertion seems to contradict RMS' innovation that if the intent behind the action is religious in nature, the minor's actions will not be efficacious. RMS resolves this contradiction by introducing another distinction that further sharpens our understanding of a minor's performance of precepts. According to Tosafot, a sacrifice may be offered without any intent, i.e., without any specific intent, and certainly without the person offering the sacrifice explicitly thinking that this sacrifice was for the sake of a burnt-offering.⁸⁸ RMS believes that the slaughtering need not be performed for the sake of the sacrifice, and the act is efficacious even if the minor thinks that the animal is unconsecrated. The knowledge that the animal is either unconsecrated or consecrated is like any other bit of knowledge available in the empirical world; it is not an intrinsically religious type of knowledge. Therefore, the actions the minor performs concerning the burnt-offering are sufficient. RMS' fundamental insight remains: the minor's actions attest to his intent, except in cases where the action itself has no value without the religious intent intrinsic to it, such as in the case of a bill of divorce.

Another law pertaining to a minor's actions and intentions appears in the laws of the wayward woman (*soṭah*). Maimonides rules that if the wayward woman's scroll is written by an Israelite, or a priest who is a minor, it is invalid since the verse explicitly states "and the priest shall write."⁸⁹ RMS explains that the source for the notion that a scroll written by an Israelite is invalid is found in the *Sifre* and the Midrash. However, the priest who is a minor also may not write the scroll since the scroll must be written for the sake of

87 *B. Hul.* 13a.

88 *B. Hul.* 12b, Tosafot s.v. *qaṭan*.

89 *Code*, Laws of the Wayward Woman 4:9.

performing the precept, and a minor writes without any particular precept in mind. If so, the wayward woman's scroll is similar to a bill of divorce. Since the bill of divorce requires unique religious intent, the act cannot testify to the minor's intent. So too in the case of the wayward woman's scroll, special intent is required for religious reasons. The thought required stems from a religious requirement and has nothing to do with normal human activity. Therefore, in these cases, the action cannot testify to the thought. RMS maintains that Maimonides also agrees with him in the matter of the writing of the essence (*toref*) of the bill of divorce: even if an adult (*gadol*) "stands above" the minor who is writing the bill of divorce (the minor performs the action, but the adult tells him what to do) this makes no difference, and the bill of divorce is invalid because the writing was not done for the sake of the precept being performed.⁹⁰ RMS writes that in the Jerusalem Talmud they asked why the minor's actions in writing the bill of divorce do not testify to his thoughts, even if the *gadol* is not standing by his side.⁹¹ The Jerusalem Talmud resolves this question by stating that the minor does not complete the act. RMS disputes the Jerusalem Talmud's explanation:

For when do his actions testify to his thoughts? Specifically in matters like readying [the vessel to become ritually impure], for it is contingent upon his viewing the dew falling on his vessel being beneficial; and, likewise, in the case of the heave offering, in which he intends to lift the offering; and, likewise, in the case of the burnt-offering that he slaughtered on the northern side; but in the case of the bill of divorce, when he writes the bill of divorce for the sake of *keritut* [dissolving the marriage], is he able to be separated from the wife of his fellowman for whose sake he is writing a bill of divorce? And if he wrote her a bill of divorce without the husband's knowledge, does this accomplish anything? Only when he writes under orders from the husband for the sake of *keritut* (separating) from the woman about whom he has commanded him to write, [that being] from the man who is her husband. If so he writes according to the intent of the other; therefore, the action does not testify to his intent...

90 *Code*, Laws of Divorce 3:16. RMS notes that Maimonides takes a different approach than our rabbis in Tosafot (*b. Giṭ. 22b*, s.v. *ve-ha*).

91 *Y. Ter. 1:1*.

This passage seems to indicate that RMS believes that action testifies to intent. He adds a novel interpretation concerning the minor's actions. In the cases of readying the vessel to become ritually impure and slaughtering the burnt-offering on the north side of the altar, the minor's actions testify to his intent because he views these actions as beneficial to him and they are related to the real empirical world. In contrast, when the minor writes a bill of divorce for his fellowman, he has no personal interest in the matter and his actions are performed in accordance with another's will. Therefore, his actions do not testify to his intent.

7. *Ḥaliṣah*

In the Laws of *Ḥaliṣah*, we find another law in which RMS again demonstrates his principled approach. The following question arose during the course of the proceedings in a rabbinical court:⁹² An unmarried couple gave birth to a son. The couple feared that the child would suffer because of his having been born out of wedlock, so the couple agreed to marry and immediately divorce. However, the woman refused to accept a divorce, and claimed that they did not marry because of this agreement but because they sincerely wished to. Therefore, she argued that she deserved all the rights and privileges of a married woman. The rabbinical court cited RMS' legal opinion. Maimonides, however, rules that *ḥaliṣah* performed under mistaken premises is invalid; i.e., if the man was misled and told to perform the *ḥaliṣah* for the woman, so that he could then immediately marry her—this *ḥaliṣah* is invalid. However if he was misled into thinking that if he performed the act of *ḥaliṣah* she would give him 200 *zuz*, even though she did not give him the money, the *ḥaliṣah* is valid since he intended to perform *ḥaliṣah* for her.⁹³ The commentators debated how to explain the difference between the two parts of Maimonides' ruling. RMS presented a fundamental perspective on the matter:

While one who peruses the words of Our Rabbi will see that his reason is that, in truth, *ḥaliṣah* is essentially contingent on the act, and not on the intent, and conditions are certainly not pertinent to an action without intent, since this is not a matter that is related to volition, for in those actions that require a person's volition a condition is relevant, but in a matter that

92 *Pisqei Din Rabbani'im*, vol. VII, p. 353.

