

THE 2013 CMTL READER

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DOES THE TORAH BAN CREATIVITY?

One of the great if bitter “in jokes” of Jewish modernity was Chatam Sofer’s use of the phrase **שחדש** **מקום** **בכל** **התורה** **מן** **אסור**, for this purpose translatable as “the new is Biblically forbidden everywhere”, to combat Reform innovation.

The first level of the joke was that Chatam Sofer was rhetorically repurposing – i.e., developing a *new* meaning for – Mishnah Orlah 3:9, where the same phrase should be translated “Grain of the new year is forbidden (until chol hamoed Pesach) even outside Israel”.

The second level of the joke is that while the consensus medieval position was that the Halakhah follows this Mishnah, the practice of even the fully observant community has generally been otherwise, such that many great decisors have been compelled to produce *limmudei zekhut* (post facto justifications) for disregarding this law.

So *chadash* is a classic example of a law where popular practice has overwhelmed the written tradition, and Chatam Sofer was offering a creative interpretation – a “chiddush” – and this became the slogan for a static, book-driven vision of Judaism.

And of course this was not Chatam Sofer’s only *chiddush* – the third level of the joke is that Chatam Sofer was a remarkably creative Torah scholar.

The fourth and final level of the joke –if I am not making an unfair presumption - is that most of those opposing Chatam Sofer did not understand that it was funny, and did not realize that he was being creative – they were wholly unaware of the Mishnah and of the history of that Halakhah. This is still true today.

When it stops being funny, of course, is when those who *support* Chatam Sofer stop recognizing the humor, and genuinely believe it to be an absolute statement, *even if they know the Mishnah and the history*. This is an unavoidable risk of absolutist rhetoric. I presume Chatam Sofer was aware of the risk that his own words could eventually be used to stifle the people most like him – brilliantly creative, deeply aware of context, fully committed to Halakhah, and capable of utilizing that creativity so that Halakhah could function effectively in every new context – but thought it a risk worth running.

The contemporary figure most comparable to Chatam Sofer in this respect was the Rav zt”l, who developed a variety of remarkably original conceptions of the extent and nature of tradition. But the Rav did not expect or want his creative rhetoric to become a tool for enforcing a stultified rabbinic conformity, or for creating an intellectual prison bounded by his own theological and halakhic positions, with his students forced to become wardens, inmates, or both.

ART, JEWISH TRADITION, AND THE HOLOCAUST (from *Jewish Values Online*)

Please answer a question from an artist in Denmark whether there is such a thing as "typical" Jewish catchwords pertaining to ethical values in the Jewish tradition. An artist wishes to use the Hebrew words or acronyms for a memorial for Danish Jews who perished during WW2.

You are trying to do a beautiful thing, and I am confident that you wish to do it sensitively and profoundly. In that spirit, let me explain what I see as key components of the task you have assumed, and what might be necessary to properly answer your question.

The creation of memorial art is often a sacred trust. Fulfilling that trust requires the artist, as best he or she can, to see the memorialized both as they saw themselves and as the artist wishes others to see them. Seeing the memorialized as they saw themselves requires commitment to understanding of the truths, beauties, complexities, and ambivalences of their cultural contexts, and of their own relationships to those contexts. Reducing Judaism to catchwords for ethical values may ultimately be a necessity of the form, but that reduction must be the end product of intense study and reflection rather than a substitute for them.

As a downpayment toward that study, I will say the following: One conception of Jewish ethics that I find compelling begins with the Biblical phrase *tzelem Elokim* (Genesis 1:27 and 9:6). One translation of that phrase¹ is "mold of G-d"². One Jewish tradition teaches that this refers to the irreducible uniqueness and unity of each individual human being, and a possible understanding of that tradition is that this uniqueness is absolute – it is not that each human being has something about them that is unique, but rather that everything about each and every human being is unique because it cannot be separated from their whole being.

And yet³ human beings are capable of forming communities, which are built on commonalities. This paradox is at the core of Jewish ethics, which recognizes that ethical obligations are grounded both in commonality and in difference⁴. This dual grounding is a Jewish solution to the problem of how ethical obligations can be universal and yet affected by relationship.

¹Please note that this translation is greatly disputed, and not all Jewish commentators agree even that the two words are part of the same phrase.

²not image, which is more likely a translation of the Hebrew *demut* from Genesis 5:1

³ Here the writings of Rabbi Joseph Soloveitchik, especially his "Lonely Man of Faith" are invaluable

⁴ Here the works of Emmanuel Levinas, and/or perhaps Rabbi Dr. Jonathan Sacks' [The Dignity of Difference](#), are essential.

Perhaps it also offers a guide to how one can memorialize a population that was murdered because it was different, when the impetus for memorialization is almost certainly grounded in a recognition of sameness.

The Jewish sage Hillel once responded to the challenge of reducing Judaism to one principle by saying “What is hateful to you, do not do unto others; the rest is commentary; go learn!” Hillel used reduction to generate a pedagogic process rather than an artistic product. My hope is that my own words here can generate such a process, in which case I would look forward with great anticipation to the product.

THE TOWER OF BABEL: AN ARTISTIC OVERVIEW

The 14th century Flemish painter Jan Beerbohm (born in Germany, Beerbohm emigrated to Flanders to study under Rubens) considered "The Tower of Babel" his masterpiece. In that work, the partially built tower, which looks like a blade aimed at the heavens, is surrounded by scenes of pastoral calm and interpersonal beauty. Two lovers carry bricks together through a field of flowers; children play cooperative games, some of them helping to mix mortar; a son helps an aged father push a wheelbarrow. The Edenic perfection of the scene, however, is marred by a thick streak of gray paint down the right side of the painting.

Some critics argue that the streak is an accidental error and should be scraped off, restoring the picture to the aesthetic perfection Beerbohm intended. Others, however, point out that Beerbohm was deeply religious, while the painting allots such beauty to the Babel culture that G-d Himself seems petulant to have disrupted it. The gray streak, they claim, was a deliberate effort to show that the portrait was superficial, that the culture must have been flawed in some presently unrecognized way. Some more pious critics concede the implausibility of this thesis, but argue instead that after the streak occurred accidentally, Beerbohm recognized it as a Divine message and left it intact. Finally, some moderns have suggested that the gray represents conformity, that the flaw of the Babel culture was that all its creativity was directed toward a communal project which left no room for individuality. They point out that the characters are seen only from the back, and that all of them wear identical clothing.

In 1952, Eric Bar Ilan transformed Beerbohm's work by reimagining the Tower as a windmill. Here the tower itself is unremarkable, but the blades of the unassembled rotor are planted vertically so that they stab both into the ground and toward the heavens.

Most interpreters understand the mill as representing industry, like "the brick that replaced rock" in the Tower's construction. Perhaps this is a Cold War image, and G-d intervenes lest humanity develop the technological capacity to destroy itself. In that case He seems not to have succeeded in the long run.

To my mind, however, Bar Ilan's work actually refers to the windmill in Orwell's Animal Farm that the dictatorial pig Napoleon has the animals continually build, but stealthily pulls down whenever it nears completion. Napoleon's windmill represents a strategy of the totalitarian state, which is to justify current suffering and cruelty by subordinating the present to a messianic future. Bar Ilan creatively argues that the architects never intended the Tower to reach the heavens; rather, they deliberately set their population an infinite task. G-d in this vision is a liberator. Bar Ilan's work tracks the Rabbinic reading of Babel as the birthplace of Nimrod's empire, with Avraham Avinu as the persecuted dissenter.

A more esoteric literary reference is at the heart of a recent installation piece by the punk kabbalist Hava N. N. builds her Tower out of piles of paper. On each paper is written either “brick” or “mortar”, in a pattern roughly parallel to standard bricklaying. Another pile, off to the side, is composed of papers labeled “rock”, and next to it is a sort of puddle of “tar”s. Finally there is a single scrap on its own labeled “Ragle Gumm”.

Ragle Gumm is the protagonist of Phillip K. Dick’s “Time Out of Joint”, which memorably notes that “Ragle Gumm was going sane”. Gumm’s developing sanity involved recognizing that the world he experienced as physical actually consisted of pieces of paper with words written on them. He had been conditioned to see the reality described by those words whenever he read them.

What is N.’s piece saying? Perhaps, as Nachman Levine argued in Nachalah, that the Tower itself is a metaphor for language, the ultimate human construction. G-d creates through speech, and asserts control by naming; it is only through the language of power and the power of language that human beings might even imagine challenging Him. Words are more real than things.

But I think that doesn’t go far enough. N’s deeper point is that the post-Babel world is insane in that it sees language as arbitrary. If language is arbitrary, why does G-d name things? Why does He care what names Adam gave the animals? To go sane is to resonate to the language of Creation.

For a Jewish mystic, this is not wholly a good thing. The truly sane understand that only the undifferentiated G-d exists, and that all distinction is illusion. But G-d has given us that illusion, and we do not necessarily gain by losing the capacity to see it, as if we had only x-ray vision.

For Maimonides, human beings Fell when Eve exchanged truth for beauty. But perhaps we can suggest a more generous reading. Eve Fell by mistaking beauty for truth, but there is value in recognizing beauty while acknowledging that it is illusory. Genesis 2:9 writes that G-d brought forth in the Garden “all trees *nechmad l’mar’eh*” (visually attractive), after all, whereas Eve saw the Tree of Knowledge of Good and Evil as “*nechmad lehaskil*” (intellectually attractive).

N.B. All visual and plastic artists and artworks cited in the above dvar Torah are fictional.

SOME PRINCIPLES OF JEWISH BUSINESS ETHICS

(excerpted from an article forthcoming from *Uri l'Tzedek*)

Leviticus 19:24 forbids placing a stumbling block in front of a blind person. The Rabbis interpreted this metaphorically as a ban against using words or actions to mislead those who lack relevant practical or spiritual knowledge. *Lifnei iver* thus prohibits giving self-serving advice and being an accomplice to sin.

What are the boundaries of these prohibitions? I suggest the following:

Self-Serving Advice

It is forbidden to use the trust engendered by or endemic to a relationship so as to create and use an information imbalance against another party in the relationship.

Salesmen/traders who talk clients into buying securities that their company was betting against are a perfect example of violators. The same is true of repairmen who advise the purchase of unnecessary parts, or insurance agents who persuade buying larger policy than needed, etc. In each of these cases X comes to Y for advice because Y represents himself as an expert whose knowledge is used to benefit clients, and Y abuses the trust created by that self-representation.

Being an Accomplice to Sin

We are responsible to create accountability for misbehavior, rather than simply appealing to the best in human nature.

This includes effective antiharassment policies, independent oversight of financial transactions and salaries, and close attention to the power dynamics of hierarchical relationships.

We are responsible for clearly stating and acting on the principle that values are not subordinate to profits.

We are responsible not to engage in commerce with firms that we know, or that a reasonable investigation would allow us to know, behave unethically or illegally.

It is not my interest here to define "unethical". *Lifnei iver* is a metaprinciple – it applies to whatever a person sees as unethical.

We are responsible not to produce products whose primary use is unethical or illegal,

unless such products are so completely integrated into the culture that failing to sell them would make a business commercially or socially unviable. For example, if one believes speeding to be unethical or illegal, one could not produce radar detectors. On the other hand, one might be permitted to sell televisions, even if one believes that a television's primary uses are to promote the sexual objectification of women and the public humiliation of reality-show participants, on the presumption that any particular customer will use the television to watch only worthwhile shows.

TOWARD A JEWISH PERSPECTIVE on the ROLE of CORPORATE MONEY in POLITICS

(This paper was commissioned by Auburn Seminary in NY as part of a multifaith theological grounding project related to the issue of the role of money in politics)

In 2010, the United States Supreme Court ruled in *Citizens United* that corporations were legal persons with respect to the First Amendment and so had rights to political speech that could not be abridged. In practical terms, the Court allowed corporations to make unlimited contributions to Political Action Committees and other nonprofits at any time.

In 2013, the Hobby Lobby chain of Craft Stores sued to overturn a law requiring employers to include contraception in the health care packages offered to employees. Hobby Lobby, and in its wake many other corporations, argued inter alia that the law violated its First Amendment rights to freedom of religion. The reaction of US Appellate Courts has so far been mixed, and the case seems likely to make it up to the Supreme Court.⁵

Hobby Lobby's majority ownership professes Christianity, and to my knowledge no majority-Jewish-owned corporation has yet made a similar claim. Some Jewish groups have, however, come out strongly against *Citizens United*.⁶ In each case their argument is that treating corporations as people gives disproportionate power to the very rich, who are unaware of the needs and desires of ordinary folk.

Now the Torah in several places⁷ forbids accepting bribes, and the Rabbis extend that prohibition even to accepting money "so as to judge fairly"⁸, on the premise that accepting money creates a natural desire to provide reciprocal favors. This might be read as the basis for a Jewish prohibition against any private campaign financing.

A similar moral might be derived from the Biblical requirement that materials for the ritual in the Temple be financed by an egalitarian head tax of half a shekel – "The rich must not add, and the poor must not subtract, from the half shekel"⁹.

⁵ See <http://www.policymic.com/articles/21873/hobby-lobby-obamacare-contraception-lawsuits-will-be-settled-by-supreme-court>

⁶ See Rabbi Aryeh Cohen of the Conservative Movement's University of Judaism at http://www.jewishjournal.com/justice_in_the_city/item/the_citizens_united_decision_and_the_image_of_god_2_0120102, and apparently the official position of Reform Judaism here <http://www.reformjudaism.org/blog/2011/01/26/yom-huledet-sameach-citizens-united>.

⁷ Exodus 23:8, Deuteronomy 16:19, Deuteronomy 27:25. See also Deuteronomy 10:17.

⁸ Talmud Ketubot 105a; see also Rashi to Exodus 23:8

⁹ Exodus 30:15

In my opinion, however, it is unproductive and poor moral reasoning to seek to map the detailed past conclusions of Jewish law directly onto the political practice of contemporary America. Each sociopolitical reality has its own balance of forces, and so the law must be adjusted to take that specific balance into account. A system which approaches justice in one context may breed oligarchy in another, and tyranny of the majority in a third. Past Jewish legal decisions were made with regard to societies which accepted Jewish law in toto, and must not be applied to pluralistic contexts without careful and rigorous thought.

For example – banning private campaign financing might generate a system in which every person has an exactly equal capacity to run successfully for office, and in which victorious candidates feel no obligations toward any individual more than to any other. But the same system, combined with a requirement that many signatures be required on nominating petitions, might in practice yield the result that only candidates approved by electoral “machines” are listed on the ballot. When combined with a low level of public financing, the same system might mean that positions seen as “fringe” by the more powerful media outlets never get the opportunity to be seriously considered by voters.

