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## SHOULD POSKIM BE DOCTORS OF THE SOUL? MEDICAL METAPHORS AND LAW IN MAIMONIDES

*(edited transcript of a lecture given by Aryeh Klapper in 2004)*

Most *frum* people assume that Halakah is the best thing for every individual human being. We observe halakhah because God is perfect, and God created a perfect law, and therefore the best thing for every person, in terms of the development of their soul, is to observe Halakhah. As a naturally *frum* person, I would say the same. So I need to emphasize that this is a *shiur* in the Rambam, and any *kefirah* here is entirely his fault.

Let's turn to Guide for the Perplexed, 3:34. The Guide for the Perplexed is written in Arabic, and I don't read Arabic. What you have here is my English translation of Rav Kafah's Hebrew translation of the Arabic. (So, any errors are Rav Kafah's fault.) I'll read the text in order, making comments along the way.

Among the things that you likewise ought to know is that the Torah does not consider the *boded*<sup>1</sup>, and the command<sup>2</sup> was not given with a view to the minority of cases. Rather, in everything that it is desirable to accomplish, be it an outlook or a character trait or an effective action, only the things that are a majority are considered . . .

Rambam classifies 'desirable things to accomplish' via law into three categories:

*Hashkafah* = theological or religious outlook: the law tries to affect what you think;

*Middah* = character trait; the law tries to affect what you are;

*Maaseh mo'il* = effective action: the law tries to affect what you do.

In all three categories, the Torah's legislative concern is only for what law accomplishes in the majority of cases,

" . . . and no attention is paid to something that rarely occurs, nor to the damage that will occur to an individual human because of that decree and Torah governance. For the Torah is a divine thing, and (therefore) you can learn (about it) from natural things, where the general utilities found in them include and necessarily entail private damages, as has been explained in our words and in the words of others."

The Torah addresses only the majority of cases **because** the Torah is from God, not despite.

We can learn the nature of Divine things from G-d's other creation, the natural world. The natural world functions according to laws of nature. Those laws of nature are set up to enable human life and human choice etc. But the laws of nature sometimes cause thousands of people to be drowned, or people to die of cold or heat, and so forth. God set up the world so that on the whole it would be good for human beings. He didn't set it up in ways that would prevent some of us from dying of natural disasters.

Since the laws of nature are set up to work on the whole, but not for the benefit of all individuals, we should expect Torah laws to do the same.

"On the basis of this distinction, you should not be astonished that the purposes of the Torah are not fulfilled in every individual.

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<sup>1</sup> isolated/individual

<sup>2</sup> the commands of the Torah

There is no theological difficulty if obedience to Halakah fails to improve individual human bodies or souls, or even if it causes damage to them. God gave the Torah to be good on the whole and in the majority of cases.

You might have been bothered, saying "Look, I know people who are great *tzaddikim* and keep Halakah perfectly. And yet, they don't seem, to me, to be fully developed human beings. How can that be? If they really learn Torah, and they really do Torah, how can they not be perfectly developed human beings?"

The answer is that Torah is designed for the majority of people. It doesn't work well for everyone.

"Rather, it follows necessarily that there will be people whom that Torah governance does not bring to perfection, as the forms of natural species do not achieve all that necessarily follows from them in each individual member of the species, for everything comes from one Deity and one Actor, were given from one Shepherd, and the reverse of this is impossible, and we have already explained that the impossible has a fixed nature that will never change."

Some philosophic background is necessary here.

1) Rambam thinks that God is bound by logic. For example, God can't do A and not-A at the same time. God can't do things that are logically impossible, because the impossible is **necessarily** non-existent – it can't **be**.

2) In the relationship between form and matter, matter often does not achieve the full purpose of form. Moderns generally don't relate to the ideas of matter and form in the way medievals did, so I'll try to spell this out more clearly.

Think of an ideal parrot, a parrot that perfectly fulfills the nature of parrotness. Certainly an ideal parrot must be able to fly, and to imitate human speech, and to be pleasing to human eyes. Obviously, many parrots are not ideal. They don't learn well, or they can't fly, or they're not pretty. They're still parrots, meaning that they all partake of the form of the parrot, and God created the form of the parrot – but they're not perfect parrots. The reason they're not perfect parrots is not that they had traumatic childhoods; it's because when God created the form of the parrot, He did not ensure that every parrot would be perfect. Probably there has never been a perfect parrot.

It remains true that the vast majority of parrots share certain characteristics of parrot-ness. For example, they will eat the same foods. So it's reasonable for pet stores to give you diet instructions which will enable the vast majority of parrots to thrive physically.

It's also reasonable to construct a diet that enables most human beings to thrive. But some humans have celiac, and therefore an aspect of the standard diet that is good for most humans is deadly to them. Some parrots may be allergic to particular varieties of birdseed.

Human beings are imperfect manifestations of the form of the human being, and human souls are imperfect manifestations of the form of the human soul. So while the Torah is the best possible human diet, some souls will have the spiritual equivalent of celiac disease.

Rambam does not go as far as saying that for some people the Torah as a whole is harmful, but he does say that specific laws can harm individual people, and that the Torah as a whole can be less than the perfect regimen for specific people.

So far, we've been purely descriptive – this is what Torah **is**. Rambam now moves to the prescriptive – what Torah should be.

“Furthermore, on the basis of this distinction it would not be proper for the commandments to be influenced by the changing conditions of human beings and the times . . . “

Not only is Torah this way aimed at the general rather than the particular, but it would be improper for Torah to be any other way. Making Torah adapt to the specifics of cultures or era would undermine its Divine nature.

Rambam next brings an anti-analogy, meaning that he explains Torah by contrasting it with something else. Analogies and anti-analogies are helpful when we already understand the something else. Here the “something else” is medicine. Because Rambam’s conception of medicine is not the same as the understanding of medicine in the West today, some background is necessary.

Rambam’s vision of medicine is patient-centered rather than diagnosis-centered. Each medicinal prescription must be prepared for the individual, in accordance with the balance of the specific patient’s humors at the particular time. You cannot simply match the patient’s symptoms to a known standard disease or syndrome and then look up the standard prescription and dose.

By contrast, Rambam contends, Torah governance **must** be general, even though this will yield negative results for some people.

“ . . . in the way that the preparation of medicines is influenced, with each preparation specific to each individual in accordance with his mixture of humors at that particular time, but rather it is appropriate for Torah governance to be absolute and completely general, even though this will be negative for some people, and not negative for others, for if it were according to the individual there would be a loss for all, “and you would have given your words by degrees<sup>3</sup>”. For this reason, it is inappropriate for matters in the Torah aimed at immediate purposes to be bounded by time or place, but rather the laws should be absolute and framed generally, as the Exalted said “the congregation – there shall be one statute for you etc.”, and their intent is the general utilities, which relate to the majority, as we have explained.

For Rambam, medicine considers each patient individually. Doctors prescribe for specific patients and account for the reality that what's good for one patient may be damaging for another. But Halakhah can't. Halakhists should not be doctors of the soul. Adjusting the “dosage” of Torah for each individual would undermine the nature of Torah as Divine law, and prevent the good for the majority that Torah accomplishes.

According to Rambam, it seems that Torah need not even be best for most people at in all of history, or in every culture at a particular time. Torah just has to be the best for most people in the course of history. We might be unlucky enough to live in a time when Torah is bad for most people in most places, but that's okay, because over the next 500 years, it'll even out.

That’s what emerges from Rambam here. However, Rambam draws a metaphorical connection between law and medicine in two other places, and in those places he seems to reach conclusions very different

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<sup>3</sup> A Talmudic objection to rulings that would produce laws that vary excessively from case to case.

from those he reaches here. We'll now look at those sources, and then see if we can find a way to develop a coherent overall account of his position.

The three sources we'll be putting in conversation are from different books: one each from the Guide of the Perplexed, the Mishneh Torah, and the Commentary to the Mishnah. One might claim that because these works were written for different audiences, Rambam doesn't need to be consistent.

I generally prefer to assume consistency. Rambam's use of a medical analogy or anti-analogy in each text is also a strong indication that he's presenting a consistent, comprehensive position. However, at first glance his uses of the analogy seem contradictory.

Rambam opens Chapter 2 of Laws of Rebels by explaining the difference between what we call Biblical/*deoraita* law and what we call Rabbinic/*derabanan* law. Biblical law can be changed as people change their intellectual interpretations of Torah. Rabbinic law can be changed only by subsequent courts that are defined as greater than the original court. Certain kinds of Rabbinic decrees can never be changed.

He then tells you that even that last kind of Rabbinic decrees, the ones that can never be changed even by greater courts - can be changed even by inferior courts when necessary.

A court has the power to uproot even these (rabbinic) decrees, even if it is inferior to the original court, because these rabbinic decrees should not be more powerful than the words of the Torah itself, and even the words of Torah - every court has the right to uproot them as "a ruling for the hour". For example: A court that sees a need to strengthen the religion and establish a protective fence so that the people will not transgress the words of Torah can flog and punish without legal basis, but they cannot establish the matter for future generations and declare that such is the halakhah. Similarly, if they saw "for the hour" that it was appropriate to nullify a positive commandment or transgress a negative commandment, in order to return many to the religion or to save many Jews from stumbling in other matters, they do "according to the needs of the hour".

This is what we call a *hora'at sha'ah*, a ruling for the moment. Courts can simply suspend any laws they want, positive laws, negative laws, Biblical, or Rabbinic laws.

At this point Rambam introduces the medical analogy:

Just as a healer cuts off someone's hand or leg so that all of him will live, so too a court rules in a particular time to transgress a few commandments "for the hour" so that all of them will be fulfilled, along the lines of the statement of the first sages "Make one Shabbat unholy for his sake<sup>4</sup> so that he will observe many Sabbaths".

This seems to be exactly the kind of situation that he was talking about in the Guide, in which the halakhah is not good for the majority of the people in this particular culture at this particular time. How should we respond? By suspending the law. Halakhah is like medicine. Just as the healer cuts off an arm or a leg so that the whole body will live, so too the judge cuts off an arm of halakhah so that the overall purposes of Torah can be fulfilled<sup>5</sup>.

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<sup>4</sup> In other words, violate the Sabbath to save a life

<sup>5</sup> This argument is used by Abraham Lincoln word for word when he suspends habeas corpus. I don't know that Lincoln read Rambam directly, but the parallel is too striking to be coincidental.

Halakhah is the patient whose arm or leg is amputated. But isn't a *hora'at sha'ah* exactly what Rambam in the Guide told us never to do? Didn't he argue that making changes to meet the times would undermine everything?