93 *Code*, Laws of Levirate Marriage and *Ḥaliṣah* 4:24.

does not require a person's volition a condition is irrelevant ...
 ... even so a person may not attach conditions to [performing]
 it, and the act is the essence of *ḥaliṣah*, and one cannot rescind
 an action ... and this is obvious.⁹⁴

Even though the levir's intent is necessary, the act is the essence of *ḥaliṣah*. Therefore, if the levir performed the act of *ḥaliṣah*, even though he thought it was conditional, the *ḥaliṣah* is sound. This is RMS' interpretation of Maimonides. However, other rabbinic decisors, such as the *Yeshu'ot Ya'akov*, disagree with RMS, claiming that Maimonides permits conditional *ḥaliṣah*.⁹⁵ RMS' interpretation results in a leniency for women, freeing them from their marital chains, as once the act of *ḥaliṣah* has been performed, it cannot be annulled. *Responsa Minḥat Shelomo* also refers to this interpretation of the OS.⁹⁶

To conclude this section, it is fair to say that in RMS' legal writings we have discovered a fundamental principle—the action is the determining factor not the intent—that affects many fields of law. As I have revealed, in some laws this principle is explicitly stated, while in others, it is only alluded to. Concerning the Laws of the Sabbath, RMS explained that the Babylonian and Jerusalem Talmuds maintain that action is primary. Even though a certain knot tied on the Sabbath was temporary, the Torah forbade tying such a knot because it was a permanent knot. RMS claims that this distinction also applies to building on the Sabbath. In the Laws of the Lulav, RMS resolved a contradiction in Maimonides' *Code* by declaring that one who plants an *etrog* tree in order to fulfill the precept of the four species is required to tithe the produce since he has planted a fruit tree. Since one can only fulfill the precept of the four species with an *etrog* from an *etrog* tree that was not only planted to fulfill the precept, but also planted for the purpose of consumption, ipso facto the tree must have been planted for consumption (as is the norm) and he must treat the produce as *orlah*, even though he only had his mind on the precept. With regard to digging pits for an idolatrous purpose, RMS disagreed with Maimonides and proposed that Tosafot could be explained in consonance with the later Riṭba and Ṭur, who maintain that one who plants a tree for idol worship is not forbidden from benefiting from the tree by his intent alone. He must perform an action (bowing, for instance) to

94 OS, *ibid.*

95 *Yeshu'ot Ya'akov*, EH §169.

96 *Responsa Minḥat Shelomo*, part I, § 80.

forbid himself from benefiting from the tree. On the matter of the wedding canopy, RMS maintained that there is no conditional marriage. The act of marrying transforms the fiancée into a wife and no condition can annul this. With regard to a post facto rationale, RMS interpreted BaHaG's remarks to mean that if the husband believed the testimony of a lone witness regarding his wife's adultery and divorced his wife based on this, he cannot provide a post facto rationale explaining why he seemed to believe the witness. The act of divorcing his wife proves his faith in the witness, and he may not take his wife back. With regard to a minor, RMS concluded that the minor's actions are efficacious and testify to his state of mind in matters that concern the real, empirical world. However, if specific religious intent is required, a minor's action is not efficacious. Notably, this novel idea of specific religious intent is the exception to the rule (which proves the rule). With regard to the matter of *ḥaliṣah*, RMS again ruled that the action is the determining factor, and, therefore, there is no conditional *ḥaliṣah*.

Conclusion

The goal of this article was to outline several broad legal principles found in RMS' legal oeuvre. At this point, we can draw several conclusions: First, RMS' oeuvre contains a metahalakhic principle dictating that Jewish law takes human nature into account. This principle even leads to somewhat audacious rulings, such as the ruling that a man who is exiled to a city of refuge may not leave it even if the survival of the entire nation of Israel depends on his doing so. However, RMS limits the application of this principle to cases in which the halakhic norm requires interpretation, eschewing its usage in cases where the law is clear and comprehensible. Second, RMS tends to judge those who violate the social order or deviate from social norms stringently. Out of the available halakhic options, he chooses a position that does not treat the tortfeasor lightly. This tendency gains expression in several laws. Third, RMS asserts that actions are the determining factor, not intentions. This principle affects various laws discussed in his legal writings and even leads him to disagree with Maimonides on an issue of practical halakhah.

This article could not have been written had it not been discovered that RMS adopts an independent stance in his works and even attempts to apply his insights to the realm of practical halakhah. Had this not been realized, I might have erroneously argued that RMS' positions are merely Maimonidean interpretations, and that one cannot draw conclusions about

RMS' own views from them. The fact that RMS wishes to push the halakhic envelope beyond the boundaries defined by Maimonides and address cases that lack legal norms allows us to distinguish those principles underlying RMS' juridical-halakhic oeuvre. RMS transfers these principles into the realm of practical halakhah, and, in so doing, emphasizes their importance beyond the analytical-academic realm.