And as it happens, the Rabbis understood the half shekel as a minimum tax, set aside to buy the animals for public sacrifices, which did not preclude the wealthy from making large additional voluntary donations of wood to fuel those sacrifices, or to maintain the temple, or even from paying additional half-shekels on behalf of the poor¹⁰. Thus rich donors could rightly feel that they contributed disproportionately toward fulfilling the public’s religious obligations.

What we *can* say productively is that the Rabbis made a strong claim about psychological reality, and that an authentic Jewish perspective on political financing must account for that claim. In other words, the Rabbis presumed that contributions generate influence, *even if* both the donor and the candidate can say sincerely that the money involved neither an explicit nor a tacit quid pro quo¹¹. Any system that presumed otherwise would be Jewishly viewed as dangerously naïve. A Rabbinically grounded political stance would therefore demand of any system that provides opportunities for unlimited contributions by the rich that it construct a mechanism or mechanisms by which the poor might counterbalance the disproportionate influence such contributions would inevitably gain.

This seems to me to lead to a viable model generally for the construction of Jewish perspectives on contemporary issues. Using Rabbinic material productively to comment on contemporary issues requires:

- 1) the distillation of fundamental presumptions from the raw material of Jewish law

¹⁰ Talmud Ketubot 108a

¹¹ Ibid 105a

- 2) the integration of those presumptions into a coherent perspective, and
- 3) the application of that perspective to the relevant reality.

I try below to use this model to construct a Jewish perspective on how the United States should regulate the capacity of money, and specifically corporate money, to influence political conversations.

Toward that end, I will seek to demonstrate the existence of two further Rabbinic presumptions, integrate the three presumptions into a coherent perspective, and finally apply that perspective to the specific question of the proper role of corporate money in politics.

B.

The Torah twice prohibits showing favoritism to the poor in lawsuits, in each case just prior to its prohibition against tilting the law toward the powerful¹². The Rabbis in their comments to this verse note that sympathy tempts to distortion just as avarice does¹³. So one might simply read this as a contention that the best results of law are those which are true, and that true results are best arrived at by means of pure reason, without consideration of context or results.

But why are these the best results? A careful reading of the Rabbinic comments makes clear that they do not see the outcomes of pure reason as the best, or even the most just outcomes; rather, they recognize that truth sometimes yields perverse results, and praise judges who create a more equitable outcome out of their own pocket by repaying the poor for the costs of rulings that have gone against them¹⁴.

Why, then, does the Torah prohibit judges from allowing the economic situation of litigants to affect their legal decisions? My alternative explanation is as follows:

The Rabbis asserted that in most political contexts, stability requires that the judicial and political arenas each be recognized by the (few) rich and the (numerous) poor as providing an opportunity for their (differing) interests to be reasonably considered. Pure democracy of course favors the poor, and the attempt to preserve a forum which the wealthy will recognize as allowing their interests to be considered fairly, if disproportionately to their numbers, lies at the heart of many systems involving bicameral legislatures. Constitutional systems, which place limits on what majorities can do to minorities, often serve the same function. That is, they allow the rich to reconcile their self-interest with

¹² Exodus 23:3, Leviticus 19:15. See also Deuteronomy 1:17

¹³ Sifre Devarim 17; see Rashi to Exodus 23:3

¹⁴ Ibid, also Talmud Sanhedrin 6b. The question of whether this practice would incentivize judges to decide for the rich is not to my knowledge raised in the Talmud.

their participation in a fundamentally majoritarian system. The alternative is that the rich will find ways to evade the courts and become fundamentally unaccountable.

I suggest that the Torah prohibits legal discrimination in favor of the poor in order to preserve the legal system as a venue which the rich recognize as legitimate. On other words, the Torah takes the position that systems designed to favor the poor will end up hurting them, as the rich will simply opt out. A political system, even one with a redistributionist agenda, must take into account the necessity of either convincing the rich to voluntarily participate, or else of oppressing them.

This prevents me from concluding that a system in which the rich can choose to have greater influence-opportunities, for example by buying reams of issue ads, is ipso facto unJewish. Greater political influence may be a necessary corrective for a legal system which is biased toward redistribution, or for a political culture which exposes the rich to excessive risk of expropriation or confiscatory taxation.

Moreover, elections are not halakhic decisions, and it is not at all clear why buying television ads is a less legitimate form of influence than offering to increase government spending in a particular area, whether it be welfare or oil exploration.

Attempts to limit *persuasive spending* by the rich in order to preserve the *interests* of the poor also run a grave risk of infantilization – the poor have minds and the capacity for research, so why should they not be given access to all the speech they can, however funded? The evidence is that money has grave limitations in terms of swaying votes – many, many well-funded campaigns have failed, and the specific alarm raised against the spending of Sheldon Adelson in the most recent US Presidential race, seems, judging by its results, to have been premature.

Nor do the rich present a unified political front.

And -what would we prefer the wealthy do with their money? Is not plowing it into public advocacy virtuous, esp. when, as is the case with most “social issues”, the rich are not in any way investing in keeping with their economic self-interest?

Why are influence-disparities owing to money more troubling than influence-disparities resulting from intellect, rhetorical skill, or erotic appeal?

For all these reasons I see no compelling Jewish reason to oppose a system which allows the wealthy to participate as they wish in issue advocacy.

For all these reasons I do not see a specifically and deeply Jewish basis for opposing *private* campaign contributions.

C.

Corporate money, however, presents a very different question. Here the issue is not the wealth of the corporation, but rather the nature of its interests and its relationship to its formal ownership.

Let me begin with a Talmudic story.

Some porters broke a barrel of wine they were carrying for Rabbah bar Bar Channah.

He took their garments (in partial payment for the wine – they had no other money).

They came and reported this to Rav.

Rav said to him: “Give them their garments”.

He asked: “Is that the law?”

Rav replied: “Yes, in accordance with Proverbs 2:20: “so that you will go in the ways of the good”.

He gave them their garments.

They said to him: “We are poor, and we have worked the entire day, and we’re hungry, and we have nothing to show for it”.

Rav said to him: “Go, give them their wages”.

He said to him: “Is that the law”?

He replied: Yes, in accordance with Proverbs 2:20 “and you will keep to the paths of the righteous”.¹⁵

As with most Talmudic stories, ours has a rich history of interpretation. Most such interpretations focus on the line between “the law” and “the right thing to do”, generally formulated as “going further in than the line of the law”¹⁶. The claim is that this *was* the law – for figures such as Rabbah bar bar Channah, who recognize a realm of obligation that goes beyond what the law can formally coerce.

My own preference is to understand this as a case of setoffs. The workers indeed owe Rabban bar bar Channah for the wine, and for Rav to rule otherwise would violate two Biblical prohibitions against showing favoritism to the poor in court.

However – Rabbah bar Bar Channah owes their wages as well.

The question before Rav is whether to allow Rabbah bar Bar Channah to “set off” the debts, that is to say whether he can subtract the wages from the presumably much larger debt the workers owe to him.

This is not a matter of law, but rather of judicial discretion.

¹⁵ Talmud Bava Metzia 83a

¹⁶ *Lifnim mishurat hadin*”; see e.g. Rashi to Talmud Bava Metzia 83a.

But in a case like this, where no third parties are involved, generally such offsets are allowed¹⁷.

However, Rav rules that the wages cannot be offset – rather, Rabbah bar Bar Channah must pay the wages in full, and then Rav will work out a payment schedule for the wine.

Either way, an obligation is imposed on Rabbah bar Bar Channah that he would not anticipate in a legal system built on law rather than on equity or justice.

The core moment of the story is its implicit ending – that Rabbah bar Bar Channah accepts the authority of Rav’s judgment.

Now imagine to yourself that Rabbah bar Bar Channah is not in court himself, but rather represented by counsel. Furthermore, imagine that counsel as well has no instructions from RbBC, simply a letter of appointment sent in the mail along with a retainer. Is it plausible that the attorney would accept Rav’s judgment? I think not, and furthermore, that he would likely be liable to censure, and for damages, if he did so.

In other words, law can function as law when it decides among interests rather than people, but justice requires the involvement of people.

I suggest that this is the basis of the Talmudic principle “It is a better *mitzvah* when done personally than when done via agent”¹⁸. While the Talmud applies this specifically to marriage and preparations for Shabbat, subsequent Halakhists argued that the principle applies to all mitzvot¹⁹ (In this context, best translated as “Jewish legal obligations”). My suggestion is that the Rabbis thought that when mitzvot are performed by agents, no space is left for the subjective, and in particular, for the possibility that someone else’s interests may conflict with mine in such a way that I would, given the choice, (properly) prefer theirs²⁰.

The underlying principle is that issues at the intersection of rights and responsibilities, of self-interest vs. communal interest, ought not to be delegated.

¹⁷ although I was informed by Israeli lawyer David Schotenfeld that under current Israeli law, this is specifically not the case with regard to employer-employee situations

¹⁸ Talmud Kiddushin 41a.

¹⁹ Magen Avraham 250:2 , Panim Yafot to Leviticus 17:13, Shulchan Arukh HaRav Orech Chayyim 250:4

²⁰ This in no way implies that one ought always forego one’s interests in favor of the interests of others. See Ayn Rand’s powerful contrarian essay “The Virtue of Selfishness”. I am also not treating here the general question of how one ought to balance one’s own interests with those of others, or of how to balance one’s material, religious, and self-development interests.

Now it seems to me that allowing corporations to play a large role in political discussions runs directly against this principle. Corporations are bound by current notions of fiduciary duty to consider almost exclusively the economic interests of their owner unless specifically instructed otherwise.²¹ The multiple layers through which ownership is filtered nowadays means that most corporations have no real relationship to any owners not themselves corporations, and most of us - who invest our money in mutual funds, often via pension funds – have no real idea what we own, let alone any notion of exercising moral influence via our money.

The result is that corporate speech is not the same as the speech of the wealthy – it can be genuinely stifling to all voices other than those representing self-interest. More sharply – the corporation, in the current economic framework, is a means of aggregating the money of the rich and the poor into the legal framework of a democracy of dollars – in corporations, it is the majority of shares that controls, not the majority of owners. Furthermore, in that democracy of dollars winner takes all, and the voices of those with title to less than half the total corporate wealth are effectively silenced.

Delegating the political speech of shareholders to corporations – which is the inevitable consequence of allowing corporations to engage in political speech - is therefore a way of ensuring that only self-interest will be considered in politics, and that the less-wealthy will not be able to influence public discourse in proportion to their assets, much less to their numbers. As a Rabbinic thinker, I am bound to oppose such delegation on the grounds that

- a) it will allow considerations of self-interest to have excessive influence over populations and politicians, to the exclusion of moral and ethical considerations not explicitly embodied in law
- b) it will erode the non-wealthy citizenry's faith that their interests are fairly represented in Congress,, especially among those citizens who do not self-identify as stockholders
- c) It will make it impossible for elected representatives to compromise in the name of the national good – only tactical considerations could justify not fighting to the end.

The first of these concerns can potentially be met by explicitly assigning corporations the status of moral agents, rather than as purely financial agents. This is a potentially laudable outcome of the Hobby Lobby litigation. It is also possible that such a development would make the non-wealthy more persuadable that elected officials were considering their financial interests fairly when making decisions.

However, it seems to me that the primary Rabbinic concern I have raised - “It is a better *mitzvah* when done personally than when done via agent” – could only be met by a wholesale overhaul of the current

²¹ See inter alia http://en.wikipedia.org/wiki/Cowan_v_Scargill and the discussion of corporate philanthropy at http://www.law.harvard.edu/faculty/fferrell/pdfs/charitable_giving1.pdf

system of corporate ownership, such that shareholders would be aware of all their holdings, and corporations would see their public speech as developing in constant dialogue with their full ownership.

Such an overhaul seems deeply unlikely to occur anytime soon. Accordingly, it seems to me that I have provided solid traditional grounds for supporting those who work toward legislation or Constitutional interpretations that set limits on corporate political speech, even in the form of “issue ads”.

OF BIRTHRIGHTS AND BILATERAL MONOPOLIES

Could Esav have successfully sued Yaakov in beit din for return of the birthright?

Genesis 25:29-34

ויזד יעקב נזיד

ויבא עשו מן השדה והוא עיף:

ויאמר עשו אל יעקב

הלעיטני נא מן האדם האדם הזה כי עיף אנכי

על כן קרא שמו אדום:

ויאמר יעקב

מכרה כיום את בכרתך לי:

ויאמר עשו

הנה אנכי הולך למות ולמה זה לי בכרה:

ויאמר יעקב

השבעה לי כיום

וישבע לו

וימכר את בכרתו ליעקב:

ויעקב נתן לעשו לחם ונזיד עדשים

ויאכל וישת ויקם וילך

ויבז עשו את הבכרה: ו

Yaakov planned a porridge;

Esav came from the field, exhausted.

Esav said to Yaakov:

“Pour into me from that red, red stuff, because I am exhausted” –
therefore his name was called Red.

Yaakov said:

“Sell as-this-very-day your birthright to me.”

Esav said:

“Behold I am going-toward-death, so what is the birthright to me?”

Yaakov said to him:

“Swear to me as-this-very-day!”;

he swore to him;

he sold his birthright to Yaakov.

Yaakov had given to Esav bread and a porridge of lentils;

he ate and he drank and he arose and he went;

Esav degraded the birthright.

Here's a straightforward story. Esav arrives tired from the field to find Yaakov about to eat a savory soup. When he asks for some soup, Yaakov says he will give it to him in exchange for the birthright. Esav agrees. Yaakov insists that Esav swear to him. Esav agrees, eats the soup, and then goes off without regret, degrading the birthright he had sold.

There are at least two ways one can argue that this straightforward story is a misinterpretation of the Biblical text.

The first is by showing that a close reading of the text reveals features that this narrative fails to account for. Here are a few such features:

- a) The oath is recorded before the sale, rather than after.
- b) Yaakov gives Esav bread in addition to soup

The second is that, on the assumption that we applaud Yaakov supplanting Esav as the *bekhor*, his behavior cannot have been as callous and even extortionist as in the narrative above.

Da'at Z'keinim records R. Yehudah haChasid as simply dismissing the last point:

**ונמצא בס' ר' יהודה החסיד מכאן אתה למד שאם יש ביד רשע ס"ת או מצוה אחרת
דמותר לצדיק לרמותו וליטלו ממנו:**

From here you learn that if a Torah Scroll or other mitzvah is in the possession of an evildoer
that a righteous person can trick him and take it from him

Most traditional commentators, however, did not agree; or, even if they did agree that Yaakov's behavior was justified, were still concerned that the sale be *legally* valid. By *legally* they mean *halakhically*, as they have no other way of guestimating ancient commercial law. So they may claim that the oath actually *effected* the sale, and that this was necessary because cash cannot purchase either intangible goods or else goods that have not yet come into being. Or they may claim that the purchase was made for cash, and that local custom required that a meal be served after an important transaction.