The solution to this apparent contradiction is found in the middle of the paragraph: "A court that sees the need to strengthen the religion and establish a protective fence so that the people will not transgress the words of Torah can flog and punish without legal basis, but they cannot establish the matter for generations"- and here's the key line - "and declare that such is the Halakhah". You can change things **so long as you don't say that the change becomes the law.**

The solution to the contradiction between the Guide and the Code is this: the Guide says that the law must never change, but the Code says that doesn't mean that what you do never changes, because you don't always have to follow the law.

Now, you may look at me and say, "Come on. That's cheating. Either it's Halakhah or it isn't Halakhah." That's a critique worth thinking about. But if you look at the language of the text and the fact that he talks about medicine in one place and surgery in the other, I think that's clearly what he means.

Student:

Is there any way to stop future generations from using it as precedent?

Rabbi Klapper:

Any way to stop future generations from using it as precedent? You have to say openly, "This is not law."

Student:

It doesn't work.

Rabbi Klapper:

Empirically, I'm not sure. For example, if we assume that this discussion is Torah, you are allowed to take notes, because the prohibition against writing Oral Torah down was temporarily suspended about 1,300 years ago. That's a very long time for an emergency measure. On the other hand, we can claim that circumstances haven't changed in a relevant way. We haven't reclaimed our capacity to memorize huge amounts of oral material.

Rambam claims that so long as you can maintain the idea of law, it's okay if you don't always follow it. Medieval philosophers had an easier time than we do accepting that a principle had been maintained while being honored mostly in the breach.

Here's a modern parallel, though. Professor Hanina ben Menahem of Hebrew University places great emphasis on the difference between Halakhah and Halakhah lemaaseh. Just because something's written in a book of laws doesn't mean that the law in practice is that way. He has any number of examples.

Reading the next selection from Rambam should help clarify his point. This is from the Commentary to Mishneh, Introduction to tractate "Avot", which I like to translate as "Chapters and Principles". Rambam's Introduction is known as "Eight Chapters". Chapter One establishes a medical metaphor that undergirds the entire work:

. . . You know that the improvement of character traits is nothing other than the healing of the soul and its powers, and just as the healer who heals bodies must first know the body he is healing . . . so too one who heals the soul . . .

This is the programmatic introduction. This book is about how to heal the soul. Therefore it should be irrelevant to Halakhah, because we said in the Guide that Halakhists should not be healers of the soul. But of course we will see that it is not irrelevant. Let's skip ahead to Chapter 5.

It is appropriate for a person to subordinate all the powers of his soul on the basis of thought, as we prefaced in the preceding chapter, and to place before his eyes one end, which is the achievement of Hashem May He Be Glorified and Ennobled, in accordance with individual human capacity, in other words to know Him . . .

"Achievement" is my best effort at translating *hasagah*. (Remember that we're dealing with my English translation of Rav Kafah's Hebrew translation of an Arabic original.) The goal for everyone, whatever their personal capacities, is to control their entire selves intellectually and realize that the goal in life is to know God.

Know that this level is a very high and difficult level, and only a few will achieve it, and only after very great preparation, and if there would happen to exist a person whose characteristics were such, I don't think he would be inferior to the prophets . . .

This is a matter of some historical interest. I was taught by Professor Paul Fenton that Muslim spiritual self-help books end at the chapter that tells you how to become a Hassid, but medieval Jewish self-help books tell you how to become a *navi*, a prophet. It seems that the Jews in this era thought that you could, in fact, become a spiritual being equivalent to the prophets. The Rambam seems to leave this as a possibility here by saying "not inferior to the prophets".

. . . in other words, someone actualizes all the powers of his soul and makes their purpose Hashem May He Be Exalted alone, and does no action great or small, and does not pronounce any word, unless that action or word brings him to a positive trait or to something that brings him to a positive trait, and he meditates and thinks regarding each action and motion whether it brings him to that end or not, and only afterward does it. The prophets of blessed memory have also already urged us regarding this matter, saying "In all your ways know him" . . .

Rambam's perfect life is one in which everything is done consciously for the purpose of self-improvement, so that you can achieve intellectual perfection, so that you can understand God.

. . . and the Sages explained this by saying "even in a matter of transgression" . . .

What does it mean to know G-d in "**all** your ways"? Rambam quotes Berakhot 63a as explaining that this means "even in a matter of transgression". What does that mean? Rashi explains that even a furtive thief at the entrance to his tunnel, who may legitimately be killed by the householder, should repent. It is very likely that Rashi's text included a clear reference to the furtive thief.

Other commentators, whose texts presumably didn't include such a reference, understand the Talmud as referring to the story of the prophet Eliyahu bringing a sacrifice outside the Temple as the climax of his publicly duel on Mount Carmel with the prophets of Baal. Since that transgression had a public-policy justification, namely returning the people's loyalty exclusively to God, these commentators sublimate Eliyahu's action, and the Talmud's injunction to be G-d-conscious "even in a matter of transgression", under the category of *hora'at sha'ah*.

Rambam's understanding of that phrase is very different.



. . . in other words, that he should give that action an end relating to the truth, even though it contains a transgression from a particular perspective. The Sages may peace be upon them already included this whole matter in the most concise language possible, and enclosed the matter with a very, very complete enclosure, to the point that if you meditate on the concision of those words, and how they were said about such a great matter so powerful in its entirety, regarding which treatises have been written without enclosing it - you will know that it was without doubt said by means of Divine power. I refer to their statement among their commands in this tractate "And all your deeds must be for the sake of Heaven", which is what I have explained in this chapter. This is what we have seen appropriate to mention here in accordance with those introductions.

When Rambam said that a person in the category of the prophets should do no action great or small without considering whether that action will bring them closer to God, closer to intellectual perfection - that meant even if the action would be a transgression of halakhah. Sometimes transgressions of halakhah may be necessary for those persons to come closer to G-d and intellectual perfection.

Student:

You're talking about *aveirah lishmoh* (a sin for the sake of Heaven) again?

RK:

Again? Rav Lichtenstein's "Is There an Ethic Independent of Halakhah", has a long footnote, I think it's number 25, saying that: a) there is no such thing as an *aveirah lishmoh*; b) If there were such a thing, you couldn't do it anyway; c) but see Maimonides, "Eight Chapters", chapter 5. So yes, Maimonides would claim that a person on the level of the prophets is capable of occasionally doing things that are legal transgressions.

Why does Rambam say this? Well, we know from the Guide that following Halakhah cannot be ideal for every individual. That raises the question: What happens if you are conscious of yourself as being one of the people who does not reach perfection through the law? Is your highest obligation to the Law? Or is it to knowing Him in all your ways?

Rambam said that halakhah is not like medicine, but he also told us that there is a way that it can be. The way to do medicine within halakhah is to not call it law.

So Rambam has a consistent position. The law must not change. True, the unchanged law will sometimes harm communities and will sometimes harm individuals. The solution to that in the case of communities is *hora'at sha'ah*, and in the case of individuals is *aveirah lishmoh*.

Rambam does not tell us how to determine whether or not one is the kind of person who can do this. It's reasonable to argue that his standard is that only those on the level of the prophets can make this judgment. That means that everything you do is consciously *leshem shomayim*, and yet you are aware that observing a particular halakhah is constraining you and impeding your attempt at self-perfection and knowledge of G-d.

Rambam would also say that you must consider your public responsibilities. An *aveirah lishmoh* cannot be done publicly, because people following your example would damage themselves spiritually, and your failure to fulfill your responsibility toward them outweigh any possible gain.

Did Rambam ever put this understanding of “In all your ways know Him” into his own practice? I'm not sure how. There are possible examples. Rambam's son R. Avraham, for example, advocates that people on the proper level should pray silently, even though silent prayer does not fulfill one's halakhic obligation of praying. He explains that the law has to be made for the multitude, and most people are incapable of concentrating unless they verbalize, but that for people on the highest level, verbalization blocks concentration. People on the highest level should therefore at least occasionally go into solitude and pray silently as opposed to verbally. That would be an example of *aveirah lishmoh*.

I have at least two difficulties with Rambam's position.

First, giving individuals the power to break the law because of their sense of their own spiritual perfection, even if we claim this applies only to individuals on the level of prophecy, is a bridge too far for me. I'm afraid that too many people - one is too many - will mistake their *madreigah* (spiritual level) and use Rambam as an excuse to take unjustified licenses. (That may be why Rav Lichtenstein referred to mention this position of Rambam only obliquely.)

Second, while there are certainly conceptual ways to distinguish between law and mandatory practice, it seems insufficiently rigorous to say that we can make any changes we think necessary so long as we declare that the law has not been changed.

However, Rambam's framework may be very useful in a somewhat different context.

Let's look again at the Guide. Rambam there says that the Divine law is more like nature than like medicine. If nature harms individuals, we don't change nature; therefore, if the law harms individuals, we don't change the law.

But we do seek to change the **effects** of nature! That's exactly what medicine does – it prevents the laws of nature from leading to premature death. And medicine is just an example. We don't say that because God created tidal patterns, therefore we can't build dikes in front of tsunamis. We don't say that because God created fire to burn, that we can't surround the fire with fire-proof materials to keep houses from burning down.

So let's play Rambam's analogy out differently.

Rambam in the Guide draws the distinction between law and medicine to tell us that we are forbidden to change G-d's Torah laws. We cannot change them, and we ought not to pretend that we have, just as we are incapable of changing His laws of nature. The Torah is like nature. Therefore, Torah deals with the majority of cases, just like nature, and Torah law is harmful to individuals in the same way that the laws of nature are harmful to individuals, and we cannot change the law to prevent those harms.

But our inability to change the laws of nature does not prevent us, or forbid us, from seeking to alter the effects of those laws. What can we do in Torah that is parallel to medicine, to building levees, to putting flame-retardant in children's pajamas?

I suggest that for Rambam, the law is what the law is. Sometimes in really, really radical cases, the law is so clearly harmful either to a group or to individuals that the only solution is surgery on the law. This is an option that exists regarding halakhah but not regarding nature, and it is profoundly dangerous, because it fosters the illusion that the laws of Torah, unlike those of nature, are mutable.

More often, the better solution to individual harm is medicine. The best halakhic parallel to physical medicine is interpretation. Interpretation is the technology of halakhah. Building levees and manufacturing antibiotics to prevent people from dying does not conflict with the claim that God is the author of the universe. Similarly, interpreting halakhah works within the rules of a system G-d established.

Rambam sees the job of *poskim*, of those who interpret halakhah in practice, as being doctors of the soul. The law is what the law is, and the law is designed to work for the majority of people in the majority of cases the majority of the time. But the law left to its own devices, just like the laws of nature left to their own devices, would harm many people. We are given permission to utilize the laws of nature. We can't make the world perfect; there are still people who are struck by lightning - but the role granted to human beings is to work with the laws of nature so as to shrink even further the minority who are damaged by them.

That is exactly the role of the *posek* in the realm of halakhah. Just like the laws of nature can be implemented in the real world in various ways, the laws of the Torah can be implemented in the real world in various ways, and the job of the *posek* is to ensure that the law is implemented in the real world in a way that accounts for specific cultural or technological circumstances, and perhaps sometimes even individual circumstances, so that the collateral damage is minimized.

This approach assumes that the Torah is written deliberately so as to leave room for interpretation. Sofrim 16:5 says that the Torah is written multivalently "so that if a judge needs to *metaher* in any particular case, he can be, and if a judge needs to be *metamei* in any specific case, he can be". The categories of *tum'ah* and *taharah* still exist. But just as the laws of nature can be affected by human will without changing God as author of the universe, the laws of Torah can also be affected by human will without changing their divine status.

That's my overall vision of how Rambam understands halakhah and psak halakhah. I think it accounts very well for the medical metaphors. But I concede that to my knowledge, Rambam never explicitly discusses the responsibility of interpreters with regard to law.

I also need to acknowledge that this discussion has conflated *poskim* and interpreters, and also has lumped all *poskim* into a single category. More nuance is necessary. For example, there are communal *poskim*, who must address the communal good, and individual *poskim*, who can focus on the effects on individuals. But I think fundamentally they're playing the same role in halakhah, namely the role of doctors. Just as Rambam doesn't see medicine as contradicting God's plan in nature, he doesn't see *poskim* contradicting God's plan in Torah, even though psak involves a degree of human volition.

Student:

Why then does he use the medical analogy? I see how it plays out, but...

Rabbi Klapper:

I think it's very important to him that you recognize that you're not God. You don't get to create the world. You don't get to create the Torah. Just as there are laws of nature, there are laws of Torah. You have to work with them. But he doesn't see them as deterministic. They set a framework. They can be adjusted.

Student:

How does that work regarding mitzvot? There is no worry that people will seek to ban gravity in order to prevent floods. But we do try to eradicate specific diseases rather than assuming their overall impact is

good. So are you concerned that people might try to simply eliminate certain halakhot, as for example Rav Goren was accused of doing in the Langer case regarding *mamzerut*?

Rabbi Klapper:

That is certainly a risk. People need to realize that law is a delicate ecosystem, and that even minor adjustments can have profoundly negative consequences. But *in hakhi nami*, **if** you could eliminate the damage to individuals who are declared *mamzerim* without causing a countervailing decline in marriage, etc., that would be true.

Student:

But then that would imply that the Torah is an incomplete solution!?

Rabbi Klapper:

Is the world an incomplete solution? That's the analogy Rambam makes. I'm not making up that analogy.

Student:

Of course not. I'm not saying that.

Rabbi Klapper:

Every philosophy has to account for this problem somehow. G-d gave us free will in the physical realm, so there has to be some purpose to our capacity to produce technology.

We have to be clear that technology is about using the laws of nature, not about changing them. Gravity has to be seen as an overall good. Fire has to be seen as an overall good. Radioactivity has to be seen as overall good. Maybe the weak force and the strong force both have to be good. Floods are just details. Trying to prevent floods is not an attack on G-d's creation of gravity.

So too, every law in the Torah has to be for the greatest good of the greatest number etc.

Student:

Is this true of Rabbinic laws as well?

Rabbi Klapper:

Rambam doesn't say that. In his system, *deoraita* laws can be changed via interpretation of Torah without *hora'at sha'ah*. He does not see precedent as binding with regard to interpretation of Torah. It's only that in our day, when we no longer do *midrash halakhah*, whether because we can't (Rav Elchonon) or choose not to (Chazon Ish), that surgery is the only way to accomplish what we need to accomplish regarding *deoraitas*. Rambam thinks that ideally, if circumstances change such that a particular interpretation of the Torah becomes harmful, the solution is to reinterpret. Regarding *derabanan*s, he may resort to surgery much more easily, because Rabbinic law is not Divinely authored in the same way. But I'm not sure. I'm not aware of him addressing the issue directly.

Student:

Does Rambam give any examples of halakhic surgery?

Rabbi Klapper:

He doesn't give any examples in the Mishneh Torah. Some of his responsa might contain example, such as those talking about how to behave under monotheistic religious oppression. I think Eliyahu at Mount Carmel and writing down Oral Torah are the standard examples. Maybe he's afraid that people will generalize any examples, and he doesn't want to create dangerous precedents, so he just tells you what the principle is. Maybe that is safer and maybe it isn't – I'm not sure.

Student:

There's no parallel to that in the natural world. You don't have the power to suspend the laws of physics for five minutes so the planes don't hit the World Trade Center.

Rabbi Klapper:

I agree.

### APPROACHING GOD AND LIVING TO TELL THE TALE

by SBM alum Miriam Gedwiser (first published by Or Torah Stone).

Miriam teaches Talmud and Tanakh at the Ramaz Upper School and is on the faculty of Drisha.

Parashat Shemini is famous for the dramatic story of Aharon's sons Nadav and Avihu, their "strange fire" which God had not commanded, and their precipitous demise. The haftarah selection for the week, the story of "*peretz Uzzah*" ([II Sam. 6:1-19](#)), contains what seems to be a companion story of the precipitous death of Uzzah, who reached out to steady the *aron*, the ark of the covenant, while David was having it repatriated. At first glance, both stories are object lessons in what happens if you get too close to God's holy objects without following proper protocol: the people who do so (Nadav and Avihu; Uzzah) get zapped. But I believe that a closer look at the details of the haftarah, including the end of Chapter 6 (verses 20-24) that are not included in the haftarah, complicates this picture and provides not just an object lesson of what not to do, but perhaps a model of the *right* way for a layperson to approach God. After the death of Uzzah, "David was afraid of the LORD that day; he said, "How can I let the Ark of the LORD come to me?" ([II Sam 6:9](#)). David diverted the *aron* elsewhere, but after seeing the blessings that came to its new guardians David decided to try again. The first, abortive processional involved festivities, but the second attempt is described with some new details: "David whirled with all his might (*mekharker be-khol oz*) before the LORD; David was girt with a linen ephod (*hagur ephod bad*)" (6:14). These two details may help us answer David's initial worry of "how can the ark of the Lord come to me?"

First, David whirled with all his might. The word for might, *oz*, appears exactly twice in the book of Shmuel. The first is [I Sam 2:10](#), where, after Hannah has delivered her long-prayed-for son, Shmuel, to the *mishkan*, she concludes her exultant prayer, "He will give strength unto His king (*ve-yiten oz le-malko*). And exalt the horn of His anointed." After Hannah's prayer, one can see the rest of the book of Shmuel as a winding and often difficult path to establish the kingship of which she prayed. The second and last appearance of *oz* in the book is in our story, as David whirls with all his might. Whatever David is doing, we have a hint that it is especially kingly.

Second, David is wearing a linen *ephod*. Two other people in Tanakh before David have worn an *ephod* using the same verb, *h.g.r.* In the book of Shemuel alef, Shmuel himself is described using the same three word phrase, *hagur ephod bad* ([I Sam 2:18](#)), as he serves the high priest Eili in the *mishkan*. (Indeed, that phrase appears only twice, regarding Shmuel and David, in all of Tanakh.) This connection raises some concerns, as we might be wary that David is trying to usurp the priesthood in addition to his kingship. This concern is only amplified if we know that the other person to wear, *h.g.r.*, an *ephod*, is Aharon in parashat Tzav (8:7), in the days of consecration immediately preceding the dramatic Eighth day that occupies our parashah. (This is the only mention of an *ephod* in sefer Vayikra.)

Is David in danger of over-stepping his prescribed roles, much as Nadav and Avihu did? Here the episode at the end of the chapter, which is omitted from the haftarah, may prove instructive. While David was dancing vigorously, his wife "Michal daughter of Saul looked out of the window and saw King David leaping and whirling before the LORD; and she despised him for it (6:10)." When David returned home, they fought about it. Michal asked David sarcastically, "'Didn't the king of Israel do himself honor today (*mah nikhbad ha-yom*)—exposing himself today in the sight of the slavegirls of his subjects, as one of the riffraff might expose himself!'" (6:20). David answered, "'It was before the LORD who chose me instead of your father and all his family and appointed me ruler over the LORD's people Israel! I will dance before the LORD, and dishonor myself even more, and be low in my own esteem'" (6:21-22). David does not approach God with arrogance or presumption, but with self-effacement. David accepts personal dishonor as a price for honoring God, even as he recognizes (with his characteristic

shrewdness) that this very act of self-effacement may bring him honor among his subjects, ““but among the slavegirls that you speak of I will be honored (*imam ikavedah*).””

David’s phrasing, *imam ikavedah*, recalls Moshe’s statement to Aharon in our parashah: ““This is what the LORD meant when He said: Through those near to Me I show Myself holy, and gain glory before all the people (*ve-al penei kol ha-am ekaved*)”” (10:3).

Moshe’s precise intentions are somewhat obscure, but the simple meaning of his last phrase seems to be that the terror of Nadav and Avihu’s deaths will generate a sense of awe for God among the people (see Ibn Ezra ad loc). There is another interpretation, however. Rashbam and Chizkuni understand the glory, *kavod*, that comes to God out of the incident to flow not directly from the deaths, but from Aharon’s reaction. In Rashbam’s words: “This is the glory of God’s presence (*shekhinah*) – that he (Aharon) sees his sons dead and he desists from his mourning in the service of his creator.” Aharon demonstrates God’s glory by putting the Tabernacle service above his family concerns. This is perhaps similar to how David demonstrates God’s glory by displaying intense joy to the point of self-effacement.

On the surface level, the haftarah and the parashah are companion stories because of the parallel fates of Nadav and Avihu and of Uzzah. But perhaps there is another set of parallel characters: Aharon and David. Aharon, by following the precise script and choreography Moshe laid out, may approach God and welcome God’s glory (*kavod*, see, e.g., 9:24). So too David shows “how can the ark of the Lord come to me?” by putting God’s honor before his own.

But whereas Aharon’s approach was carefully choreographed, David’s is spontaneous, almost spastic if we listen to the words used to describe it – *mefazes umekharker* (6:16). Perhaps this is the difference between priests and kings. Although both Aharon and David wear an *ephod*, Aharon the priest must follow precise instructions and may not innovate – and his sons, who followed their passions for God’s service, ended up dead. For David the king, innovation and intuition in the service of God are essential. In our contemporary life we have ritual areas where the Aharon mode of extreme caution may be appropriate, and we have others that require David-like intuition and self-expression. May we be blessed with the wisdom to know which is which.