Claiming that an unstated amount of cash traded hands is an effective way of resolving the halakhic problem of *ona'ah*, which states that a seller can revoke a transaction if the purchase price was less than 83.3 percent of the worth of the purchase, so long as the seller was unaware of its true value at the time of sale.

However, I have trouble understanding how this widespread reading accounts for the transaction occurring within the narrative context of Yaakov cooking and Esav hungry. Furthermore, even if Yaakov paid cash, and especially if he paid only soup, Esav seems to make the deal under duress/*ones*, and sales made under duress are sometimes invalid.

Rishonim and Acharonim have an array of alternate solutions to the problems of *ona'ah* and *ones*. Perhaps Esav's odds of dying (either because of the inherent dangers of hunting, or because of a scheduled duel with Nimrod, who regarded him as a poacher) before Yitzchak were so great that the birthright was genuinely worthless to him; perhaps Yitzchak was impoverished at the time (although rich before and after); and so on.

In Chapter 2 of his **Economic Morality and Jewish Law**, Rabbi Dr. Aaron Levine z"l offers an original approach. *Ona'ah* judges the purchase price against a hypothetical marketprice. The birthright, however, was a case of bilateral monopoly, meaning that Yaakov could not have bought it from anyone other than Esav, and Esav could not have sold it to anyone other than Yaakov. In such circumstances, there is no market, and the price will always depend solely on the leverage each party has – how badly one needs to sell, and the other to buy. Dr. Levine argues that Yaakov seized the moment to buy at the lowest price Esav would sell for, rather than at the highest prices Yaakov would pay, but there was no coercion to sell, and *ona'ah* is irrelevant because there was no market.

Dr. Levine interestingly regards *ona'ah* as an ethical requirement embodied in law, and yet apparently feels that the challenge to Yaakov's character can be answered satisfactorily if a technical solution to the law can be found. I think his analysis is an enormous contribution, but I am not satisfied at least ethically; even in cases of bilateral monopoly, do we not still care about whether the seller had the information necessary to properly set his own reserve price?

To illustrate: Wikipedia asserts that the US Navy is the only buyer for nuclear powered aircraft carriers, and that the Department of Defense has thus far authorized only one seller of such. Negotiations as to price are therefore a function of leverage. But surely it would matter, ethically and likely halakhically, if the seller had been misinformed that aircraft carriers were useless in battle, and therefore sold them for almost nothing?

Seforno argues that Esav never thought that the birthright was worth more than Yaakov paid for it, but this seems unconvincing in light of his later complaint to Yitzchak. Radak, by contrast, acknowledges that Esav later regretted the sale, but sees the oath as preventing him from reversing it.

By requiring the oath, Radak concedes that the sale as such *was legally reversible*. On what grounds? Dr. Levine certainly has a point that it is difficult to claim *ona'ah* in the absence of a market.

I have a suggestion. Tosafot Bava Kamma 110b discuss the gemara's apparent belief that if someone dedicated an animal as a sin-offering, but died before the animal was sacrificed, the heirs would be allowed to recover the animal for personal use were it not for an unrationalizable tradition saying otherwise. The gemara makes similar claims about a case in which money was given to kohanim in order to enable a sin-offering to effectively atone, but the giver died before the sacrifice was brought, and a case in which a woman ends up needing *yibum* or *chalitzah* from a man afflicted with boils. Tosafot ask: If this is so, why shouldn't every ordinary commercial transaction be reversible whenever it results in a loss? They answer:

וא"ת

אדם שקנה מחבירו שום דבר ונתקלקל יבטל המקח דאדעתא דהכי לא קנה!?

וי"ל

דהתם לאו בלוקח לחודיה תליא מילתא, אלא כמו כן בדעת מוכר, ומוכר אקנה ליה אדעתא דהכי,

אבל הכא דקדושין בדידה קיימא, והוא אינו חושש היאך דעתה להתקדש,

וכן גבי מקדיש נמי בדידה קאי,

וכן נותן הגזל בדידה קאי

If you were to ask a kushya:

(According to this), if a person bought something from someone else, and it became ruined, should not the transaction be nullified, on the ground that he did not acquire it with that in mind?

One can reply:

There, the matter is not completely dependent on the buyer, but rather equally on the intent of the seller, and the seller did transfer it to him with that in mind,

whereas here, kiddushin takes effect on her, and he is not concerned about what her intent is when she agrees to be married.

Similarly, the sanctification of sacrifices applies to his (animals),

and similarly the (case of the) one who gives the robbed goods (to the kohanim) is talking about his own.

Tosafot's point, as best I understand it, is that in all transactions there are *implicit* conditions made by both parties which should in principle enable them to void the transaction. However, commerce cannot exist that way, so the rule is that conflicting implicit conditions cancel each other out. When we can presume that party A would accept party B's implicit condition, that condition is valid. In other words, the sale is valid anywhere in the range between what A and B respectively would accept rather than not transact.

This may leave room for a definition of ona'ah in cases of bilateral monopoly – paying less (or charging more) than the other party would accept rather than forgo the transaction, assuming they had accurate information.

Remember that Radak argues that the oath prevents the transaction from being cancelled; in essence, Esav agreed to a "no backsies" deal. But Radak, unlike most others, does not see the legal solution as obviating the ethical question. In Radak's analysis, Yaakov's motive was at least in part that he did not wish to treat Esav with the formal honor socially due an older brother. Yaakov was punished for this by being made to bow before Esav when he returned from Lavan's house.

The question is whether any critique of Yakov's behavior casts a shadow on Jewish history. Netziv argues generally that sometimes one has to do the lesser of two evils, but that one cannot make a pleasure of necessity – he argues that Yaakov was punished for enjoying Esav's discomfiture when he took the *berakhah*, and perhaps Netziv would say the same thing here about the *bekhorah*.

It seems clear to me, however, that Netziv does not think that Yaakov should have left the *berakhah* to Esav. Rather, he thinks Yaakov is accountable for not being the kind of person who could do what was necessary without enjoying it. That is a fascinating and challenging standard.

DRONE WARFARE: A JEWISH PERSPECTIVE

(a version of this essay was first published in TABLET MAGAZINE online)

Wandering through a Marshall's last week, I was sorely tempted to buy my kids a dramatically discounted remote control helicopter with camera. Remote controlled toys are generally cool – flying toys are cool – and overhead photos are cool, so what's not to like?

Of course, put a missile launcher on that toy and we suddenly have a “drone”; paint it black, call it “Predator”, and send it to Pakistani airspace, and we have a public controversy. Drones are bedeviled nowadays by ethical and public relations challenges, to the point that farmers may shy away from using them to watch livestock. Alec McGillis reports in the current New Republic that one manufacturer hopes to solve the ethical spillover from military uses by painting one pink and marketing it as “The Soft Kitty”.

Is there a Jewish perspective on those ethical challenges? One simple reason to say there must be is that Israel makes extensive use of drones to monitor and kill its enemies. A Jewish perspective on drones is therefore necessary in the same way that Jews and Judaism must have perspectives on the ethical challenges involved in banking, medicine, social work, or law. Jews need to know whether, when, and how they ought or not to make use of drones.

But a much deeper question is the extent to which Judaism can and should contribute substantively to *universal* discussions of military ethics. As Dr. Barukh Brody cogently notes in the context of medical ethics, discussion of Jewish law are often formally and deliberately irrelevant to nonJews because the *halakhah* explicitly distinguishes the obligations of Jews from those of nonJews.

Jewish law therefore cannot necessarily provide a Jewish perspective on drone warfare as such, one which applies equally to Israel, the United States, Russia, and India. At the same time, Jewish perspectives on almost anything must incorporate the concepts, tensions, and arguments of *halakhah* if they are to have any hope of rising above the platitudinous.

A reasonable starting question is whether Judaism recognizes the legitimacy of ethical limits on military technique if those limits might have adverse military impact. Perhaps a Jewish military ethic consists of asking only two questions: whether the war is worth fighting, and if it is, how best to win it.

Furthermore - military operations involve killing people, often in ways that cause the victims excruciating pain before death. The notion that ethics should be a constitutive part of rules as to which delivery vehicles and modalities may be utilized to inflict such injuries can seem ridiculous.

Ethical defenses of drone warfare generally rest on these premises, and essentially are arguments from military effectiveness. They contend that

- a) Drones are merely a delivery vehicle for conventional weapons; they do not kill, maim, or injure in ways or numbers that can be invidiously distinguished from cruise missiles, bombers or artillery. On the contrary - they often add a level of verification and precision unmatched by other military modalities.
- b) Drones allow proactive defense against terrorists or guerrillas in ways that were previously and remain otherwise impossible.

These arguments in and of themselves seem compelling to me. If war is ever justifiable – and the overwhelming weight of Jewish tradition is against pacifism, for both Jews and nonJews – then the use of drones to kill legitimate military targets is in principle a legitimate tactic of justifiable war. I say this even though in the context of torture I have held strongly that potentially effective military tactics can be ethically offlimits – nothing about drones raises any of the same concerns.

One critique of drone warfare seeks to use its primary strength against it, namely that it allows someone from side A to kill someone from side B without any risk that side B will kill him first. But to the best of my knowledge, Judaism has never recognized a “sporting principle”. In Westerns, it is often considered unethical to shoot an unarmed man, even if you and everyone else in the room knows that the man is not unarmed by choice, and that he will do his best to kill you the moment he lays hands on a viable weapon. Judaism by contrast contends that “One who comes to kill you, *anticipate* and kill him first”. There is no intrinsic Jewish reason to avoid using guns against knives, or tanks against cavalry, et al, so long as the knives or cavalry pose a genuine threat to one’s life.

Others argue that drone warfare violates international law. Since prominent Jewish legal thinkers such as Rabbi Shaul Yisraeli have argued that Judaism mandates obedience to international law, it might follow that Jewish law forbids drone warfare as well. However, even if one concedes the principle that international law carries significant Jewish weight – and in a different context I might dispute that principle sharply – that weight would apply only to *settled* international law. Drones are new enough that no settled international law exists regarding their use. So long as a plausible argument exists for the legality of drone warfare, Jewish law would avoid ruling on it so as to avoid an excessive entanglement of religion with politics.

Rather, serious ethical, and Jewish, objections to drone warfare arise out of three other questions:

- a) When one side of a war develops a qualitative technological advantage, must it ethically consider what will happen on future battlefields when the technology spreads, or is it rather entitled to win its own war, and leave the future to be negotiated? The US is currently trying hard to prevent nuclear proliferation, but our generally unrepented use of atomic bombs against Hiroshima and Nagasaki makes clear that our objection is pragmatic. Drones certainly have the potential to allow totalitarian governments an unprecedented capacity to observe the actions of their subjects, and likely also will give them the capacity to kill their political opponents with less risk of politically dangerous collateral damage. One wonders how the current civil war in Syria would be altered if the Assad regime obtained drones, for instance. These are the same capacities that make drones attractive to the US.
- a. We should acknowledge here that military ethics in practice are often an invention of the strong to constrain the weak. This does not necessarily mean that these conceptions of ethics are incorrect or unconvincing, but it almost certainly means that they are incomplete. The rules of war cannot make it illegitimate for the weaker side to win.
Judaism generally sees ethics as a device by which the strong constrain themselves; “Who is powerful? The one who conquers his evil inclination.” I think there is room for a Jewish argument that imposes ethical responsibility for consequences beyond the immediate military horizon.
- b) To what extent should one object to particular weapons because they provide the potential and temptation to abuse, even if they have highly legitimate uses?
- a. For example: Drone warfare has enabled the United States and Israel to carry out preemptive attacks outside their borders against persons allegedly threatening their security, at very low risk to their own personnel. The Obama administration has used them to kill an American citizen abroad who recruited suicide bombers, even though that citizen had not engaged in violence himself and had never been tried by a US court. It is likely that, were drones unavailable, a simple cost-benefit analysis would have prevented many of those attacks. If one objects to that particular use of drones, one might nonetheless conclude that no leader could responsibly adopt a more risky and costly modality if drones were available, and therefore conclude that banning drones – making them legally unavailable – is the only way to prevent them from being used for such purposes.

Rabbinic law is largely composed of *seyagim*, legal “fences” erected to prevent individuals or communities from setting foot on slippery slopes. So a strong Jewish argument can be made for proactively regulating weapons to prevent potential abuses.

- c) Over the past fifty years, the concept of “declaring war” has generally declined, but this decline has been particularly marked in the US, for political reasons. Since the US Constitution reserves to Congress the right to declare war, the weakening of that concept has led to an increase in executive authority, such that executives can fight decade-long police actions without a declaration (the attempt of the War Powers Act to restrain the executive legislatively is beyond our discussion here). Drones offer the capacity to accomplish military objectives without committing troops to foreign soil, and therefore likely without need for explicit Congressional approval. If one opposes this trend, drones are bad.

However - there is little or no direct Jewish precedent for the idea that the status of war is created verbally, by the declaration of one or more sides, rather than simply by circumstances – is there or is there not an ongoing violent conflict between significant political entities? Nor is there extensive Jewish discussion of whether it is best to distinguish sharply between war and peace, or rather to see them as on a continuum of (non)violence. It therefore seems to me that from a Jewish perspective this is a purely political question.

To sum up – I see no Jewish reason to object intrinsically to warfare by remotely piloted vehicle.

However, I see reasonable arguments for believing that the availability of drones makes certain forms of problematic policy choices more likely, and that in the absence of proactive regulation, drone warfare will have more pernicious consequences as the technology becomes more widely available. I don’t think there are useful ways to Jewishly discuss the likelihood of those consequences, but it seems to me that Judaism can contribute to the conversation by insisting that the conversation include longterm and indirect as well as short term and direct consequences.

MAY SERMONS DISCUSS POLITICS? (from Jewish Values Online)

Question: Is it appropriate for a rabbi (as a religious leader) to discuss partisan political issues either from the bimah or as part of a kiddush program in shul (synagogue) on Shabbat?

Answer: Torah should matter in the concrete, daily lives of Jews, and therefore Torah must speak to political issues. Budgeting priorities, health care access and quality, legitimate grounds and tactics of war – these are precisely the types of issues that Judaism in particular cares deeply and has much to say about.

This remains true even when these issues become the subjects of partisan debate. If a Torah scholar sees Democratic policy on late-term abortion as facilitating murder, or Republican healthcare policies as depriving people of their basic human dignity, how can s/he not say so?

The claim that Judaism requires one to vote a particular way is always oversimplified. It is usually wiser to discuss and weight the values involved and let listeners reach their own conclusions. But the job of a religious leader is to set priorities in complex circumstances.

Voting involves a judgment of consequences, not just of intent, and rabbis often have no particular qualifications to judge consequences. But neither do politicians! We should train religious leaders to be expert in these areas, as much as or more than we train them to be expert at dealing with the emotional consequences of personal decisions. (Of course, rabbis, like everyone else, should avoid speaking out of ignorance, or lecturing the more informed.)