**ARE CHAZOKOHS ETERNAL?**  
**IF THEY ARE, DOES THAT MEAN THAT HALAKHOT BASED ON THEM CAN NEVER CHANGE?**  
*by Aryeh Klapper (first publication)*

Dear Rabbi Klapper,

You wrote on Facebook recently that “in halakhic discussions, saying ‘the *chazokoh* can’t change’ is either untrue or irrelevant, even if one believes that *chazokohs* embody immutable ontological truths about human nature, because human nature is EXPRESSED differently in different cultures, and practical halakhah depends on their expression.”

Those are strong words, especially since the Rav rejected a potential solution to *agunah* issues on the ground that the *chazokoh* called “*tav lemeitav*” is immutable; you wrote that his words “must be understood as a rhetorical flourish”. Can you back all this up with sources, perhaps with specific reference to “*tav lemeitav*” and *agunah* issues?

Sincerely,

A supportive but skeptical reader

Dear Supportive but Skeptical,

Thank you for asking. I appreciate your giving me the opportunity to make the case properly.

Let’s start by discussing some legal presumptions similar to *tav lemeitav*, and then apply what we’ve learned to the specific example.

The Talmud uses *tav lemeitav tan du milimeitav armalta* (=it is better to sit as two than to sit as a widow) to represent a presumption that women prefer a bad marriage no marriage. The Talmud never refers to *tav lemeitav* as a *chazokoh*, and there are also at least three unrelated types of *chazokohs* in the Talmud. So we can’t locate comparable instances just by searching for the term *chazokoh* in the Talmud. We need to find other legal presumptions that are grounded in generalizations about human psychology, and ideally that relate to issues of marriage and remarriage.

Here are three that I found:

- 1) *Itita dayka unminseva*
- 2) *Ein ishah meizah paneha bifnei baalah*
- 3) *Ein adam oseh beilato beilat znut*

We’ll discuss each of them and then turn back to *tav lemeitav*.

**1) “*Itita dayka uminseva*” (= a woman investigates punctiliously before she remarries)**

This principle is cited by the Talmud at various points in the 10<sup>th</sup> and 15<sup>th</sup> chapters of Yebamot as a partial explanation for why ordinary standards of evidence are greatly relaxed with regard to claims that a husband has died, even though permitting a woman to remarry is a matter of enormous halakhic gravity.

The Talmud explores a variety of hypotheticals in which a woman might be less inclined to investigate punctiliously. The question is whether they might also contain countervailing factors that increase her credibility or likelihood to investigate thoroughly. The framing of the questions demonstrates that the

presumption *itita dayka uminseva* is not absolute; there are circumstances where it does not apply, and circumstances where it is less reliable.

Mishnah Yebamot 116a presents the principle as emerging from a *maaseh shehayah* (=specific historical instance) in which a woman claimed that her husband had gone abroad as part of a group of ten, and died there by snakebite. The Rabbis sent agents to the place of his death and verified his death. Tosafot explain that the Rabbis of the time “saw that there would be many cases of *agunah* if they did not believe her”.

Maharik #72 explains Tosafot as follows: It would make no sense to generalize from one case that all women always investigate punctiliously. Rather, what the Rabbis learned from the case was that even in a case where the husband was part of a group, and actually died, the widow might have difficulty finding witnesses who would testify in *beit din* to his death. The result of requiring any evidence beyond her word would therefore be a significant and perhaps indefinite delay of her eligibility for remarriage. In other words, Maharik explains, the *maaseh shehayah* had no effect on the Rabbis’ estimation of what percentage of women would investigate thoroughly before remarrying. They knew all along that most would, and that a significant minority would not. They originally thought that requiring further evidence would deter a significant number of careless or mendacious women without excessive cost. What the *maaseh shehayah* changed was their assessment of the cost-benefit ratio. They accordingly decided to establish the law on the basis of the presumption *itita dayka uminseva* even though they knew that some women would not fully investigate.

We can derive two relevant conclusions from Maharik. The first is that *chazakot* do not make absolute fact-claims. Instead, they allow or require the law to act **as if** it knows something to be true. The second is that the legal effect of a *chazakah* is mediated by circumstances. Nothing about the *chazakah* itself, or about the Rabbis’ estimate of its reliability, changed because of the *maaseh shehayah*. What changed was the Rabbis’ estimate of the costs and benefits of ruling based on the *chazakah*. Those costs and benefits might be affected by ease of transportation and communication, and many other factors.

## 2) ***Ein ishah meizah paneha bifnei baalah* (=a woman would not be brazen in her husband’s presence)**

The Talmud in various places cites this principle in the name of Rav Hamnuna. Obviously, this is not a universally true description of the way married couples interact. So what does it mean?

In Talmudic context, it means: “A woman would not falsely claim in the presence of a man known to have been her husband that he is no longer her husband”. That factual assertion yields the legal outcome: “A woman’s claim in X’s presence that he divorced her is presumed true if X is known to have been her husband, even if X claims they are still married.” Here again, the Talmud does not claim that the presumption is absolutely true; if the woman has made such a claim before, and been conclusively disproven, we do not accept her claim the second time. But we do accept it the first time, until it is disproven (for example, if she claimed that the divorce took place in front of specific witnesses, and they deny this).

RAMO EH 7:2 codifies with approval the position of Orchot Chayyim, as cited by Beit Yosef, that “in our day, where there is much chutzpah and licentiousness, a woman is not believed on the basis of this presumption when the result is a leniency”. This position is endorsed by many subsequent authorities. Even though RAMO explicitly frames it as a claim that the presumption is no longer factually true, to my knowledge no authority rejects it on the grounds that a *chazakah* is by definition immutable, or that this legal result is immutable. What debate occurs is about whether reality has changed in ways sufficient to change the law.



Rav Moshe Feinstein powerfully addresses 1) and 2) together in Igrot Mosheh EH1:49. The question posed to him is whether one can rely on *itita dayka minseva* in Soviet Russia. The questioner suggests that just as RAMO refused reliance on *ein ishah meizah* because of social changes, contemporary Rabbis should refuse reliance on *ishah dayka uminseva* and require further investigation before permitting remarriage.

Rav Mosheh's reply is that the questions are unconnected; the growth of "chutzpah and licentiousness" need not extend from claims of divorce to claims of death. This is at first glance not responsive. The questioner did not claim that the same social changes would yield both results; rather, he claimed that the circumstances of Soviet Russia undermined *ishah dayka uminseva* **in the same way** that changes many centuries earlier had undermined *ein ishah meizah*. He certainly has a reasonable case. It is difficult to believe that the presumption's reliability was unaffected by the triumph of an explicitly anti-religious ideology and the development of the *gulag*.

Nonetheless, Rav Mosheh simply dismisses the connection. I suggest that Rav Mosheh followed Maharik's explanation that *itita dayka uminseva* became a legal presumption after the *maaseh shehayah* not because it was always true, but rather because it was usually true and the alternative was unacceptable. Under Stalin, refusing to accept woman's word would lead to even more cases of *iggun* than in Talmudic times, and also to many women simply leaving the religious community. Rav Mosheh therefore felt that the presumption could and must be sustained because society had changed in a way that justified relying on a less-reliable presumption.

We can derive from RAMO that *chazakot* are affected by changed circumstances. We can derive from Rav Mosheh that a change in the *chazakoh* can but does not necessarily lead to a change in the laws that are based on it. In this case, he preserves a leniency even though the presumption it is based on has weakened.

3) *Ein adam oseh beilato beilat znut* (=given the choice, a man does not make his sexual acts into fornication).

Mishnah Gittin 81a presents a dispute between Beit Hillel and Beit Shammai as to whether a divorced couple who share a hotel room are legally presumed to have remarried via sex. Rabban bar Bar Channah explains in the name of Rabbi Yochanan that the issue between them is our principle, which Beit Shammai denies and Beit Hillel endorses. The Halakhah follows Beit Hillel. (All parties assume that the woman would consent to be married – see the discussion of *tav lemeitav* below.)

Shulchan Arukh EH 149:5 points out that Beit Hillel were aware of the phenomena of prostitution and fornication respectively. This presumption therefore applies only to cases in circumstances where there are grounds for believing that the man desired marriage with this woman, such as when the woman involved is the man's divorced wife, or when the man contracted the marriage conditionally but consummated it without restating the conditions.

RAMO EH 33:1 records a controversial position that extends the presumption to other cases in which neither party has a prior history of fornication.

Many cases fall in between the boundaries set by Shulchan Arukh and RAMO respectively. The case that matters to us is when a man and woman act publicly as a couple and are secluded together sufficiently to create a presumption that they have an ongoing exclusive sexual relationship, and perhaps are also

civilly married (in jurisdictions where civil marriage is available). These facts constitute solid grounds for assuming that this man desires marriage with this woman.

True, neither party seems interested in specifically halakhic marriage. However, there is a dispute as to whether intent to marry must specifically intend halakhic marriage to be effective. One can argue that marriage is a universal term, and halakhic marriage simply imposes a set of specific conditions on that universal term. The couple in our case wishes to be married, just without the conditions halakhah attaches to marriage. The general rule is that if one wishes a legal result without the conditions halakhah attaches to it, then the result happens but the conditions attach. So if our presumption attaches, they may be considered halakhically married.

The result of this legal reasoning is that a cohabiting couple may be considered halakhically married, and therefore require a get to divorce. Absent a get, the wife is committing adultery if she remarries, and the children of her remarriage are mamzerim. No Orthodox halakhist accepts a civil divorce as sufficient to end a halakhic marriage.

What interests us is the language used by Rav Chaim Dovid haLevi (Shut Aseh Lekha Rav 8:72) in rejecting the result: “The truth is that we too in our beit din – we have no concern for this *chazokoh*, and we permit a woman who lived with a man, even if they lived together in the manner of husband and wife, and even if they have children together, without a get, **because in our time, a generation licentious and permissive – one ought not show concern for the *chazokoh ein adam oseh beilato beilat zenut.*”**

Rabbi Halevi is explicit that the legal presumption simply does not apply in our society, and neither does the halakhah it generates. This is the standard halakhah. Some poskim disagree, but to my knowledge no one frames their disagreement in terms of the immutability of the *chazokoh* or of the halakhah.

Let’s summarize what we’ve learned so far. In each of our three examples, no claim is made of absolute truth; rather, a presumption is authorized under specific circumstances. At least some authorities then claim that a change in circumstances affects the reliability of the presumption and therefore changes the halakhah. However, there is no necessary relationship between the reliability of the presumption and the halakhah. One can argue that the halakhah changes even though the presumption is unaffected, and conversely that the halakhah remains static even though the presumption is affected. Many authorities disagree with the specific claims of psychological or halakhic change, but none object in principle to claims of psychological or halakhic change.

Therefore, a claim that “*tav lemeitav* is immutable, and therefore the halakhah is immutable”, cannot be grounded in a general claim about *chazakot*.

However, *tav lemeitav* is unique in that the Rav rhetorically framed his objection to a proposed halakhic mechanism in terms of a claim of immutability (originally of all *chazokohs*, and later perhaps about *tav lemeitav* alone: see minutes 63 to 70 of <https://www.yutorah.org/sidebar/lecture.cfm/727707/rabbi-hershel-schachter/eruvin-114/> (h/t Dov Weinstein)). So let’s look at it specifically.

#### 4) *tav lemeitav* (=it is better to sit as two than to sit as a widow) -

“*Tav lemeitav tan du milemeitav armalta*” means “Better to sit as two than to sit as a widow”. The Talmud in five contexts cites this apparent folk-saying in the name of Resh Lakish to establish a presumption, or *chazokoh*, that women prefer a bad marriage to no marriage.

The *chazokoh* has a concrete legal implication in each context. For example, on Yebamot 118b it means that a woman cannot be divorced via constructive agency (*zakhin leadam shelo befanav*) even from a husband with whom she has quarreled, because that mechanism requires assuming that she wants the divorce.

The Talmud cannot mean that **all** women **always** prefer **any** marriage to no marriage. The Mishnah and Talmud each recognize instances where a marriage must be annulled or ended to protect the woman's legitimate interests, and Rabbeinu Gershom's decree requires the wife's consent to divorce, and yet divorce happens. Indeed, there is quite a lot of halakhic literature responding to fears that wives will unjustly seek to compel divorces. A presumption is a default, not an absolute claim about reality.

My claim is that statements of the form "*tav lemeitav* embodies an ontological claim about human psychology, therefore the *chazokohs* based on it can't change" are either untrue or irrelevant in a discussion of whether a particular halakhah can change.

It may be helpful to think about what it means for a halakhah to change in light of technological advances. We're not talking about reinterpreting the Torah, or about establishing new principles. What we mean is that the same legal principles will now yield different results. Law applies to reality, so an immutable Divine law will have different practical legal results in different realities.

You need not agree with every proposed halakhic change. You might think that this technological change is not relevant to this law, or you might think that this law can only be changed in this way via a formal mechanism that is unavailable, such as a vote by the Sanhedrin. But none of that affects the underlying principle that technology can change, and that practical legal results can change in response to technology. It is false to say that "Because the Torah is eternal, therefore halakhah cannot respond to technological change".

The same is true of a *chazokoh* rooted in human nature. Even if one holds that human nature is immutable, it will be expressed differently in different cultures, and practical halakhah may respond differently to those different expressions.

For example, the underlying legal principle of constructive agency is that the action must be unequivocally in the best interests of the party. The practical halakhah of whether constructive agency works to divorce a woman may change depending on whether divorce under particular circumstances is unequivocally in a woman's best interests in a particular society.

Remember that *tav lemeitav* never meant that women **always** prefer **any** marriage to no marriage. Rare circumstances in one society may be common in another. Suppose that *tav lemeitav* is rooted in an understanding of Bereishit as claiming that women desire marriage more than men do. Even if that were so, the attraction of any specific marriage would be affected by the overall marriage market. No one denies that women prefer good marriages to bad marriages, so their calculations about which marriage offer to accept, or whether to divorce, are necessarily affected by the odds of contracting a better remarriage.

For example: a society in which eligible men greatly outnumber eligible women will yield different results than a society in which women face a "shiddukh crisis".

Moreover, Beit Yosef EH 140 states explicitly that women would rather be unmarried than married to an apostate, or that divorce can be considered a presumptive benefit for a woman who has explicitly and repeatedly requested it. No one before the Rav ever opposed such claims on the basis of a formal claim that *chazakot* in general are absolute or immutable, although many asserted that *tav lemeitav* remained very broadly applicable.

Another example: the Talmud rather cynically suggests that one reason women prefer any husband to none is that it allows them to risk pregnancy without suspicion of immorality, as everyone will assume that the child is their husband's. Perhaps In a society where IVF for singles is commonplace, that rationale no longer applies, even though nothing about human psychology has changed.

My purpose here is not to evaluate these arguments, just to demonstrate that such arguments are and always have been legitimate. I hope this suffices to substantiate my claim that "in halakhic discussions, saying 'the *chazokoh* can't change' is either untrue or irrelevant, even if one believes that *chazokohs* embody immutable ontological truths about human nature, because human nature is EXPRESSED differently in different cultures, and practical halakhah depends on their expression."

### **The Pandemic Theology Dilemma: Preserve Normalcy or Embrace Crisis?**

by SBM alum Shlomo Zuckier. (This essay was previously published by *The Lehrhaus*.)

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As we stand now, some 14 months from the outbreak of the pandemic, it is worth reflecting on some of the more salient religious discussions that were taking place in the scary early days of the pandemic. As life was disrupted and people were unsure how to go about their lives, religious and otherwise, many turned to rabbis. Much literature (including several *sefarim*) has been produced on various halakhic issues that emerged at that time. While sophisticated theological discussions have been far less extensive, it is worth reflecting on one discussion, partially exposed and partially beneath the surface, that took place in the months of March and April 2020.

That discussion pertains to the overall religious sensibility with which one is bidden to respond to COVID-19, especially as it was at its height. Aside from taking safety precautions, how should one relate to God in a world of COVID? Should one preserve normalcy to whatever extent possible or should one instead embrace the sense of crisis and channel it in one's religious devotion?

I believe that different religious leaders, some explicitly and some less so, advised the adoption of one or the other of these approaches. This essay will draw both from a programmatic theological essay and from several other treatments of the issue that are less direct in their theological leanings but reveal a clear sensibility in that direction. It will analyze rabbinic approaches from America and Israel that can be categorized as Modern Orthodox, Dati Leumi, and/or moderate Haredi. Furthermore, the period a year ago during which these discussions took place – the abrupt shift from Nissan's celebration to Sefirah's mourning will be especially helpful in bringing to light the practical ramifications of these theologies.

#### **Rav Mosheh Lichtenstein's Theological Approach**

The most explicit treatment of the question of the appropriate theological response to COVID was presented by Rav Mosheh Lichtenstein, Rosh Yeshiva at Yeshivat Har Etzion, on March 27, 2020, during the early days of the pandemic. It was originally sent to Yeshiva students and alumni, and is published here at *The Lehrhaus* for the first time. The essay is worth reading and analyzing in great detail; for the purposes of this essay, however, we will quickly summarize the essay and turn to one of its larger questions.

R. Mosheh presents a dichotomy between two types of prayer – prayer out of a sense of normalcy and prayer out of crisis. Drawing upon his grandfather, Rabbi Joseph B. Soloveitchik's theology,<sup>6</sup> R. Mosheh notes the difference between appealing to God in nature and appealing to God *against* nature. While the first is channeled in the first blessing of Shemoneh Esrei and Tractate Berakhot, the latter appears in the second blessing of Shemoneh Esrei (on revivification of the dead) and Tractate Ta'anit. Under normal circumstances, (and especially in the modern era,) where nature is our friend, it is appropriate to call out to God as functioning within nature. In a pandemic, however, where nature itself is the source of the greatest danger, one must cry out to God out of a sense of crisis. One beseeches God to override the natural order rather than to serve our needs within it.

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<sup>6</sup> This relates to both the themes of human and divine majesty and humility and the dichotomy between regular prayer and prayer out of crisis that are prevalent within R. Soloveitchik's work. See *Lonely Man of Faith*, "Majesty and Humility," and *Worship of the Heart* at length.

This approach, R. Mosheh emphasizes, has major ramifications in terms of the way in which people should pray in a situation of acute crisis, as well as for a variety of other ritual issues. On that point he writes as follows:

In light of this analysis, the ramifications on the policy of psak must be determined as well. One of the primary approaches to current halakhic questions attempts to maintain a familiar routine to whatever extent possible, and is willing to be lenient to achieve this end... Familiar routine is a comfort; but when the world order has turned upside down, the objective should not be to seek calm or comfort, but rather to face reality, and understand that our relationship with the world around us has shifted. We must recognize the crisis and make the necessary spiritual adjustments... The aspiration to execute a halakhic policy which strives to maintain routine is not a question relating to a specific halakhic detail, nor is it a general question of leniency or stringency in policy, but rather a fundamental question of whether the crisis should be acknowledged, and the aspiration to return to that which is familiar and routine abandoned. The world is changed, and this must be acknowledged.

Halakhic policy must reflect the crisis of the moment, in order that people can “recognize the crisis and make the necessary spiritual adjustments.” Maintaining a familiar routine (absent cases of particular need) should not be the goal. The facts on the ground dictate that the world has changed; it would be an affront to God to ignore this reality in the interests of greater cohesion.

### **Halakhic Ramifications**

There are several important points in this account of Coronavirus. It insists on a human reaction that takes the crisis seriously, which will have implications below. It focuses both on the fact that humanity is uncommonly fighting against nature and the phenomenon of greater isolation. It draws on theological views of Rabbi Soloveitchik in insisting that this requires a distinct liturgical response. It points to the risk of overlooking the crisis and cautions against it, as well.

This diagnosis of the spiritual significance of the COVID pandemic is valuable in itself, and worth considering both on its own experiential terms, and also as it relates to Rabbi Soloveitchik’s theologies of technology and of prayer. However, it also has more pointed applications in the halakhic realm. Various ritual (and other) matters of Jewish law stand to see a very different application if treated under this theology and its attendant meta-halakhah rather than an alternate one. Below, we will consider some of these ramifications, both within R. Mosheh’s approach and within alternate approaches that preserve a different theological understanding.

### **The Importance of Retaining Normalcy**

The position of R. Mosheh, while well-developed, was not the primary position taken in response to the early stages of COVID. The majority practice, at least among American synagogues, was generally to do whatever possible to retain a sense of spiritual normalcy and routine amid the pandemic. This manifested itself in several different ways. To give perhaps the best example, many synagogues held pseudo-Minyanim over Zoom, even though they generally did not think this actually counts as a minyan. One of the main benefits of this practice is the sense of consistent synagogue-like interaction in the lives of the congregants.<sup>7</sup> While there have been calls for increased *tefillah* in a general sense, and [daily Tehillim recitations](#), there have not generally been calls to qualitatively rethink the nature of prayer or one’s spiritual existence, nor have there been accounts of how this pandemic differs from other crises.

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<sup>7</sup> Another such benefit is offering regular contact with the synagogue and its rabbi at a time when natural interactions are not taking place. Additionally, some communities have used this as an opportunity for expressing prayers for the deceased that are [parallel to Kaddish](#), if not [Kaddish itself](#).