The Jewish religious community generally aggregates along ritual rather than ethical/political lines, and therefore it is practically necessary for rabbis to get along with members of both parties. Rabbis who talk primarily about politics, and in partisan fashion, will reasonably be suspected of imposing their ideologies on Torah rather than deriving them from Torah.

This does not mean that ritual is more important, or naturally a more appropriate topic for rabbis, than politics. Decisions to aggregate along ritual rather than theological grounds, or on ritual rather than Zionist grounds, do not require us to consider *nusach hatefillah* more important than the national existence of the Jewish people, or precise kashrut standards more important than precise standards of monotheism – they simply reflect practical judgments as to the best way of advancing our collective interests.

Bottom line: Rabbis cannot, and congregants should not, see political issues as offlimits. Rabbis are wise to make such pronouncements sparingly, and with humility – they should make clear that even their wisest, most Torah-grounded judgments do not exclusively or unquestionably represent G-d's true will. But they are entitled, and sometimes obligated, to vigorously seek to persuade their congregants to act in accordance with their best judgment as to G-d's true will, even when His will does not command a political consensus.

ZABLA, or: WHY RABBINIC COURTS ARE OFTEN INEFFECTIVE

A common scenario in the Orthodox community is for one party in a financial dispute to suggest bringing the issue to beit din – this is a prima facie halakhic obligation when the alternative is a nonJewish court system. The second party agrees in principle, but rejects the specific beit din suggested by the first party, and instead insists on "ZABLA". This is an acronym for זה בורר לו אחד, a process in which each litigant chooses one judge and the two judges then select the third member of the panel.

What should the first party then do? Here is Rabbi Yosef Gavriel Bechhofer's [advice after experience](#):

The potential for distortion and miscarriage of justice in these settings is so great, that it would seem to me less of an issur to go to "Ercha'os" [nonJewish courts] than to participate in such travesties.

Rabbi Bechhofer's words resonate with what I have been told consistently by my teachers in yeshiva and serious talmidei chalkhamim in both the Modern Orthodox and charedi worlds, and simply what I pick up in casual conversation with many orthodox laypeople – that ZABLA is simply a recipe for corruption and injustice.

I have proposed that plaintiff in beit din should be given a "heter arkaot" (permission to sue in civil court) whenever the defendant demands an unregulated ZABLA

- a) No Beit Din nowadays, at least in America, has the jurisdiction to restrict ZABLA, and
- b) So long as the plaintiff agrees to ZABLA, he has not rejected Jewish legal processes, and therefore no Beit Din can give the plaintiff permission to sue in secular court.

In practice these arguments would mean that defendants win by default, and the Beit Din is helpless to do anything other than suggest that defendants accept a deeply problematic and perhaps corrupt arbitration panel.

The question of Beit Din's authority to restrict ZABLA coercively can be framed – somewhat too shallowly – as a question of whether there is a "beit din kavua" nowadays. Igrot Mosheh 2:3 seems to set a very high bar – being the exclusive local beit din and formal appointment by the local community or local rabbinate. He specifically says that New York therefore has no such beit din. By contrast, Shevet Halevi 8:302, 8:303, and 9:285 has a very low bar, perhaps simply being representative of the local community. It is likely not coincidence that Shevet HaLevi often expresses his deep unhappiness with the corruption that occurs in ZABLA situations, and the prohibition of participating in a ZABLA unless one is *certain* the other judges have integrity. Igrot Mosheh does not address that issue, and I wonder how he ruled in practice in such circumstances.

In practice, however, beit din has only social pressure to work with, so even a popular misperception of Rav Mosheh's position would be sufficient to prevent them from imposing limitations on ZABLA.

However, beit din can release the plaintiff to sue in secular court, and defendants may have an interest in preventing that. So the presenting issue is not whether beit din can limit the ZABLA, but whether it can release the plaintiff if the defendant refuses to accept a limited ZABLA.

Here Netivot seems to say that willingness to go to any Jewish court is sufficient to enable a defendant to be considered “obedient to the law”. He concludes therefore that “he is not judged under the rule of *alim*²²”. Our question is whether a defendant’s willingness to go to any Jewish court is also sufficient to prevent the plaintiff’s court from issuing a *heter arkaot*, and if it does, whether under these circumstances willingness to go to Zabla, allowing no other conditions, is also sufficient to prevent the issuance of a *heter arkaot*.

One relevant piece of evidence is the location of Netivot’s comment. He does not insert it the first time the word אַלם is mentioned, which is in the Mechaber to ב סעיף, or in the רמ"א to ב סעיף, which mentions ציית דינא, but rather in the ד סעיף to הגה.

Now ב סעיף is a general discussion of when one can go to court, whereas ד סעיף is a specialized discussion of when a Jew can sell a Jewish debt to a nonJew even though that will result in the Jew paying the nonJew more than he would have owed the Jew.

So the ב סעיף of דין אַלם relates to an ordinary ערכאות, whereas the ד סעיף of דין אַלם relates only to a case in which the defendant will owe more in ערכאות than he would have in בית דין. Netivot’s silence in ב סעיף suggests to me that his standard of ציית דינא would be different there – he would allow the דין אַלם there even if the defendant agreed to go to a lesser Jewish court. But we must examine his sources to see if this is correct.

When we finish retracing the game of telephone, I suggest that Tosafot originally discussed only the question of how to reconcile the existence of compulsory jurisdiction with the existence of ZABLA. Their solution is that compulsory jurisdiction exists only when the defendant offers an illegitimate alternative; **they do not address the question of when ZABLA is and is not a legitimate alternative, or how it might be bounded.**

This became related to the question of whether one could sue in secular court *when a contract gave you more rights under secular law than Jewish law* – you can do so only when the other party is in contempt, *so long as you have a viable and legitimate Jewish alternative*. Otherwise, one can sue only in Jewish court – although one does have the right to impose the court of correct jurisdiction on the defendant.

²² We can define *alim* as “someone on whom the beit din cannot in practice enforce judgment, even though under Halakhah they should be able to

In other words, if ZABLA seems inappropriate, it can be prevented, but one cannot punish the defendant financially for insisting on it.

This ruling was then misunderstood as a statement about whether one could allow suit in non-Jewish court *even when the only Jewish alternative would be ineffective*. Actually, it is the right and obligation of a beit din chosen by the plaintiff to release him to sue in non-Jewish court whenever the available Jewish options do not promise justice.

For the same reason, Jewish courts may and should release plaintiffs whenever they have signed a secularly binding agreement accepting the beit din as arbitrator and the defendant refuses to, even if the defendant promises to spend as much time as desired in beit din. The refusal to sign is compelling evidence that defendant intends to forum-shop, i.e to require the plaintiff to sue from scratch in non-Jewish court if beit din rules against the defendant.

Bottom line: I believe that a beit din has the right to release plaintiffs to sue in non-Jewish courts when the alternative is an unregulated ZABLA, and I believe that this is in full conformity with essentially all major halakhic precedents. Furthermore, it is likely prohibited for potential judges to participate in an unregulated ZABLA unless they are so well conversant with the beit din scene that they would be able to vouch for the integrity of their fellow judges, and for the same reason, I would suggest that it is against at least the spirit of Halakhah for a defendant to insist on an unregulated ZABLA. The exact nature of regulation is an important topic for discussion, ideally on a broad policy level but failing that in individual jurisdictions and perhaps even cases.

SBM 2013 SH'EILAH

On a trip to Israel, right after graduating Lotus University in 1984, Robin Smith met David Nunez, a Brazilian Jew. They bonded at once and were soon married by a Conservative rabbi, with a few male Orthodox friends in attendance.

As time passed, they grew more observant, and eventually joined a Conservative synagogue on Utopia Parkway in Queens, NY. They had a girl, Catherine, whom they sent to pluralistic Jewish schools.

David and Robin identify themselves unambiguously as Jews. Robin avoids talking about her parents, has no contact with any family member, and generally says that she had a difficult childhood.

More time passed, and they began moving in a generally Orthodox social orbit. They moved to Lomokome, New Jersey, and joined the Young Israel there. Catherine graduated college.

Catherine nags Robin once in a while about the absence of grandparents or cousins on her side. One day, Robin talks of her childhood for the first time. It seems that she realized from a very young age that she was different from her Catholic social circle – she couldn't stand even being in Church, and Hebrew writing was mystically attractive to her. Just after high school graduation she realized that she must be Jewish. She confronted her parents with that as a fact, and when they refused to admit either that she was adopted or that her mother had been born Jewish and converted, she stormed out and never looked back.

When she arrived at Lotus University in the fall, however, it took time for her to join the Jewish community and to identify as a Jew. She set foot in Chabad for the first time at her first Passover seder in her sophomore year, but by midjunior year she was a regular at Hillel meals. Some time that year, she says, learned from her father in a tearful phone call that her mother had in fact been born Jewish, in Russia, but it was too late to repair the relationship. Robin's parents are no longer alive.

Catherine becomes fascinated by her background. She submits her mtDNA to www.FamilyFoliageDNA.com, a site that allows you to be contacted by possible relatives who have also submitted their DNA. Several weeks later, Catherine is contacted by Leah Perlstein, who, the mtDNA test says, is certainly a direct maternal relative, according to the shared "regular" DNA likely a number of generations back.

Meanwhile, David is deeply worried – has he accidentally intermarried? Over Robin's objection, he makes an appointment with the local GPS Beit Din for a psak about his wife and children's Jewishness. She accompanies him to the appointment and responds to the beit din's questions, but she recognizes that she did poorly and completely failed to convince them that her story was plausible.

The Beit Din tells them that Robin must undergo giyyur, as there is no valid testimony that Robin's mother was Jewish and that they don't generally accept DNA evidence into Halakhah for any purposes other than direct identification of a body. Besides, they point out, a maternal ancestor of Leah's might have converted into Judaism while Robin descended from an unbroken Gentile maternal line. Most human beings are Gentiles, after all.

David's expectation when going to beit din was that at worst Robin would undergo rapid Orthodox giyyur. But she simply refuses. "My father told me that I was completely Jewish, and I believe him, and anyway I know my own soul – it's a yiddisher neshomoh". She notes that the beit din will likely not be willing to convert her in any case, as she adamantly refuses to cover her hair anywhere outside shul and will not give up her Shabbat ritual of squeezing herself fresh orange juice – she simply cannot see how it relates to threshing.

David and Robin approach you, the rabbi of their shul. They recognize that you will not be willing to overrule the beit din, and furthermore, that the beit din is making a reasonable decision based on the evidence available to it. However, they ask:

If Robin is certain, based on her appraisal of her presumptive father's character and her metaphysical self-perception, that she is actually Jewish, must she separate from David?

If David feels that the combination of DNA evidence and Robin's confidence convinces him that Robin is Jewish, must he separate from her?

Will the rabbi allow them to remain members of the shul now that they have disclosed their situation to him?

HALAKHAH AND SUBJECTIVELY COMPELLING JEWISH IDENTITY

The 2013 SBM Sheilah focused on a woman whose Jewishness comes into question as the result of a conversation with her daughter. It might reasonably be thought that if the mother cannot be declared Jewish, the same is automatically true of the daughter - but such is not the case. The source of this potential split is a fascinating discussion on Yevamot 46b-47a, which is based in large part on a word from this week's parashah.

דברים פרק כא:טו-יז

כי תהיין לאיש שתי נשים – האחת אהובה והאחת שנואה –
וילדו לו בנים - האהובה והשנואה
והיה הבן הבכור לשניאה:
והיה ביום הנחילו את בניו את אשר יהיה לו
לא יוכל לבכר את בן האהובה על פני בן השנואה הבכר:
כי את הבכר בן השנואה יכיר לתת לו פי שנים בכל אשר ימצא לו
כי הוא ראשית אנו
לו משפט הבכרה: ֹ

Devarim 21:15-17

If a man has two wives – one loved and one hated –
and they bear him children – the loved and the hated –
and the eldest son is the hated's
on the day that he bequeath to this sons that which will be his
he must not 'elderize' the son of the loved in the face of the son of the hated who is eldest.
Rather he must **recognize=יכיר** the eldest son of the hated so as to give him double in all that may be
found of his
because he is the first of his strength
his is the status of the eldest.

A beraita understands "recognition" as a public act – "he must make others recognize him" (יכירנו)
(לאחרים), which is reasonable when one considers that this recognition takes practical effect after the
father's death.

Rabbi Yehudah derives from this understanding that the father has general legal credibility about his
children's status; for example, a kohen father is believed when he says that his sons are not valid
kohanim because of their mother.

How does he derive this? Most commentators explain that the father's power to declare one child
"eldest" carries with it the implication that an older child is not actually his son, and therefore is actually

a *mamzer*. If the father can declare his son a *mamzer*, then a fortiori he can declare his son an invalid kohen.

Note:

The Sages disagree with Rabbi Yehudah and say “he is not believed”. It is not clear how far the disagreement extends. Here are three possibilities:

- a) They reject any notion that the verse confers any power on the father. Rabbi Yehudah thought that the existence of a prohibition against a specific “elderization” implied that the father otherwise was believed when he “elderized” a son. The Sages, however, think that the prohibition is simply intended to keep the father from trying.
- b) They agree that the verse gives the father the general power to ‘elderize’, or at least to be believed when he declares someone to be his eldest son, but reject the notion that this power carries any implications for any other status. For example, recognizing A as the eldest son of X does not require recognizing B as a *mamzer* even if B was born before A to a mother who had been married to X for the year prior to his birth.
- c) They agree that the verse gives the father the practical capacity to declare his son a *mamzer*, but only as a consequence of declaring an ‘eldest’; they reject extending this power to direct declaration of other statuses.

The Talmud suggests that this statement of Rabbi Yehudah contradicts his own practical ruling brought in a different beraita:

ושפטתם צדק בין איש ובין אחיו ובין גרו –

מכאן א”ר יהודה:

גר שנתגייר בב”ד - הרי זה גר, בינו לבין עצמו - אינו גר.

מעשה באחד שבא לפני רבי יהודה,

ואמר לו:

נתגיירתי ביני לבין עצמי.

א”ל רבי יהודה:

יש לך עדים?

אמר ליה: לאו.

יש לך בנים?

א”ל:

הן.

א”ל: נאמן אתה לפסול את עצמך, ואי אתה נאמן לפסול את בניך.

“You must judge justly between each man, his brother, and his convert” (Devarim 1:16) –

Based on this, Rabbi Yehudah said:

A convert who converted in beit din - his conversion is valid; if he converted within himself – he is not a valid convert.

A case: Someone came before Rabbi Yehudah,
and said to him:

“I converted within myself”.

Rabbi Yehudah said to him:

“Do you have witnesses?”

He said: “No.”

“Do you have children?”

“Yes”.

He said to him:

“You are believed to disqualify yourself, but you are not believed to disqualify your children.”