This seems to constitute a position focused on maintaining normalcy in difficult situations. One can note several reasons that underlie or support this position. At one level, there is certainly a value to routine, not only because it provides comfort, but also because it provides structure and aids people's functioning in difficult times. This is noteworthy in itself, but it is especially important against the backdrop of the mental health crisis precipitated by COVID that has affected so many. Additionally, there is the more specific concern about religious experience. While there may be advantages to embracing the isolation of the pandemic and calling out to God from isolation, there is also a logic to maintaining spiritual practices of normalcy and applying them in this difficult time. Furthermore, looking ahead to a time following the crisis, there is the value of maintaining schedules and commitments going forward, when it comes time to return to the synagogue. We are starting to feel the ramifications of this today, as more and more people are returning to regular prayer. For that reason, there has been a general trend to minimize divergences from standard practice and to make religious life hew to usual structures as much as possible, even as life has become ever so unusual.

To illustrate this point, it is instructive to consider a [letter](#) that Rabbi Yaakov Taubes of the Mount Sinai Jewish Center sent to his community on March 27, 2020, less than two weeks before Pesach:

Dear Community,

Over the past few weeks, as the situation in the world has worsened and the extent of our new reality began to set in, many have tried to find meaning in the chaos... For many of us, finding Hashem [in] these extraordinary times has gotten harder not easier. Without our Shul, our friends, indeed without everything that helps [make] a religious life worth pursuing for so many, connecting to Him has [become] more difficult. Davening at home, observing Shabbos without community, not seeing anyone - these can be impediments to achieving and enhancing proper Yiras Shamayim... The lack of stability and the unknown about how long this will all last can be so incredibly stressful and... many of us are not looking upward to Shamayim, but downward at our phones. This past Thursday was Rosh Chodesh Nissan, the beginning of the month of redemption, and often most importantly for many who are used to being in a rush in the morning, the beginning of a month with no recitation of tachanun. When Rav Hershel Schachter, Shlita, was asked about whether we should perhaps say tachanun during Nissan this year in light of the troubling times in which we find ourselves, he replied that the reason tachanun is omitted is that we are commemorating the redemption which our ancestors experienced from Egypt and projecting forward to the future redemption, which Chazal say will also take place in some form at this time. The significance of these ideas remains in place, despite everything going on at present... Our world has been turned upside down, but it nonetheless is time to get ready for Pesach and that is what we are going to do...

The letter notes the challenge of facing a chaotic world lacking structure, which both creates a personal challenge and a difficulty of connecting to God rather than to news and other this-worldly sources. Taubes' solution to this challenge is to focus not on the timely challenge but on the timeless redemption celebrated on Pesach. The ritual marking of Nisan as a time of joyful redemption and thus not a time for the anguish-ridden prayer of *tachanun* should therefore be applied as normal, reaffirming both God's capacity to redeem and the maintaining of ritual matters as per usual.

There are thus two essentially opposite views on how best to respond to the crisis of the pandemic. Should one emphasize the uniqueness of the current moment and look to shift religious practice and experience where possible – a perspective of Coronavirus Exceptionalism? Or should one rather be a Coronavirus

Normalizer, seeking to minimize the divergences and emphasize continuity with spiritual life in general? This important debate will have ramifications on several different planes.

### The Debate Over Tahanun in Nisan

R. Taubes noted the view of R. Hershel Schachter regarding the skipping of *tahanun* during this year's Nisan, a view that is worth considering more directly. Moreover, the general approach towards Coronavirus Normalization might be seen in a series of halakhic decisions offered by Rabbi Schachter, adopted and applied to the synagogue context by a broad spectrum of American Centrist Orthodox rabbis.

R. Schachter's view not to recite *tahanun* was publicized, along with a directive to cease reciting *Avinu Malkeinu*.<sup>8</sup> With the onset of the crisis, many had called for [adding Avinu Malkeinu](#) to their prayers, either the classical litany of *Avinu Malkeinu* requests beseeching redemption from God following the *Amidah*, or, alternatively, a one-line insertion into the blessing of *Shema Koleinu* requesting an end to the current plague. R. Schachter ruled that these somber additions were all to cease with the onset of the redemptive month of Nisan, as they would in a usual year.

This view was disputed by several others, among them R. Mosheh himself. In a March 29 email, part of a rabbinic discussion as to how to proceed on this issue, he wrote:

I am definitely of the opinion that one should continue to say Avinu Malkenu and Tachnun in chodesh Nissan as well and I personally do so. Although there is a compelling halakhic case for this, that is not the main reason. The real reason is that there is a compelling religious and emotional need to do so. If in times like this we don't cry out to the KBH, then when should we do so?

For R. Mosheh, if there is ever a time to call out to God, it is in the midst of a pandemic. Maintaining the usual rules of avoiding mourning during Nisan would be inappropriate in a time of great crisis. He also noted halakhic precedents for this. [Ta'anit chapter 3](#) discusses scenarios of national crisis (especially drought) where the community would fast and possibly even blow the *shofar* on Shabbat in order to facilitate the prayer of *et tzarah* necessitated by the difficulties of the time. If clear expressions of mourning are allowed on Shabbat in times of crisis, that should certainly be allowed for the lesser celebration of the month of Nisan.

Furthermore, he ties some of his theological reflections on the obligation of prayer to this issue, arguing that in times of crisis there is not only the usual obligation of prayer but a special obligation of prayer based on crisis that actually is a higher grade, biblical requirement. One who prays as if all is normal and does not engage with the pathos and crisis of the moment may have fulfilled the usual, rabbinic obligation of prayer but fails to succeed in the biblical requirement of a prayer out of crisis. This approach likely draws upon the theological and halakhic reading of the Rambam and Ramban offered by Rabbi Joseph B. Soloveitchik, Rav Mosheh's grandfather.<sup>9</sup>

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<sup>8</sup> The following message was publicized in one rabbinic group:

Rav Schachter feels that Avinu Malkeinu should not be recited during Chodesh Nissan as it has always been considered to be a חודש הגאולה. Tachanun is not recited nor should Avinu Malkeinu.

<sup>9</sup> See his classical account of this distinction between two levels of prayer in the essay "[Prayer, Petition, and Crisis](#)," appearing in R. Soloveitchik's *Worship of the Heart*.



R. Mosheh goes a step further, diagnosing and condemning the (unattributed) view of those who believe it is best to not recite Avinu Malkeinu during Nisan. He even takes on the [suggestion](#) of the Israeli Rabbinate to fast a half-day rather than a whole day, seeing it as an attempt to minimize the significance of the moment<sup>10</sup>:

I believe that there is an emotional and religious unwillingness to admit the true extent of the crisis and to behave accordingly and that this creates a very unhealthy disconnect bet[ween] our medical and practical behaviour and our religious awareness. All the attempts to seek the positive and to emphasize the normal can only be legitimate if they follow a deep and sincere recognition of our situation as a crisis rather than attempting to ward it off or paper it over. In light of this, I am afraid that fasting half a day, not saying Avinu Malkenu in Nissan (if you said it before) etc. may be a form of denial of the extent of the current crisis or may encourage such a denial.

This powerful critique stems directly from R. Mosheh's theological approach to COVID, that the crisis and isolation should be leaned into and taken seriously by offering prayer born of crisis, rather than minimized by maintaining a business-as-usual attitude. Interestingly, it would seem that the ultra-conservative Edah HaChareidis in Jerusalem agreed with him on this issue, as their [guidance](#), also published early in Nisan 5780, recommended the recitation of Avinu Malkeinu as well.

It is worth noting that R. Mosheh's position here is consistent with his [position](#) on the phenomenon of public prayer and fasting for droughts, rituals which have routinely taken place in Israel in past decades. R. Mosheh has publicized his position in opposition to these fasts, on the grounds that there is no true crisis, as there is full and continuous access to water during the so-called crisis. Viewing his treatment of that issue in light of this one, what emerges is neither a pro-fasting or anti-fasting position, but rather a more nuanced stance: whether or not one declares a state of religious emergency, entailing fasts and special prayer should rely not on formalized categories of crisis ("the *mishnah* says that one should fast following a drought") but rather on the lived experience of crisis, taking a realist perspective as to what qualifies as danger. If people are actually dying, or lack access to basic goods, that is reason to shift one's mode of prayer. This existentialist position on prayer as part of one's relation to God, extending beyond a formalist halakhic approach and considering the experience of the individual praying, has some deep connections to the philosophy of Rabbi Joseph B. Soloveitchik.<sup>11</sup>

### **Empty Invitations: The Debate Over *Kol Dikhfin***

This debate over how to experience the joy of Nisan relates to another dispute over how to approach the invitation *kol dikhfin yeitei ve-yeikhol*, "all who are hungry may come and eat," (part of *ha lahma anya*) where the host of the Seder renders an invitation to all wayfarers at the outset of the Haggadah's recitation. In a time of social distancing and even lockdown, is there logic to reciting this empty and even false invitation? Rabbis offered divergent views on this issue in advance of Pesah 5780.

R. Hershel Schachter [encouraged](#) the recitation of the prayer as usual, applying the following logic:

At the beginning of the Pesach Seder, we invite all impoverished people to join us for the meal (*ha'lachma anya*). Although one would surely not allow guests into his home during

<sup>10</sup> It is not clear who in particular, other than the Israeli Rabbinate, this critique is aimed at. That being said, it would apply squarely to the position noted above.

<sup>11</sup> For an analysis of some of these categories, see several relevant essays by Alex Sztuden, especially "Grief and Joy in the Writings of Rabbi Soloveitchik, Part I: Psychological Aspects," *Tradition* 43:4 (2010), 37–55.

this dangerous time, these words should still be recited at the start of the Seder. The reason we announce this invitation is in remembrance of the practice when the Beis HaMikdash stood. Then, Jews would invite anyone to join them in eating the Korban Pesach. Our recitation of these words today, is not meant as a true invitation, as is clear from the fact that we don't open the doors and announce it in the streets for guests to hear. After the destruction of the Beis HaMikdash, there was an additional prayer added, that we return to the land of Eretz Yisrael. It is recommended to explain this to those at the table before reciting this paragraph.

This position makes two assumptions. First is that the invitation rendered by *ha lahma anya* is never a genuine invitation, as is demonstrated by the fact that it is recited as a formula rather than publicized to the relevant parties. Possibly more relevant is the secondary assumption regarding how that formulaic line should be applied, understood, and publicized this year. R. Schachter suggests explaining to Seder attendees that this line is a mere artifact, which is reasonable enough, but essentially does not treat this year as differently from any other. In fact, it emphasizes the fact that this year's *kol dikhfin* is no more an empty invitation than any other year.

However, some have suggested that this year, even as one recites the full text of *ha lahma* including its invitation, there is reason to introduce additional messaging that speaks to the current crisis. Rabbis David Block and Yitzchak Etshalom, both educators at Shalhevet High School in Los Angeles, [have written](#) in these virtual pages to suggest additional prayers surrounding *ha lahma anya* that capture the moment and offer a message.