If Rabbi Yehudah gives fathers *carte blanche* credibility with regard to statuses, why would the father in this case not be believed to declare his son not Jewish?

Rav Nachman bar Yitzchak and Ravina offer different resolutions.

Rav Nachman bar Yitzchak explains that in this case the father is testifying that he is not Jewish, and the Torah only grants credibility regarding children’s statuses to Jewish fathers.

Ravina explains that Rav Yehuda’s grant of power does not extend to cases in which the son’s disqualification would also apply to already-born grandchildren.

The Talmud, as understood by Rashi, concludes that while Ravina is correct that the power of *yakir* even according to Rabbi Yehuda does not apply when it would disqualify extant grandchildren, the law follows Rav Nachman bar Yitzchak’s explanation of our case (which works according to both Rabbi Yehuda and the Sages), so that the father is not believed to declare his son not Jewish even if there are no extant grandchildren.

Now explanations grounded in *yakir* apply only to fathers, but Rav Nachman bar Yitzchak’s explanation should apply equally to fathers and mothers. Therefore, in the SBM *sh’eilah*, if Robin (the mother) is disqualified *on the basis of her own testimony*, and Catherine (the daughter) would be considered Jewish *if we disregard her mother’s testimony*, we may well be able to treat Catherine as Jewish even if we treat her mother as not Jewish.

How can this result be intellectually respectable? For now, I will set out two basic options:

- 1) We actually believe that both parent and child are Jewish, but the parent is obligated to accept the stringencies generated by his/her own statements as if they were true
- 2) Halakhah follows its own procedures and epistemology, and to accept something as legal truth does not require accepting it as factual truth.

Each of these options is worthy of extensive nuanced development, which I hope will come in subsequent installments.

So we have concluded that Catherine can be treated as Jewish even if Robin cannot be, *so long as Catherine would be considered Jewish if we disregard Robin’s story*. That makes sense in theory, but in

practice, what evidence could Catherine have for her Jewishness other than being Robin's daughter? This of course raises the question of how one establishes one's Jewishness, and whether and under what circumstances there is a presumption of Jewishness. This discussion as well relates to a dispute between Rabbi Yehudah and his colleagues, as well a number of fascinating Talmudic narratives.

On Yevamot 46b-47a the following fascinating but enigmatic *beraita* appears:

מי שבא ואמר גר אני, יכול נקבלנו?
 ת"ל: אתך -
 במוחזק לך.
 בא ועדיו עמו, מנין?
 ת"ל: וכי יגור אתך גר בארצכם.
 אין לי אלא בארץ, בח"ל מנין?
 תלמוד לומר. אתך -
 בכל מקום שאתך;
 אם כן, מה ת"ל בארץ?
 בארץ - צריך להביא ראיה, בח"ל - אין צריך להביא ראיה,
 דברי ר' יהודה;
 וחכמים אומרים:
 בין בארץ בין בחוצה לארץ - צריך להביא ראיה.

1. One who comes and says "I am a *ger*=convert" – one might have thought we accept him-
2. so Scripture teaches: "with you" –
3. only if you already presume him to be.
4. If he comes with his witnesses, from where do we know?
5. Scripture teaches "If there should *gar* with you a *ger* . . .".
6. ". . . in your land" –
7. So far I only know in the land – from where do I know (that this is also true) in the diaspora?
8. Scripture teaches "with you" –
9. wherever he is with you.
10. If so, why does Scripture teach us by saying "in (the) [your] land"?
11. In the land – he must bring evidence; in the Diaspora – he need not bring evidence,
12. according to Rabbi Yehudah.
13. But the Sages say:
14. Whether in the land or in the diaspora – he must bring evidence.

We can ask many basic questions about this *beraita*, such as:

What is the definition, or: what are the boundaries, if any, of the "acceptance" referred to in line 1?

Is the presumption in line 3 of born Jewishness or rather of conversion?

Why do we need a Torah text to teach me that witnesses are believed?

How does ““If there should *gar* with you a *ger* . . . “ teach that one believes a claim of conversion supported by witnesses?

What is the basis of the dispute between Rabbi Yehudah and the Sages?

These questions are asked by the Talmud and Rashi, and we may return to them in future weeks. The question that matters to us this week, however, is this:

The first line, at least in the opinion of the Sages, asserts that a claim to be a convert rather than a Gentile is believed only if there is a prior presumption supporting the claim. Is this also true of a claim to be a born Jew?

Rabbeinu Tam, as cited in the Tosafot to Yebamot 46b, asserts that the claim to be a born Jew is accepted as is. He in essence reverses the beraita by arguing that the prior presumption of conversion is necessary only when there is evidence of prior Gentileness; a person with no known background would be believed if they claimed to be Jewish. Rabbeinu Tam asserts this on the basis of the following *beraita* from Pesachim 3b.

ההוא ארמאה דהוה סליק ואכיל פסחים בירושלים.

אמר: “כתיב (שמות יב) 'כל בן נכר לא יאכל בו', 'כל ערל לא יאכל בו', ואנא הא קאכילנא משופרי שופרי!”

אמר ליה רבי יהודה בן בתירא: "מי קא ספו לך מאליה?"

אמר ליה: "לא."

"כי סלקת להתם, אימא להו: 'ספו לי מאליה.'"

כי סליק, אמר להו: "מאליה ספו לי."

אמרו ליה: "אליה לגבוה סלקא!"

אמרו ליה: "מאן אמר לך הכי?"

אמר להו: "רבי יהודה בן בתירא."

אמרו: מאי האי דקמן? בדקו בתריה ואשכחוהו דארמאה הוא, וקטלוהו.

שלחו ליה לרבי יהודה בן בתירא: "שלם לך רבי יהודה בן בתירא! דאת בנציבין ומצודתך פרוסה בירושלים."

A Gentile would go up and eat from Paschal sacrifices in Jerusalem.

He said: "Scripture writes 'No gentile may eat it', 'No uncircumcised my eat it', and yet I eat from the best of the best!"

Rabbi Yehudah ben Beteira said to him: "Did they feed you from the tail?"

He replied: "No".

"When you go up there, say to them: 'Feed me from the tail.'"

When he went up, he said to them: "Feed me from the tail."

They said to him: "The tail goes to the Most High!"

They said to him: "Who said this to you?"

He replied: "Rabbi Yehudah ben Beteira."

They said: What is this before us? They investigated his background and discovered that he was a Gentile, and executed him²³.

They sent to Rabbi Yehudah ben Beteira: "Peace unto you, Rabbi Yehudah ben Beteira! For you are in Nezivin but your net is spread in Jerusalem."

Here is Rabbeinu Tam's argument as presented by Tosafot:

תוספות מסכת יבמות דף מז עמוד א

במוחזק לך –

1. אומר רבינו תם:
2. דדוקא בדידיעין דהוה עובד כוכבים מעיקרא,
3. דאי לא הוה ידעין, מהימן, מגו דאי בעי אמר 'ישראל אני', דמהימן,
 - a. כדמשמע בריש מסכת פסחים (דף ג: ושם)
 - b. גבי ההוא עובד כוכבים דהוה סליק ואכיל פסחים בירושלים.
 - c. ואין לומר
 - d. שאני התם דהוה סמכי ארובא דהוה ישראל,
 - e. דהא בכל מקום נמי איכא רובא, דרוב הבאין לפנינו בתורת יהדות ישראל הם!?
4. ועוד ראייה משמעתין,
5. דאמר ליה ר"י אי אתה נאמן לפסול את בניך,
6. ואיהו גופיה כשר, אלא דשוי נפשיה חתיכה דאיסורא, אבל אם בא על בת כהן - לא פסלה, כדפי' לעיל.
7. ומההיא דלעיל (דף מה.) דא"ל זיל גלי אין ראייה,
8. דשמא לא היו בודקים אלא אם הוא ישראל אם לאו, אבל במשפחתו לא היו בודקין.

"Only if you already presume him to be" -

1. Says Rabbeinu Tam:
2. (The requirement that a convert have a prior presumption applies) specifically when we knew that he was originally a Gentile,
3. because if we had not known, he would be believed (when he claimed to be a genuine convert), since he has a *migo*²⁴ that he could have said 'I am a Jew', as someone who makes such a claim is believed,
 - a. as is implied at the beginning of Pesachim
 - b. regarding the Gentile who came and ate the Pesach in Jerusalem (that he was initially able to do so suggests that anyone claiming to be Jewish was accepted until counterevidence emerged).
 - c. and it would be incorrect to (reject Rabbeinu Tam) and say

²³ It is not a capital crime for a Gentile to eat the Passover, so presumably there is a backstory about the particular gentile – perhaps he was a spy?

²⁴ An argument of the form: If I were lying, I would have made a stronger claim than this, and you would have believed me – so believe me when I make this weaker claim.

d. that because they relied on the majority (of those who presented themselves to eat the Pesach) being Jewish, (whereas our *beraita* discusses a non-Passover case in which no such majority exists),

e. because everywhere else there is also a majority, (namely) that most of those who come before us בתורת יהדות=presenting themselves as Jews are Jews!?

Rabbeinu Tam argues, as best I can tell, that it is obvious from the story that in previous years no one had investigated whether the Gentile was Jewish before feeding him from the Passover sacrifice, and this indicates that generally a claim to be Jewish was presumed true.

Tosafot then raise a possible objection to the generalization: Perhaps it is not that the claim to be Jewish is believed, but rather that the claim to be eligible to eat the Passover is believed, on the ground that most people making such a claim are telling the truth? In other words, perhaps there is no general presumption of Jewishness, just a situational probability analysis.

Tosafot's response is that most people claiming to be Jewish are Jewish, so one does not need the presumption ever.

Here we need to clarify the difference between presumption (חזקה) and probability (רוב).

A presumption can exist without a ground – it can simply be a default setting. For example, Jews are presumed to be telling the truth when they act as formal witnesses in *beit din* – they have a *chezkat kashrut* – simply by being born, even if they are born into a culture that has made lying into a fine art.

A probability, by contrast requires a ground – we need to understand what we are claiming, why we think it is likely true. Determining the context of the odds is vital. For example – suppose most of the people in the world are not Jewish, but most of the people claiming to be Jewish are – does the majority support someone's claim to be Jewish, or oppose it? Should we seek more precise sociological data – for example, see whether either majority is affected by skin color, age, or level of education?

Note also that handling conflicts between presumption and probability is a massive topic.

Note also that halakhah likely often requires one to investigate ordinary probabilities to see if one can determine the status of a particular case, and allows one to presume that an individual case came from the majority only if either further investigation is impractical, or else if there is a superprobability (likely somewhere between 85 and 95 percent.)

Some practical questions for us then are

- 1) If we accept as normative the position of Rabbeinu Tam as recorded by Tosafot – what is the probability *today* that those who claim to be Jewish actually are Jewish? Do the percentages vary geographically, eg among Israel, Russia, and the US, in ways that we must account for halakhically?
- 2) Does Rabbeinu Tam's *migo* argument apply for someone who claims to be a convert and was not previously known to be Gentile, but whose previous Gentileness could be discovered easily, eg. via a Google search?
- 3) Does Rabbeinu Tam's claim that a claim to be Jewish is accepted presumptively apply even if the person making the claim has not previously identified as Jewish, or had previously identified as not Jewish, and so had, before making the claim, been assumed to be not Jewish?

Tosafot Yebamot 47a's presentation of Rabbeinu Tam's apparent position that many people are presumptively Jewish, meaning that if they claim to be **Jewish**, halakhic authorities will believe them without requiring corroborating evidence. According to a *beraita* on Yebamot 47a, the claim to be a **convert** is believed only with corroboration or **if** there is a prior presumption. Rabbeinu Tam commented that this is true only if there is prior knowledge of Gentileness; someone coming literally out of nowhere and claiming to be a convert would be believed.

Rabbeinu Tam (or perhaps Tosafot on his behalf) cited as proof a story from Pesachim 3b, in which a Gentile was given a portion of a Passover sacrifice simply by showing up. He addressed an implicit challenge to his proof: what if that story was not based on **presumption**, but rather on the **probability** that most people presenting themselves to eat the sacrifice are Jewish? He responded that most people presenting themselves as Jewish are also Jewish, so Pesachim and Yebamot remain parallel.

However, this response muddies the waters – do we believe the claim to be Jewish because of a presumption, or rather on the basis of probability? We explained last week that presumptions (*chazakah*), unlike probability claims (*rov*), can exist even without an evidentiary basis.

Tosafot cite the beraita on Yebamot 47b we looked at two weeks ago as a second proof for Rabbeinu Tam.

מעשה באחד שבא לפני רבי יהודה,

ואמר לו:

נתגיירתי ביני לבין עצמי.

א"ל רבי יהודה:

יש לך עדים?

אמר ליה: לאו.

יש לך בנים?

א"ל:

הן.

א"ל: נאמן אתה לפסול את עצמך, ואי אתה נאמן לפסול את בניך.

A case: Someone came before Rabbi Yehudah,

and said to him:

"I converted when I was alone".

Rabbi Yehudah said to him:

"Do you have witnesses?"

He said: "No."

"Do you have children?"

"Yes".

He said to him:

"You are believed to disqualify yourself, but you are not believed to disqualify your children."

At first glance this text seems to contradict rather than support Rabbeinu Tam: why don't we presume the convert to be Jewish? Tosafot, however, start the other way around: why do we presume the children to be Jewish, so that eliminating the father's testimony leaves their identity legally solid?²⁵

ועוד ראיה משמעתיין,

דאמר ליה ר"י אי אתה נאמן לפסול את בניך,

There is another proof (for Rabbeinu Tam's position) from our own sugya,

where R. Yehudah says to him "You are not believed to disqualify your children",

Why isn't the father presumed Jewish? Tosafot answer that in fact he is, but a technical mechanism nonetheless prevents him from enjoying all the *privileges* of Jewish status.

ואיהו גופיה כשר, אלא דשוי נפשיה חתיכה דאיסורא,

אבל אם בא על בת כהן - לא פסלה,

כדפי' לעיל.

And he himself is also valid, just that 'he has made himself a slice of prohibition', but if he were to have relations with a daughter of a kohen²⁶, he does not disqualify her, as I explained earlier.

The simplest explanation of this mechanism is that it functions in the same manner as an oath.

²⁵ The text does not actually say that the children are considered Jewish, only that their father's testimony does not determine their status, but Tosafot presumes that they are considered Jewish.

²⁶ I would emend based on parallels to "a woman whose halakhic status would change as the result of having sex with a Gentile"

The upshot of Tosafot is that we presume the father to be Jewish *even though he has told us that he is not* by claiming to have been invalidly converted. Here the basis for treating the father as Jewish cannot be probability – no one thinks that most people claiming not to be Jewish are actually Jewish. Rather, the basis must be presumption.

The last section of Tosafot notes that a story on Yebamot 45a should not be seen as evidence for Rabbeinu Tam. As background for this story, you need to know that the Talmud records three positions as to the status of matrilineals:

- a) that they are *mamzerim*
- b) that they are invalid to marry *kohanim*
- c) that they are no different than Jews with two Jewish parents.

תלמוד בבלי מסכת יבמות דף מה עמוד א

ואף רב יהודה מורה בה להיתירא,
דכי אתא לקמיה דרב יהודה, א"ל: זיל איטמר, או נסיב בת מינך.
וכי אתא לקמיה דרבא, א"ל: או גלי, או נסיב בת מינך.

Rav Yehudah also ruled to permit (a matrilineal Jew to marry a Jew with two Jewish parents), as when (a matrilineal Jew) came before Rav Yehudah, Rav Yehudah said to him: “Go hide, or else marry a woman like yourself (i.e. matrilineal)”, and when he came before Rava, Rava said to him: “Either go into exile, or else marry a woman like yourself (i.e. matrilineal)”.

Prima facie, Rav Yehudah and Rava suggest that the matrilineal simply show up in a Jewish community elsewhere, where he will be presumed (in their opinion, correctly) to be a **halakhically** valid marriage partner for Jews born from two Jewish parents, even where he would be **socially** ineligible would his heritage be known²⁷. This suggests that the new community will not investigate their claim to be Jewish.

Tosafot argue, however, that the new community might have investigated whether he was Jewish, but not have researched his family. Once again, we are left to wonder how he could prove his Jewishness without revealing his parentage. Bottom line, though, this explanation is offered only to reject using the *beraita* as a proof for Rabbeinu Tam; once Rabbeinu Tam has triumphed anyway, there is no reason to assume the new community checked at all whether he was Jewish.

ומההיא דלעיל (דף מה.) דא"ל זיל גלי אין ראייה,
דשמא לא היו בודקים אלא אם הוא ישראל אם לאו, אבל במשפחתו לא היו בודקין.

²⁷ This is not the right place to discuss the ethics of hiding one's background from potential spouses, the current social status of matrilineals in the Jewish community, or the relationship of this passage to the issue of *mekach taut* as a method of freeing agunot.

From that earlier (narrative" in which he says to him "Go into exile" there is no proof (for Rabbeinu Tam),
as perhaps they would only investigate whether he was Jewish, but they would not investigate his family.

SBM 2013 TESHUVAH

Dear Robin and David,

There can be few things more painful psychologically than having one's core identity questioned, or worse yet, stripped away by force. Such a process inevitably feels like a violation of the self and a removal of the dignity inherent in one's status as a *tzelem Elokim*. I cannot properly begin the halakhic analysis of your questions without acknowledging that all this has happened to you - to Robin as an individual, to Robin and David as a couple, and to Robin, David and Catherine as a family. It is a credit to you and a testament to your Jewish and halakhic faith and commitments that you are still willing to ask these hard questions to me, and I pray that at the end of this letter you will feel that your commitments have been honored and your faith justified.

As you correctly note, it would not be practical or proper for me to overrule the beit din, and I appreciate your acknowledgement that the beit din did not decide unreasonably. Furthermore, as longstanding members of the Orthodox community, you recognize that law by its nature requires figures of authority to interpret it, whose interpretations must generally bind their constituents even when those constituents would on their own interpret those laws differently. At the same time, you feel that justice has not been done in your case; that you have not been completely heard; and that the religion you love and are committed to has become a source of great pain.

My intention in this letter – more scholarly than my usual correspondence with congregants – is to give you a clear and comprehensive explanation of the relevant halakhot and principles that apply to your situation, as best I understand them. I want to make sure that you feel completely heard, and to empower you to make thoughtful and prudent decisions with complete spiritual integrity. Please tell me if anything is unclear, or raises further questions for you, and I will do my best to be present for you and walk this path together with you.

Section 1: To what extent are you bound by the beit din's decision?

The beit din has declared that Robin must undergo conversion. Does this mean there is nothing to be done for you? Not necessarily. A reasonable beit din will certainly listen to claims that it erred substantially and thereby caused harm, and reverse itself; an unreasonable beit din may thereby forfeit its standing sufficiently to make overruling it seem a matter of course. Furthermore, there are exceptional circumstances in which individuals can follow their own consciences against beit din, albeit at their own spiritual risk. But before we discuss those extreme cases, let us understand whether and why beit din has any authority over you at all, and whether I am erring even in discussing the matter with you in terms other than a simple acceptance of their ruling.

In the United States, no Beit Din has mandatory geographic halakhic jurisdiction over issues of conversion. This means both that batei din cannot coerce converts to come before them specifically, and that converts cannot force a particular beit din to hear their case. In practice, the GPS system tries to take advantage of the second clause to undo the first – converts need courts, and if every other beit din refuses to hear cases from a particular district, to all intents and purposes the remaining beit din has compulsory conversion jurisdiction in that district. For the Modern Orthodox community, the GPS system has certainly made strides in that direction, but has not yet achieved it.

This means that GPS courts, as a matter of law, have only the authority you grant them by agreeing to be judged by them. The first question is whether you can suspend or remove that authority retroactively as the consequence of a court decision you find problematic.

A beraita on Avodah Zarah 7a states:

הנשאל לחכם וטימא - לא ישאל לחכם ויטהר;
לחכם ואסר - לא ישאל לחכם ויתיר;

One who asked of a sage, who declared it impure- must not ask of a sage and have it declared impure;
To a sage, and he declared it forbidden – must not ask of a sage and have him permit it.

Prima facie, this means that you have acted incorrectly even by asking me your question. However, Tosafot right there states that the only prohibition is to ask the second sage *without telling that sage that you have asked the first sage*, and Tosafot Niddah 20b states that there is no prohibition at all against asking a second sage – on the contrary ,

השואל ישאל כל מה שירצה דמתוך כך ידקדקו בדבר ופעמים שהראשון טועה ויצא הדבר לאורה

The questioner asks all that he wishes, because as a result they will pay close attention to the matter, and sometimes the first sage erred and so the matter will emerge in its proper light.

So you have done nothing wrong by asking.

Both Tosafot emphasize that the second sage *is* prohibited to overturn the first's ruling, as per a beraita cited on Niddah 20b

חכם שטימא - אין חבירו רשאי לטהר, אסר - אין חבירו רשאי להתיר

If a sage declared something impure – his colleague is not authorized to declare it pure;

If he prohibited – his colleague is not authorized to declare it pure.

However, as Rav Uzziel notes in his defense of halakhic appellate courts (insert source), rabbinic courts nonetheless regularly overrule each other. Ramban Chullin 44b initially claims that the prohibition applies only when the questioner does not provide the rationale for the original psak. He concludes that courts can overturn a *משנה בדבר טעות*, but not a *הדעת בשקול הדעת*. RAN disagrees with even this limitation in principle, although he is unwilling to overturn Ramban's contrary ruling. Rosh and Raavad disagree about the rationale for this prohibition. Raavad says that the issue is the honor of the first

sage, whereas Rosh seems to believe that the first sage's prohibition is a performative utterance. Rosh's understanding can itself be understood in two ways. His language seems to suggest that the first sage's statement directly creates a prohibition even if erroneous, but this is very difficult to explain. The alternative is that the questioner, by asking the question, commits him or herself in some binding, neder-like fashion to abide by the answer.

It seems to me that the framing of your question successfully solves the problem raised by Raavad, by explicitly accepting the GPS beit din's decision and asking only about its limits. Furthermore, it seems clear that Robin was in that beit din unwillingly, and that David asked the question while unaware of Robin's issues with conversion, each of which might well be grounds for invalidating or undoing any neder here, thus solving the problem according to one understanding of Rosh. But most importantly, it seems to me that a responsible beit din, such as the local GPS beit din, would not wish to impose a painful psak on people unless there were no way around it, and therefore intends its psak to be tentative and subject to review by anyone willing and able to do so.

Nonetheless, it seems clear to me that both courtesy and law would impel me to ask the beit din for a rehearing rather than overruling them, even should I disagree with them, and to avoid ruling against them unless I find their position indefensible, which you have conceded is unlikely. But you have acted properly in asking me to look at the case.

It must also be noted that Talmud Yebamot 88b apparently allows an individual to act in a manner other than what beit din would have prescribed, if the individual makes a claim of certainty. Such a claim cannot relate to law (it must be distinguished from "kim li k'hai"), but rather to fact. Furthermore, Yebamot 92a *requires* an individual to act against beit din when he or she is aware that beit din has made a factual error. Now "certainty" is a vague term; Yebamot 88b does not say that a contrary certainty would be a sufficient basis for action in the face of a formal decision by a beit din of proper jurisdiction; and Yebamot 92a gives unclear guidance as to the degree of confidence necessary to act on one's own perception of fact against beit din. Nonetheless, we must investigate fully whether these sources provide you with adequate grounds for continuing marital life with one another, in other words whether you can claim, and act on the basis of your claim, that the beit din made an error of fact. We will make that our first order of business, and then return to the question of whether in my judgment the beit din should revisit its judgments of fact and/or law.

What judgments of fact did beit din make? It failed to rule that you were Jewish. But is "Jewishness" a fact independent of the law, or is it rather a status that is consequent on a formal legal determination?

Robin, you state that you know via introspection that you have a Jewish soul. If the beit din's failure to rule that you were Jewish stemmed from a failure to recognize that Jewish soul, you have a claim that it made a factual error.

I myself incline to the apparent view of Rabbi Yaakov Kaminetzky that Jewish and Gentile souls are ontologically identical, and distinguished only by their obligations and resultant privileges. However, my experiences with sincere converts have taught me that this is by no means obvious, and certainly there is much support in the tradition for the existence of Jewish souls. So long as that position does not degenerate into a claim of ontological Jewish superiority and a concomitant failure to recognize the tzelem Elokim in every member of humanity, I am happy to take cognizance of it halakhically. Obviously, I cannot know whether introspection reliably yields correct identification of the soul's genotype, but for our purposes I will accept your certainty.

It seems clear to me, however, that law and ontology – put differently, halakhic Jewishness and Jewish souledness – are not always in one-to-one correspondence. A midrash I often share with conversion candidates teaches that G-d offered the Torah to other nations before giving it to us, and they turned it down – but they did not turn it down unanimously. Sincere converts, this midrash teaches, are the souls among the other nations who were outvoted. They may well be ontologically Jewish – more so than a possible ethnically Jewish minority who voted against accepting Torah – but they are not halakhically Jewish until they formally go through the conversion process.

A second indication that ontology and legal status can be separated is the case of minor converts. Such converts can choose to reject conversion at bar or bat mitzvah – but how can we give potentially Jewish souls the option of rejecting their conversions? Rather, even those with Jewish souls may be legally able to exempt themselves for all but the Seven Niachide Commandments.

If this is accepted, it follows that a beit din could accept your self-knowledge as absolutely reliable, and affirm that you ought to convert with all deliberate speed, and yet deny that you are currently Jewish. Your self-knowledge could not then serve as the basis for a claim that the beit din had made an error of fact, although it would serve as a strong argument for the beit din to expedite any conversion process.

At the hearing, you produced two pieces of evidence that spoke to the Jewishness of your body rather than of your soul. The first was your father's assertion to you that your mother was in fact a Russian-born Jew. The second was the mtDNA test showing a very high probability that you shared a maternal relative with a halakhically recognized Jew within the past several generations. The beit din offered two grounds for the insufficiency of the mtDNA evidence – that DNA evidence is generally not halakhically probative, and that sharing a direct but distant maternal relative with a Jew cannot

demonstrate the Jewishness of that relative - and presumably was simply not convinced either that your father told you the truth, or that he was adequately aware of the criteria for halakhic Jewishness. The question is whether, while conceding that the beit din decided reasonably, you can argue that you are nonetheless 'certain' of your biological Jewishness, and that you are halakhically entitled to act on the basis of that certainty.

The beit din, and for that matter I, never met your father, and we have no way of evaluating his credibility other than from your description. As I understand your story, he never lied about your Jewishness, but rather evaded your questions, and you tell me that in your experience he never told a direct lie, and for that matter that he was an academic expert on contemporary Jewish law. Rav Moshe Feinstein states in many teshuvot that intimate knowledge of someone's character can make their descriptive statements legally equivalent to your direct observation. Furthermore, the mtDNA test certainly supports the position that he was telling the truth.

At the same time, you had left your parents' house in anger over this issue, so that your father had a strong motive to lie if he saw doing so as the only way to regain a role in your life. Furthermore, you understand that the reliability of website DNA tests can reasonably be questioned, and that we have at present no information as to how far back Leah Perlstein's maternal line goes before it hits a conversion.

I urge you to be very cautious about making a claim of certainty on the basis of the currently available evidence. An easy certainty on the basis of inference and deduction is the province of fanatics, and very dangerous. Yigal Amir, for instance, was 'certain' that Yitzchak Rabin would implement policies that would lead to an enormous number of Jewish deaths, and accordingly killed Rabin as a "rodef", a deadly pursuer; but how could he be certain of something this-worldly that so many knowledgeable and intelligent people denied? Here, too – where you and beit din have access to fundamentally the same evidence - denying with certainty the admittedly painful possibility that they are correct would seem worrisome to me.

All this assumes that "certainty" is a standard roughly equivalent to "a subjective conviction of an overwhelming probability", perhaps so overwhelming that one would be entitled to disregard even life-threatening consequences of the minority. However, Rashi and Meiri to Ketubot 22b apparently allow this claim even on the basis of a claim such as "my husband would certainly have returned if he were alive", which Meiri describes as a "not terribly certain certainty" (ברי אינה כל כך בריאה). This lower standard, however it may be set, does not require the same fanatic mindset, and you can reasonably assert that your relationship with your father enables you to reasonably meet that standard even when beit din could not.

While some acharonim take Ketubot 22b as a paradigm, however, and believe that beit din can never impose its vision of facts on an individual who has better access to those facts and a contrary conviction, I prefer to read that sugya as exceptional, as a chiddush. It seems to me that even Rashi and Meiri might agree that our acceptance of a weak “bari li” in that case is just a reflection of our general willingness to lower standards of evidence to prevent agunahood. Furthermore, it may be that our general willingness to believe wives regarding husbands’ deaths is based on the tragic consequences that would follow from an error of hers being exposed, and the likelihood of any such error being exposed. These create a presumption that women have good grounds for believing their husband dead when they remarry, even if the grounds they articulate are objectively insufficient. Neither of these rationales apply to our case. Furthermore, Ketubot discusses a case in which the woman acts on her own claim of certainty *with the endorsement of the court*. It is possible that we require claims of certainty to be recognized by the court – the same court which does not share that certainty – before being implemented. Here too, perhaps your claim of certainty must be validated by the beit din before you can rely on it.

However, Zeiri on Yebamot 92a *requires* you to act on your own perception of the facts against a court’s direct ruling that Shabbat has ended, and without any court’s authorization. The standard there is “knowledge” rather than “certainty”; it is unclear whether this represents a rise or rather a decline.