Block, for example, has offered the following prayer, based on the structure of one composed by several rabbis at Bergen-Belsen, in another scenario that deviated (in that case much more exceptionally and poignantly) from the usual Pesach Seder. He notes that his text includes both a sense of mourning what is missing and joy at doing what is appropriate in the situation. The suggested prayer reads as follows:

Our Father in Heaven! It is open and known before You that it is our will to do Your will to celebrate the festival of Pesah with our communities, families, and friends, to pray and recite Your praises together with our communities, to have an intergenerational conversation about the story of the Exodus, to take care of the elderly, to sincerely invite those less fortunate to partake of the *Seder* with us, as the *Haggadah* says, "Anyone who is hungry – come eat, anyone who is needy – come and partake of the Pesah offering." With aching hearts we must realize that the current precautions around the COVID-19 pandemic prevent us from such celebration, since we find ourselves in a situation of *sakkanat nefashot*, of potential danger to our lives. Therefore, we are prepared and ready to fulfill Your commandment, "And you shall live by them (by the commandments of the Torah), but not die by them," and we heed Your warning: "Be very careful and guard your life." Therefore we pray to you that You maintain us in life and hasten to redeem us that we may observe Your statutes and do Your will and serve You with a perfect heart. Amen!

While this approach certainly does not diverge from R. Schachter on the specific halakhic question of whether to recite *ha lahma* and its invitation, it also has a distinct educational message, one that takes seriously the crisis of the moment and applies it to educational effect with this new suggested ritual. What is emphasized is not the similarity to every year's *kol dikhfin*, but how different the overall experience is.

### ***Sefirah* and COVID**

We have seen that the question of how to celebrate happy religious occasions during Coronavirus is an important barometer of how one relates to this experience theologically. In parallel, issues relating to traditional religious periods of mourning may be instructive as well. By this I refer to *sefirat ha-omer* and the traditional practices of mourning that accompany it, including, most notably, the common custom of refraining from listening to music. (That practice has several forms. Some disallow only live music or singing with musical instruments, but not *a capella* music; the details need not detain us now, as we are speaking about a general attitude.)

Some have raised the question as to whether, given both the difficulty of social distancing and the limited options for entertainment and even engagement in the home, there might be a dispensation for listening to music during *sefirah*. As one rabbi put the question (sent out to RCA members on April 13, 2020): “In order to reduce some of the depressing atmosphere can we allow for the dispensation of the *issur* of music, at least the recorded kind, during *sefirah*.” Rav Schachter’s [response](#) to this query notes that the practice of not listening to music is only a *minhag*, or custom, patterned after the year of mourning following the death of a relative. It originally applied only to music with dancing and was later extended to recorded music. Given the attenuated level of the prohibition and the current moment, Rav Schachter ruled as follows:

During this time of global suffering, it would appear that for some individuals, refraining from listening or playing music may leave one in a state of sadness or emotional distress. This would appear to reach beyond the intent of this restriction. If the motivation to listen to music is not to put oneself in a cheerful mood but rather to ease the tension or pressure in one’s home, and to help bring oneself back to a normal disposition, that would be permissible. One should still avoid listening to very cheerful music.

The permissive ruling was not limited to cases where there would be a risk to someone’s mental health – those cases are clear and allow for much more [extensive leniencies](#). Rather, this was a case where one would be sad or emotionally distressed as a result of lacking access to music as a comforting activity. In such a case, Rabbi Schachter presumed that the original practice was not intended to cause people sadness, only to avoid excessive happiness, and thus one may listen to music, albeit while still trying to avoid more cheerful music. The basis of the argument is fully halakhic, and based around the goal of maintaining one’s usual state of mental well-being.

One might have invoked another factor in this context, that the global pandemic and state of crisis might precisely call for a more somber state of affairs than usual. Rather than being a reason to alleviate the sorrow of *sefirah*, it might be a reason to double down on the sense of isolation and lack of calm precipitated by the prohibition on music (assuming it didn’t rise to a level of danger to one’s mental health).

In fact, Rav Asher Weiss, a leading decisor in Israel, argued in a similar direction in a short Hebrew [essay](#) translated here:

In terms of your question, which many are asking – should one be lenient at this time to allow listening to music during *sefirah* given the Coronavirus?  
I will express to you my pain. It appears to me to be a tendency in the broader community, and even among many rabbis, to be lenient in a sweeping manner in all areas, given the Coronavirus. Some exempted women from cleaning for Pesach, others permitted eating *kitniyot*, yet others allowed speaking to their distant and isolated relatives using a computer

on Yom Tov, some allowed planting flowers on *hol ha-moed*, and many other similar cases. The more lenient, the more praiseworthy!

This tendency has no place and no justification. We are in a time of crisis, and in a time of crisis it is incumbent upon each person to strengthen themselves [religiously] and to practice additional stringencies and to sanctify oneself through [refraining from] what is permitted, not to denigrate what is prohibited.

For this reason it is clear that there is no reason to allow in a sweeping or general fashion playing and listening to music during *sefirah*; rather, each case must be considered on its own. It is clear that if, as a result of social distancing and remaining at home, a man or woman has a psychological difficulty like depression, and listening to music will settle their mind and give a rest to their turbulent soul, there is certainly room to be lenient.

Similarly for parents with large families who have difficulty occupying their children... But there is no room to make a general [lenient] ruling here.

While R. Weiss agreed with R. Schachter about the relatively limited *minhag* of not listening to music (and especially recorded music) during *sefirah*, and he allowed for leniencies in cases of need, he was not willing to offer a sweeping permissive ruling. Instead of formulating this point on purely halakhic grounds, R. Weiss invoked a theological consideration – the fact that our current moment is one of crisis. Rather than the broad tendency to leniency that many have adopted, with the goal of making life easier in these difficult times, R. Weiss insists, it is necessary to seek religious growth, including by pursuing stringency. That is at least part of the reason why R. Weiss was loath to offer a general leniency, and why he only permits music in cases where it is deeply needed.

## Conclusion

Pandemic cases make for complicated theology. Proper responses to the impetus of a global crisis, and one that entails extreme isolation in practice, might pull in two opposite theological attitudes. At once, there is a goal of preserving a sense of normalcy in order to promote psychological and even spiritual well-being. At the same time, one might see the objective of emphasizing the crisis and its limitations, with the goal of having the appropriate relation to God in prayer and ritual. Both Coronavirus Exceptionalism and Coronavirus Normalization are reasonable positions, given the circumstances.

This tension has been demonstrated by analyzing three cases – the nature of prayer and its application during Nisan; new rituals in *ha lahma anya*; and possible attenuation of mourning rituals—where there have been debates over specific questions that tie in to this broader theological issue. It is no coincidence that each relates to an event triggered by the Jewish calendar – generally these responses have been formulated piecemeal, responding to specific events and items on the immediate agenda. While it is possible to notice patterns and uncover the implicit theology behind these rulings, these theologies are generally not explicitly formulated as such, with the notable exception of R. Mosheh Lichtenstein's explicit treatment.

This analysis revealed some patterns as to who comes down on which side of the divide. R. Hershel Schachter, followed by many community rabbis such as R. Yaakov Taubes, emphasized a focus on retaining normalcy as much as possible. That meant retaining the normal calendar of skipping prayers of mourning, retaining the pseudo-invitation of *kol dikhfin* as usual, and trying to avoid some of the difficulties of *sefirah*'s mourning period. On the other hand, a group of rabbis from different sectors of Israel's halakhic community coalesced around the view of emphasizing the crisis of this moment in their messaging – R. Mosheh Lichtenstein of the Dati Leumi community, Hasidic *dayyan* R. Asher Weiss, and the Lithuanian Eida HaChareidis leadership. Their embrace of a theology of crisis and isolation, of increased prayer even in happy times, and of increased stringency rather than leniency all combine into a coherent theological position.

This pattern reflects a divide between American and Israeli decisors and communities. Part of this may tie in to Israel's long-standing culture of instituting special days of prayer and fasting in response to current events, which America lacks. Additionally, in Israel the pandemic was seen, on a national level, as a Jewish crisis, while Jews in the United States likely saw it as a more general challenge rather than a particularly Jewish one.

By examining these various theological and meta-halakhic issues, it is possible to attain a view of the theologies in response to this horrific crisis. As the greatest challenges of COVID seem far back in the rear-view mirror, and as things are beginning to return to normal it is worth keeping in mind these divergent theological approaches to crisis taken up by various Jewish communities. And, just as we recently marked the end of the plague in Rabbi Akiva's time with Lag ba-Omer, may this emergence from COVID portend a happier outlook, as well.

### ORIGINALISM and HALAKHAH:

#### Reading Justice Barrett's theory of Constitutional interpretation in a Yeshivish key by Aryeh Klapper (first publication)

"Congressional Originalism"<sup>1</sup>, coauthored by Amy Coney Barrett and John C. Nagle, is built around three *chakirahs*, (= conceptual distinctions).

##### **Chakirah #1:**

Are authoritative interpretations *mevarer* (= clarify, discover) or rather *koveia* (=establish, determine) the canonical meaning of a canonical text?

The *nafka mina* (= practical difference) between these approaches is when someone believes they have independent certainty about the text's original meaning.

If authoritative interpretations are *mevarer*, then one's own certainty may have greater epistemological validity, and in such cases, one would be legally bound by one's own interpretation.

If authoritative interpretations are *koveia*, then original meaning may be the proper **goal** for authoritative interpreters, but whatever result they reach is binding on all, whether not one believes that they achieved their goal.

Imagine, for example, that the Supreme Court rules that execution is inherently unconstitutional. You know that this cannot be the original meaning of the Constitution as amended, because the 5<sup>th</sup> Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law". Plainly the authors of the amendment accepted the notion of capital crimes, and believed that a person could be deprived of life if given due process of law. (I heard this argument from Professor David Halivni.) Which interpretation is legally binding on you?

##### **Chakirah #2:**

Is *Torah Shebikhtav* (= Written Torah, specifically the Pentateuch) *din*/law, or is it just a *mekor*/source of *din*?

If *Torah Shebikhtav* is itself *din*, then it must have a fixed and coherent meaning, and interpretations which contradict this meaning cannot be *din*. But if *Torah Shebikhtav* is only a *mekor*, then it can have many possible meanings, possibly even meanings that would otherwise be mutually exclusive.

Moreover, if *Torah Shebikhtav* is not law, then one cannot use its authority to justify disobeying its authoritative interpreters, even where one believes they have badly misread the text.