Zeiri’s position seems to contradict the story of Rabban Gamliel and Rabbi Yehoshua, in which Rabbi Yehoshua eventually accepts Rabban Gamliel’s calendar in practice even while continuing to think it based on false witnesses. Chatam Sofer suggests in response to a different problem that Rabbi Yehoshua was unable to disagree with Rabban Gamliel because Rabban Gamliel’s exoteric reason was so absurd as to be equivalent to providing no reason at all, and one may not argue with a court unless it provides its reasoning. However, Zeiri’s beraita makes no mention of any reasons offered for beit din’s decision that the sun had set, and the okimta seems dochek.

Rabbi Uziel suggested that Rabban Gamliel’s case was unique because it involved the sanctification of the New Moon, which was a prerogative of the nasi. He suggests that this identifies it as a national matter on which no dissent or diversity could be brooked. Shabbat, by contrast, may from a halakhic standpoint be largely a private matter.

If we accept the public/private distinction, which side of the line would our case fall on? My instinct is that citizenship is a fundamentally national matter, even if it is devolved to many lower courts. Rabbi Dosa’s argument to Rabbi Yehoshua that one must accept the nasi’s calendar lest one question all past courts, applies even more so to citizenship – if one questions the Jewishness of someone a court

has adjudged Jewish, will we not end up questioning everyone's Jewishness? However – it seems to me necessary to admit that we have long since passed the time in which we had any option of accepting claims of Jewishness without investigation, at least for purposes of knowledge. Perhaps we can nonetheless define it as national and make it impervious to dissent for vestigial formal reasons, but that seems to me a weak reed to rely on.

Nonetheless, it seems highly implausible to me that Zeiri in fact holds that one may never defer to a beit din's fact-determination when one disagrees with it. Rather, I suggest that Zeiri actually advocates a bari-plus – one must have certain *and direct* knowledge, rather than certain but inferential knowledge. Note also that Zeiri, unlike Ketubot, does not require court authorization to act against their ruling. As a result, he does not offer you any protection against a beit din that chooses to enforce its ruling.

For all these reasons I believe that you are currently bound by the beit din's decision.

I notice that the beit din was careful not to discuss Catherine's status, and that you were careful not to ask about it as well. It seems to me likely that this was because Catherine is an adult and entitled to choose her own halakhic decisors and make independent decisions. I will accordingly not address Catherine's status directly unless she asks me herself.

2) Are there grounds for asking the beit din to reconsider?

I noted at the outset that "A reasonable beit din will certainly listen to claims that it erred substantially and thereby caused harm, and reverse itself; an unreasonable beit din may thereby forfeit its standing sufficiently to make overruling it seem a matter of course". The remaining question is whether you have, or can obtain, grounds for the beit din to rehear your case. I think the answer is yes, and once I have your consent and cooperation, I will prepare a version of this section of the teshuvah to the beit din.

a) You can research Leah Perlstein's family and see if you can find the place where your family trees meet.

b) You can find your mother's Russian birth certificate – perhaps it will even say "yevrai".

c) It seems possible that the beit din ruled as it did because it reasoned that your Catholic childhood could easily be discovered via the internet, and so your later integration into Jewish practice and community cannot create a presumption of Jewishness – the fact of your past Catholicism creates a presumption of Gentileness that antedates any presumption of Jewishness. However – this assumes that the presumption of Jewishness requires a claim that one was always Jewish. However, Meiri and

Rabbi Avraham min Hahar inter alia to Yebamot 47a each discuss the case of someone who was a presumptive convert, even though he had not produced any evidence of conversion. Perhaps that tells us that anyone who, after being known as a Gentile, engages in full Jewish observance for a long period of time, acquires a presumption of Jewishness-via-conversion. It is possible that the beit din had not considered this argument.

d) I have an additional argument based on Igrot Moshe 3:108 that I think would be more effective with the beit din if I made it without showing it to you.

3) What if the beit din maintains its position after properly considering our new arguments and, potentially, new evidence?

I want to emphasize again that by requiring conversion the beit din in no way contradicts your knowledge of your own soul; it simply says that the evidence regarding your body is not legally sufficient. Agreeing to convert likewise does not require you to believe that your father told an untruth or inaccuracy. I argued earlier that your own certainty should not be sufficient to exempt you from the beit din's requirement of conversion, but I do think it should be sufficient to exempt you from making any blessing during immersion. In this way the process can be compatible with both your conviction and your identity, as of course you would be immersing anyway for other halakhic purposes.

You have indicated a concern that the beit din would be unwilling to convert you owing to the haircovering and orange juice on Shabbat issues. Each of these are worth extensive conversations, which I would welcome. The key is to keep your eye on the prize, which is an integrated soul, body and identity.

David – I'm sure you understand far more deeply than I how deeply this process has wounded Robin. You have raised a joyously Jewish child together, and Hashem-willing will accomplish much more and experience more occasions of overwhelming joy. Make every effort to allow her to feel secure in your love as she courageously confronts new insecurity on such a fundamental issue, and I believe you will merit experiencing much more joy together.

I look forward to hearing from you.

With all best wishes and blessings,

Aryeh Klapper

TZNIUT – A RESPONSE TO RABBI KLAPPER’S ESSAY

by Miriam Gedwiser

It is by now a sad truism that the battle for the public sphere in Israel has a way of being waged over women's bodies. Equally predictable is the rush of Sensible People to rescue both their own credibility and that of the Torah by disclaiming the “extremists.” But I cannot help but wonder whether these problems are really “theirs” alone. Are the restrictions that I observe – on what I may wear, on where I may sit – different in kind, or just in degree, from the repression everyone seems to love to hate?

Several rabbis, including teachers and friends of mine, have thrown in their two cents about what tzniut “really” is and how the desire for invisible women shared by spitting zealots and their better-mannered sympathizers is not Torah-true. My teacher, Rabbi Aryeh Klapper, for example, attempts to show that tzniut is a “dynamic” value meant to limit unnecessary self-exposure and to preserve intimacy and the integrity of personal space, but is not to be used by one person to prevent another “from living a normal fulfilling human life.” I appreciate his and others' efforts, but have been uniformly left with the feeling that they are asking the wrong question (“why is spitting on girls not in comportment with true tznius?”), and thus arriving at an unsatisfying answer. In this response to Rabbi Klapper's essay, I hope to show how I think this conversation should be redirected.

* * *

As a teenager my typical shabbat morning involved davening at the hashkamah minyan and then learning in the beit midrash until the main minyan finished. I sat in the main section of the beit midrash, which was well-lit and full of books, rather than the women's annex, which was neither. One day a *kippah-srugah*-clad man approached me. He neither asked my name nor told me his, but he did tell me I should be behind the mechitzah. Did I not know that men were forbidden from praying before immodestly clad women? Taken aback, I retorted with a garbled version of a *teshuvah* I had recently learned that allowed a woman to pray with men without a *mechitzah* under certain circumstances. (See Igrot Moshe, Vol. 8, O.H. 5:12b.) I did not think to ask him what about my elbow-knee-and-neckline-covered self he found immodest. Eventually he took his complaint to our shul's rabbi, who rebuffed him, but it was months before I could sit down to learn without anxiety. That was the first time someone asking me to be invisible.

Unlike the zealots this fellow was civil and not terribly persistent. But his strict equation of noticeable female presence with immodesty, and his assumption that he should be able to tell a girl what to do, should sound familiar. And so rather than marshal sources showing the absurdity of spitting on little girls in the name of “modesty,” and rather than ask “what is tzniut, really?” I think we should begin by asking two descriptive questions: First, is there something about our tradition that leads men, even only a small subset of them, to equate the mere presence of females with immodest exposure? Second, is there something about our tradition that prompts men of no particular communal stature to tell women and girls where they can be?

I believe the answer to both questions is yes. Without entering the polemical battles of attempt to prove, through extensive citations, what "the Talmud" or "the Rabbis" thought about "women's issues," I offer some relevant examples from the learning I happened to be doing while the Beit-Shemesh media frenzy was going on.

The first text is from Yevamos 113a, which I ran across with my gemara chavrusa tangential to an unrelated sugya: Rav Malchiu allowed a deaf man, who was not biblically obligated to provide a ketubah, to write a valuable one nonetheless, presumably since otherwise his prospective wife would have been uninterested. "Raba remarked: Who is so wise as R. Malchiu who is indeed a great man (gavra rabbah). He held the view: Had he wished to have a maid to wait upon him, would we not have allowed one to be bought for him? How much more, [then, should his desire be fulfilled] here where there are two."²⁸ In this moment of little or no practical import, we just get a sense of how Rava - himself a "gavra rabbah" in countless talmudic discourses - thinks of a wife: as a maid with benefits.²⁹

Reading Rava's quip I felt like a seminary girl who had finally secured a coveted invitation to the sage's house, only for him to open with the joke that so amused my male classmates in middle school: "What do you do when the dishwasher breaks? Slap her!" Of course, most of the readers of this text are men, many of them boys learning and living in all-male environments. What do texts like this encourage such a boy, and later man, to think about what to expect from women and wives? Does it make him more or less likely to think of women as beings whose right to a "normal fulfilling life" provides serious counterbalance to his own material and sexual desires?

Or turn to the laws of Rosh Chodesh, which came up as I taught an introduction to halacha class on the basics of the Jewish calendar. First, one understanding of the specifically female exemption from work on Rosh Chodesh (OH 417) is not that women are prohibited from anything, but that they have a permissive "day off" on which their husbands may not compel them to do work. (See, e.g., Ba"ch *ad loc.*). The implication, of course, is that on other days husbands *may* compel their wives to do work. A problem arises, because Tosafot (Megillah 22b s.v. "ve-ein bahen bitul melakhah...") use the exemption of women from work on Rosh Chodesh to explain why the gemara (Megillah 22b) says an extra aliyah in Rosh-Chodesh torah reading will not cause "bitul melacha." Why, a contemporary maggid shiur at YU asks, should the exemption of women from work matter to what happens in shul? It's not like Rashi and Tosfos' wives were running Torah reading! The rabbi gave his own explanation, apparently unaware that Rashi and Tosfos' wives may very well have been attending shul regularly. (See, e.g., <http://jwa.org/encyclopedia/article/medieval-ashkenaz-1096-1348>.)

And then we get to Kiddush levanah. One explanation for the practice of women not to say the prayer, which we learn on Sanhedrin 42a is equivalent to greeting the *shechinah*, is that it would be un-tznius for women to congregate outside. (See Minchas Yitzchak 8:15) Does the near-universal agreement of

²⁸ Interestingly, this story may also be read as pushback against the prior Talmudic generalization that women want to marry more than men (and therefore the rabbis instituted a ketubah for a hearing man who marries a deaf woman, but not for a hearing woman who marries a deaf man).

²⁹ I am not taking issue with the idea that a wife performs domestic chores per se. The issue is rather with the equation of a spousal relationship with a hierarchical master-servant one.

contemporary orthodox women not to say Kiddush levanah mean that they have, then, rejected Rabbi Klapper's attempt at a balanced approach to tznius for a maximalist position that bars them from congregating in the street even to pray? Not necessarily. Perhaps today's women are instead following the Mishnah Berurah (OC 426:1) and others, who explain, following the Shela"h, that, although women perform many timebound mitzvot on a voluntary basis, they do not say kiddush levanah because "they caused the diminution of the moon."

Husbands compel wives. Women don't go to shul. Women should be perpetually embarrassed by Eve's primordial sin. I was not out to investigate gender in the Talmud when I ran across these statements. I was simply learning, and these are the sort of comments that every man who spends time learning runs across frequently, usually without giving them much thought. The question, therefore, is not (just) what we can do to make these texts less troubling. It is what these texts actually do to people who are not thinking about whether the texts are troubling.

Learning mishnah Niddah, for example, one might get the impression that the most interesting and important question regarding first intercourse with a prepubescent girl is its effect on her niddah status. M Niddah 10:10. (More graphically, the detailed discussion in the gemara on Niddah 64b regarding exactly how much such a girl would be bleeding to indicate that her "wound" had not healed and that therefore intercourse was still permitted!) One might "defend" the text itself by pointing out that this halachic question is a valid one, and is not to the exclusion of any questions about the case from other perspectives. But can we defend the system in which men are trained to think about the situation primarily or only in halachic terms, and to have no terms for thinking about the other consequences for such a (hypothetical) girl's own subjective "personal integrity"? And can we be surprised when the men who are trained this way prefer to see a nine-year-old girl with bare legs through the lens of "ervah" rather than through the lens of kindness or human dignity?

* * *

Rabbi Klapper does not engage with the problematic texts or the ways that they affect the men who learn them. Rather, he begins with what I take it he thinks is a more favorable text in the story of Abba Chilkiya, his wife, and a delegation of rabbis on Taanit 23b.

מאי טעמא כי מטא מר למתא נפקא דביתהו דמר כי מיקשטא? אמר להו: כדי שלא אתן עיני באשה אחרת.

[The rabbis asked] "Why, when Master arrived at the city, Master's wife came out adorned? He said to them, so that I not place my eyes on another woman."

Rabbi Klapper uses this story, along with a discussion of the principle of *lifnei iver*, to conclude that "Jewish law does not allow men to use erotic *lifnei iver* to prevent women from living normal fulfilling lives." But Abba Chilkiya's wife is not dressed to have a "normal fulfilling live" in a general sense. She is dressed to attract her husband, lest he "place his eyes on another." She is dressed, in other words, to respond to the male gaze. The "chiddush," if there is any, of the story, is that there are male gazes to which women may say "yes," even in public. What is missing from the story is any indication that a woman's dress might be driven by something other than the eroticized male gaze – that the quest for

"normal" nonsexual "fulfillment" might permissibly lead women to say neither "no" nor "yes" to their male onlookers, but rather to just get dressed.

Further, the story of Abba Chilkiya reflects exactly the male assumption of control over what women do in public that we see (albeit taken to further extremes) among today's zealots. Men in the story discuss and judge women's dress based solely on what that dress does to men themselves. Abba Chilkiya's response to "Why does she dress like that?" is not "Mind your own business."

I admit that Rabbi Klapper's view of tzniut as "preserv[ing] the integrity of personal space," a "dynamic" value that must be balanced with others, is appealing, and his reading of that view into the Mrs. Abba Chilkiyah story is at least plausible. But I must confess that after learning quite a bit of rabbinic material relating to women and marriage, I have never come to the independent conclusion that halakhah values "the integrity of [women's] personal space," – indeed, it often seems the contrary.³⁰ So it requires more than a merely plausible reading of a single text to convince me. In the absence of engagement with either the directly problematic texts or the overall attitude they foster, then, I believe Rabbi Klapper's apologetic comes off as too weak to do the difficult work of reclaiming tznius from the zealots.