Imagine, for example, that the Second Amendment is law. We would have to decide whether or not "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed" meant, now and always, that private citizens have a right to own guns. But if it is only a source of law, then we might decide that it creates a private right in some times and societies, whereas in other times and societies it only prevents exclusion from the militia, or protects the institution of the militia.

##### **Chakirah #3**

If authoritative interpreters are only *mevarer*, and *Torah Shebikhtav* is law – does everyone have an obligation to interpret *Torah Shebikhtav* independently to the best of their ability, or can they rely on a *chazokoh* (legal presumption) that the authoritative interpreters are correct?

Justice Barrett's central *chiddush* (= original contribution) is that we can sometimes rely on such a *chazokoh*. She contends that this is true not only of judges, whose fundamental activity is interpretation, but even of Congresspersons, who might be legislating in ways that command or enable others to act in violation of the Constitution's original meaning.

The primary goal of "Congressional Originalism" is to explain an apparent paradox, or display of hypocrisy, in the way some originalist judges and congressman relate to Supreme Court precedents. On the one hand, they make and enforce laws that should be unconstitutional according to originalism, on the basis of some Supreme Court decisions that they hold were wrongly decided. On the other hand, they declare themselves bound to overturn many other such precedents. This suggests that their choices are motivated by policy – whether or not they agree with the results of the decisions – and not by principle.

A secondary goal of the article is to explain why originalist candidates for the Supreme Court can be believed when they promise not to overturn certain precedents that they admit are not compatible with the Constitution's original meaning.

To accomplish these goals, Barrett contends that not all precedents are alike. Some are "super-precedents", meaning that so much social value and expectation has been built atop them that undoing them is unthinkable. Put differently, no one who accepts the fundamental values of our society would **want** to undo them.

Nevertheless, an originalist who believed that the Constitution is *din* and the Supreme Court only *mevarer* might feel regretfully obligated to undo them. Such originalists would be a threat to our society, and could not be trusted with power.

Barrett contends that originalists **can** be trusted with judicial and legislative power, because with regard to superprecedents, they would rely on *chazokoh* and refuse to investigate whether the superprecedent was wrongly decided. As Supreme Court Justices, they would refuse certiorari to cases seeking to raise such issues, and as Congresspersons, they would never challenge the constitutionality of legislation authorized by a super-precedent. For example, she suggests that Congressional originalists could cheerfully cooperate with and fund the Social Security Administration under the authority of *Helvering vs. Davis*, even while believing intellectually that the case was wrongly decided and that the Constitution did not intend federal spending authority to extend so far. The very same originalists could then turn around and with integrity refuse to fund the Affordable Care Act as unconstitutional despite recent Supreme Court decisions affirming it. Such recent and controversial decisions do not attain the *chazokoh* of correctness.

The difficulty Barrett's *chiddush* tries to solve is intimately familiar to Modern Orthodox halakhists. People are constantly bombarding us with evidence purportedly demonstrating that *halakhah* as we practice it nowadays is inconsistent with the true meaning of the texts we acknowledge as authoritative. If we acknowledge being convinced by any single instance, we are then accused of blatant hypocrisy if we oppose any other change purely on the ground that "that's not what our texts really mean".

Justice Barrett provides one avenue of reply. We can distinguish mistaken halakhic superprecedents from mistaken contemporary interpretations. Making peace with the former need not prevent us from making war on the latter.

Of course, in both Constitutional law and halakhah, the identification of superprecedents can be controversial. Barrett's claim that she could be trusted with power foundered for many liberals on her refusal to acknowledge *Roe v. Wade* as a superprecedent (whereas in *Planned Parenthood v. Casey*, Justice Souter argued for upholding *Roe*'s outcome essentially boiled down to declaring it a superprecedent.)

Orthodox self-parody identifies the custom to say a second *Yekum Purkan* on Shabbat as a superprecedent, such that anyone who even considers removing it from the liturgy cannot be trusted with halakhic authority. The joke has a serious polemical basis, and may have become self-fulfilling by now. The problem is that we make a *kal vachomer* to everything else, and so all suggestions of change, for whatever reason on whatever grounds, become threats to the culture.

I suggest that Justice Barrett's approach might help us generate more constructive dialogue regarding some contemporary halakhic controversies, in a perhaps surprising way.

The concept of superprecedents can function in two ways. It legitimates past decisions that lack textual support, and by the same token, denies legitimacy to proposed changes that could be textually justified. In the Constitutional realm, it both legitimates *Roe* and delegitimates efforts to deny the existence of a privacy interest, or to claim that key elements of the Bill of Rights do not restrict state governments.

In the realm of Halakhah, if we see texts as having unchallengeable authority, we instinctively respond to proposed changes we dislike by denying that they have any textual basis. Sometimes that comes at severe cost to our integrity.

Justice Barrett's approach allows us to acknowledge the textual plausibility of arguments for change that we intensely dislike. Instead of straining to refute those arguments, we can challenge ourselves to articulate why we see specific existing practices and rulings as culturally core, such that we cannot imagine genuinely halakhic Judaism without them – and perhaps to admit that we can imagine genuinely halakhic Judaism without others, even if we would rather have things stay as they are. It may be that *Yekum Purkan* matters that much; or it may not. We will benefit regardless from having the conversation.



### A Moment Ensconced in Love

by SBM alum Sarah Robinson

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אַתֶּם רְאִיתֶם אֲנֹכִי עָשִׂיתִי לְמִצְרַיִם  
וְאֶשָּׂא אֶתְכֶם עַל כַּנְפֵי נְשָׁרִים וְאָבֹא אֶתְכֶם אֵלַי:  
וְעַתָּה אִם תִּשְׁמָעוּ תְּשִׁמְעוּ בְּקוֹלִי וְשָׁמַרְתֶּם אֶת בְּרִיתִי  
וְהָיִיתֶם לִי סִגְלָה מִכָּל הָעַמִּים כִּי לִי כָל הָאָרֶץ

*'You have seen what I did to Mitzrayim,  
that I carried you on the wings of eagles and brought you to Me.  
And now, if you fully heed My voice and keep My covenant,  
then you will be a treasure to Me from among all the nations - for all the earth is Mine.'*  
(Shmot 19:4-5)

Before HaShem gives Moshe instructions before Matan Torah, HaShem gives a preamble of sorts, speaking about how He has already done so much for us (by taking us out of Egypt) and a promise to become even closer to HaShem if we choose to keep the mitzvot. Why did HaShem bother saying this? Wasn't it obvious?

I heard a beautiful answer by Rav Moshe Miller, a Tanakh teacher in Michlalah.

HaShem's preamble teaches us a powerful lesson about making commitments to people we care about. Hashem could have, ostensibly, been blunt and crass. As is the case of many leaders who overthrow previous rulership, the new rulers often become as bad or worse than the ones they were replacing. We don't even have to think back 100 years; Hitler and Stalin promised revolutions against bad, old governments to then be infamous for murdering literally millions of people. HaShem could have said, "well, you were slaves to Paroh and now you'll be slaves to me too!" But He didn't. Instead HaShem was basically saying, "I've shown you that I am committed to you and love you. If you want to join me, I'll become even closer to you." This is why there are so many midrashim that describe this moment as the marriage between HaShem and Am Yisrael and the Torah as a ketubah -- because we would expect such a conversation to happen between a couple, romantically in love and eager to marry.

The moment of Matan Torah was a national experience. But how can I connect to this, individually? We look to Ruth whose story we will read this holiday. Why did she say yes to converting to Judaism? Consider the pshat:

When Ruth declares "Wherever you go, I'll go" etc., she was basically trying to tell Naomi: "I am loyal and committed to always being with you, no matter how hard you push me away. Even if you are trying to self-sabotage and wallow in loneliness, telling me I ought to stay in Moav, I will stay by your side because our relationship is too precious to discard." What we then see is that the heart of love is a passionate commitment of one to the other. Not surprising that, in modern culture, we borrow from Ruth's language of loyalty to her mother-in-law to describe a romantic, marital relationship. "Till death do us part – כי המוות יפריד ביני וביניך –"

Now consider how Midrash Mishlei 31 understands this moment:

“שָׁקֵר הַחֵן וְהַבֵּל הַיּוֹפִי” –  
שהניחה אמה ואבותיה ועושרה,

ובאה עם חמותה, וקיבלה כל המצוות:  
 תחום שבת - "אל אשר תלכי אלך"  
 איסור יחוד עם איש - "ובאשר תליני אלין"  
 תרי"ג מצוות - "עמך עמי"  
 עבודה זרה - "ואלקיך אלקי"  
 ארבע מיתות בית דין - "באשר תמותי אמות"  
 ושם אקבר" –  
 אלו שני קברות המתוקנות לבית דין,  
 אחד לנסקלים ולנשרפים ואחד לנהרגין ולנחנקין  
 לפיכך זכתה ויצא ממנה דוד, שריווה להקב"ה בשירות ותושבחות  
 "Grace is vain and beauty is nothing" –  
 that [Ruth] left behind her mother and her father and her wealth,  
 and came with her mother in-law and accepted the mitzvot  
 The boundary of the city on shabbat -- "wherever you go I'll go"  
 The prohibition to be secluded with a man -- "wherever you sleep I'll sleep"  
 The 613 commandments -- "your nation is my nation"  
 Idolatry -- "your God is my God"  
 The 4 Executions of the court -- "Wherever you die, I'll die"  
 "And there I'll be buried" –  
 these are the two burial plots for the courts –  
 one for the stoned and burned and the other for the killed and strangled.  
 Therefore she merited that King David came from her, who was overflowing to God in songs and praises.

At first glance, this midrash is off. How can it take Ruth's breathtaking, passionate moment of love -- saying that she is ready to now become a Jew...to then say that it's just a list of all the mitzvot Ruth is willing to do. Like, really?! It's deflating and a bad read of the moment.

But maybe the midrash is teaching us a deep lesson about a different kind of love. Sometimes in the daily thoughts of life what keeps the relationship steady are the things big and small to care for our partners. If our relationship means listening to the halacha of tchum Shabbos – then I'll do it. If our relationship means giving up my avodah zarah – I'll do it.

Maybe in our relationships with our parents, siblings, our spouses and children -- this can manifest in the small things we do to acknowledge our partner's unique needs and idiosyncrasies -- big and small. If you need me to move to California -- I'll do it. If you need me to step up my game in doing dishes -- I'll do it. If you need me to put my socks in the laundry hamper – I'll do that too, because I love you and I care about us.

I think this reading of the midrash dovetails nicely with what HaShem had told Bnei Yisrael before matan Torah -- He is giving us the mitzvot because He loves us, and now Ruth is saying I'm willing to take on the mitzvot because if this is the parameters of the relationship -- then I am willing to do this out of love for my mother-in-law.

The moment of giving and receiving the Torah -- a moment ensconced with love.