³⁰ Interestingly, this story may also be read as pushback against the prior talmudic generalization that women want to marry more than men (and therefore the rabbis instituted a ketubah for a hearing man who marries a deaf woman, but not for a hearing woman who marries a deaf man).

³⁰ I am not taking issue with the idea that a wife performs domestic chores per se. The issue is rather with the equation of a spousal relationship with a hierarchical master-servant one.

³⁰ The most disturbing example that comes to mind is from Nedarim 20b, including:

ההיא דאתאי לקמיה דרבי, אמרה לו: רבי, ערכתי לו שלחן והפכו! אמר לה: בתי, תורה התירתיך, ואני מה אעשה לך. ההיא דאתאי לקמיה דרב, אמרה לו: רבי, ערכתי לו שלחן והפכו! אמר: מאי שנא מן ביניתא .

Perhaps ironically, this actually reflects the "permissive" position on sexual behaviors generally preferred by contemporary women's advocates. But the point is not about the ultimate halachic ruling (which is itself phrased in very problematic terms of what a man may do to his wife based on what "he wants"). Rather, the point is that the way Rabbi and Rav speak to the women is not the way someone speaks when they see softer considerations of women's "personal integrity" as serious counterbalances to the technical halacha of what men may, must, or may not do to women.

Are Wives Maids? Distinguishing Legal Rationales from Social Policy

SBM alumna Miram Gedwiser's beautiful, powerful, and challenging response from to my essay on [Tzniut](#) calls attention to the following passage from Yebamot 113a).

ההוא חרש
– דהוה בשבבותיה דרב מלכיו –
אנסביה איתתא וכתב לה ארבע מאה זוזי מנכסיה.
אמר רבא: מאן חכים כרב מלכיו, דגברא רבה הוא!
קסבר:
אילו רצה שפחה לשמשו, מי לא זבנינן ליה!?
כ"ש הכא דאיכא תרת!

There was a particular person who was deaf
(and mute, and therefore, in the time of the Talmud, presumptively incompetent for most legal purposes)
who lived in the neighborhood of Rav Malkhiyu
(who served as either an explicit or implicit trustee for the deafmute's property) –
he married a woman to him, and wrote her 400 zuz from (the deafmute's) property.

Said Rava: Who is as wise as Rav Malkhiyu, who is a great man!

He held:

Had (the deafmute) wished a maid to serve him, would we not have acquired this for him!

All the more so here, **where there are two**

(grounds for seeing the money as being spent in the deafmute's best interest!)

What are the two grounds? A plausible initial reading is that R. Malkhiyu conceives of wives as maids who also provide sexual services.

I wish to argue, however, that this is a serious misreading. Here's why.

The Talmud records Rava as making five statements of the form "who is as wise as Rabbi X". (The form is apparently unique to Rava). Here is one of the five:

On Pesachim 76a, Rav Chinena son of Rava of Pashronya permits eating a bird that fell into *kutcha*, a salty dairy liquid. The problem is that Shmuel said that salty liquids are to be considered as boiling for the purposes of kashrut, so the bird should be considered to have been cooked in milk. Rava praises Rav Chinena as uniquely capable of permitting this. The rationale offered is that Shmuel's position only applied to liquids that were so salty as to be unpotable, whereas *kutcha* is potable.

Here we need to note that

- a) just before this story is cited, Rava is cited as offering the same interpretation of Shmuel's position and

- b) after the rationale for Rav Chinena, the *stama d'gemara* adds that the permission would not stand if the bird had previously been cooked, or if it had been flavored.

The point is that Rav Chinena must have done something more than pasken like a particular position to earn Rava's high praise. What he did was reach a proper result – preventing a substantial economic loss - in the teeth of the apparent law, by carving out an exception – an exception radical enough that the Talmud promptly limits it by carving out exceptions to the exception.

Now in our case too, the praise is earned for the creative circumvention of a rule so as to achieve the proper result. The rule is that the possessions of an incompetent can only be used for his or her tangible benefit. Rav Malkhiyu found a way to conceive of marriage as a tangible benefit. If a wife were really a maid plus benefits, and marriage simply a longterm contract for services, we would not need Rav Malkhiyu to permit it, or praise him uniquely for doing so. Rather, marriage is more than that, and Rav Malkhiyu's greatness is in realizing that it can nonetheless be conceived of in purely pragmatic terms for the purpose of this law.

Furthermore, I suspect that the "benefits" Rav Malkhiyu has in mind here are not sexual. Why? On Ketubot 51a, we find the following:

ההוא יתום ויתומה דאתו לקמיה דרבא.

אמר להו רבא: העלו ליתום בשביל יתומה.

אמרי ליה רבנן לרבא: והאמר הוא דאמר: ממקרקעי ולא ממטלטלי, בין למזוני, בין לכתובה, ובין לפרנסה?
אמר להו: אילו רצה שפחה לשמשו, מי לא יהיבין ליה? כל שכן הכא דאיכא תרת.

An orphan brother and sister came before Rava – (both underage, and with the inheritance belonging to the brother, and with insufficient income from real estate to support the sister).

Rava said regarding them: Give additional support to the brother for the sake of the sister.

The Rabbis said to Rava: But are you not the one who banned using portable property to support the dependants of an estate?

He said to them: If (the brother) wished a maid to serve him, would we not have acquired this for him!

All the more so here, **where there are two** (grounds for seeing the money as being spent in the brother's best interest!)

Now it is clear that sisters are not inherently maids, and that the additional benefits they provide are not sexual. My suspicion is that Rava here was applying what he had learned from Rav Malkhiyu, and he found yet another way to use entrusted property for a proper but legally problematic purpose.

In both cases the formal rationale is not the true rationale. The deafmute should be able to marry for reasons having nothing to do with services, and the sister should be supported even if she does nothing for the brother.

(See also Bava Batra 8a, where Rabbah imposes a tax on the wealthy estate of underage orphans. When Abbayay challenges him, he asserts that paying the tax will maintain the social

prestige of the orphans, and is therefore in their interest. My sense is that there as well the formal and actual rationales diverge.)

But rhetoric has consequences. Rav Malkhiyu and Rava solve their immediate cases, but they run the risk that observers, and now readers, will mistake the formal rationale for the actual, and believe that wives, and sisters, are only maids plus. It is our responsibility to prevent this from happening, and it is not clear that we are meeting that responsibility.

This for now – I hope to engage more comprehensively with Miriam’s essay in the near future.

WOMEN IN THE RABBINATE (from *Jewish Values Online*)

Question: What is the major blockage to women entering the rabbinate, if any, in each movement? Why does it differ between them?

There are, to the best of my knowledge, no formal barriers to women entering the rabbinate in the explicitly nonhalakhic movements, although I understand that issues of placement equity have been raised, and of course women rabbis face the same challenges in terms of balancing family and work that women (and men) face in any other time-intensive profession. There are elements of the Conservative movement that still resist women rabbis, but I leave it to others to judge the grounds of that resistance. While the question refers to “each movement”, then, it seems clear to me that in practice the interest is in Orthodoxy.

Within Orthodoxy, the first point is that the formal title “rabbi” means something very different than “qualified to serve as the spiritual leader of a synagogue”. Rather, it reflects a teacher or institution’s judgment that a particular person has reached a level of scholarship and judgment sufficient to allow them to issue rulings with regard to a particular set of Jewish legal issues, generally with kashrut at the center of the curriculum. Sociologically, however, men are often called “rabbi” simply because they hold synagogue or educational positions. The Jewish legal issues associated with women in the rabbinate apply largely to questions of employment rather than of academic certification, but the fact that most people see the title as employment certification has been a major drag on the effort to train competent women scholars and grant them halakhic authority equal to that of men, and is the motivation for the set of alternative titles that have been proposed recently.

To concretize: Most segments of Orthodoxy at this point agree that there are no restrictions as to what parts of the Tradition women *may* learn, although only Open, Modern, and Centrist Orthodoxy generally *encourage* women to learn Talmud, commentaries and codes at a high level. Most segments of Orthodoxy also agree that in theory women who achieve proficiency in those studies should disseminate their opinions in matters of halakhah and should have those opinions treated no differently than those of equally proficient men.

However, there is much less support in Orthodoxy for women taking on positions in the congregational rabbinate. Some base their opposition or hesitation on technical or intuitive halakhic or hashkafic (values-based) discomfort with women having formal positions of halakhic authority or public Jewish leadership; some on “slippery slope” concerns, as there are some roles, such as communal shofar blower for men, that Orthodox halakhah certainly bars women from performing; some on sociological concerns, building on recent studies of the “feminization of the synagogue” in liberal denominations

following the ordination of women; still others are concerned that radical sociological change generally diminishes traditional authority, especially when it is clear that the impetus for that change has come from the laity rather than the rabbinate; and finally, others simply are afraid that giving women the title rabbi will fracture the Orthodox community, or at least the non-charedi Orthodox community, and that this will have grievous consequences in many religious areas at least as important for women, such as divorce.

The irony is that the congregational rabbinate certainly and perhaps primarily involves many roles, such as social worker and institutional administrator, that women play throughout the Orthodox community. Furthermore, as noted above, there is little disagreement in principle with the ability of women to issue halakhic positions. Yet somehow the conjunction of the two raises hackles.

I think there is something of a chicken and egg question here, or perhaps a Catch-22. It is not unreasonable, although perhaps unfair, for the rabbinic community to ask women seeking new roles to demonstrate that they are as qualified as exceptional men, not just that they meet a bare minimum standard, and to ask that they demonstrate a fundamental willingness to function within the existing system, even if it rejects their positions on issues important to them, before they are given influence within it. However, until women are given a clear economic path to such influence, i.e. an expectation of good jobs and broad communal respect, they have many excellent reasons not to invest the massive time and energy necessary to reach that standard within Orthodoxy. But so long as there are at best very few women who reach that standard, the issue does not seem terribly pressing to the majority of the male rabbinate. The pragmatic argument above in fact deeply alienates them, as a core value of the yeshiva student is that Torah must be learned for its own sake, rather than for the sake of a living or of honor.

One way to test my thesis, of course, is to endow an institution for women, parallel to the many kollels that exist for men, in which women simply learn at a very high level for many years with no specific practical goal. As Dean of The Center for Modern Torah Leadership, I would be happy to discuss creating such an institution with any interested donor.

Another approach is to find ways in which women can gain rigidly constrained halakhic authority, and assume carefully delimited positions of spiritual authority, and see how that goes. This is the approach taken by Nishmat and its Yoetzet Halakhah program. This may eventually allow the development of positions for women that don't use the title "rabbi" but nonetheless provide scope for a full array of intellectual and spiritual religious competencies at the highest level.

Finally, one can simply formally give some women the title “rabbi” and see what happens. My sense is that this would fracture precisely those parts of the community that understand why not giving women such a title is an issue.

To sum up: the barriers to women developing the tools necessary to be (great) rabbis, and then to becoming full and active participants in the development of Halakhah, are largely sociological rather than halakhic, in the sense that the halakhic positions necessary to enable this already exist and enjoy broad acceptance within mainstream Orthodoxy. But sometimes sociology is properly normative, and the intuitions of the observant community should never be dismissed out of hand. I support the cautious approach, so long as it is coupled with full respect for the persons and scholarship of women who study Torah, with a commitment to giving such women opportunities to teach Torah commensurate with those given to equally knowledgeable and capable men, and with a vigorous effort to develop women who embody the kind of Torah scholarship that mandates great respect and influence.

THE AGUNAH CRISIS: AN ANALYSIS OF SOME PROPOSED SYSTEMIC SOLUTIONS

(from a series in progress)

I

I was honored to be a participant in the Tikvah/JOFA Agunah Summit. The experience caused me much and ongoing rethinking. That rethinking was certainly a goal of the summit, and much has been written optimistically about other outcomes.

But I also felt that much of what was said and happened at the Summit evidenced deep confusion about the nature of the challenge and about the ways in which proposed solutions would work in practice, and that this confusion often made it difficult even to have serious conversations, let alone to agree on action steps. I am accordingly starting a series of articles intended to describe the agunah issue as clearly as possible, in the hope that this will enable new collaborations and creativity.

I. Who is an Agunah?

A) The “Classic” Agunah: Definition and History of Four Categories

a.

Definition:

In popular discourse, the classic agunah is a woman whose husband has disappeared and may or may not be dead. The Rabbis relaxed their usual evidentiary standards and allowed her to remarry on the basis of normally invalid testimony or circumstantial evidence of death.

However, fearing fraud, they also imposed severe penalties if the husband eventually turned up alive.

History:

Thousands and thousands of responsa through the centuries address cases of disappeared husbands. These responsa generally reflect the commonsense understanding of the Talmud, namely that formal rules of evidence should not prevent a widow from remarrying, but that remarriage should be permitted only when the husband’s death can genuinely be seen as proven.

Rabbi Yoel Sirkes was among the most eloquent about the religious obligation to allow such women to remarry. He applied to them a midrashic reading of a verse from Kohelet “And I have seen the tears of the oppressed . . . and power flows from the hands of their oppressors – these are the Sanhedrin”, which originally was said regarding mamzerim, and he gave the task of freeing agunot Redemptive significance. But his responsum addresses a case, as he acknowledges in a coda, where the husband turned up alive, happily before the putative widow remarried.

The modern rabbinate has generally been admirably successful and humane in dealing with such cases. Under the leadership of Rav Ovadiah Yosef, the Israeli rabbinate has resolved all cases associated with the 1973 war, and more recently, the RCA Beit Din led a consortium of rabbis in resolving all cases associated with the 9/11 attacks. These decisions included bold and innovative consideration of forms of evidence that had not previously been accepted by rabbinic courts, such as DNA tests.

It is important to realize that popular discourse leaves out several other Talmudic cases that may have great contemporary significance.

b.

Definition:

The Talmud uses the term *igguna* to refer to a woman whose husband lives apart from her but is unable to obtain an effective divorce from him. In that case as well, the Rabbis relaxed evidentiary standards to make long-distance delivery of an effective get practical.

History:

The Talmudic method for enabling long-distance divorce has been effective ever since.

c.

Definition:

Without using the term "*igguna*", the Talmud records several cases in which the Rabbis used extraordinary legal means to ensure that husbands could never deliberately place wives in doubt of whether they had been divorced.

History:

Divorce in Talmudic times seems to have occurred fairly often without formal court oversight, with the husband privately hiring a scribe and delivering the document in person or by agent. In post-Talmudic halakhah, however, the husband almost invariably uses a court scribe and court agents, and delivery as well takes place in the presence of a court. Court practice is constructed so as to ensure that the divorce is proof against any subsequent attack or allegation.

The cases mentioned by the Talmud therefore occur nowadays only when they are deliberately constructed by courts. For example, one such case was used to allow a remarried woman to remain with her second husband, when, to everyone's shock, her first husband turned up alive many years after the Holocaust and despite eyewitness testimony of his certain death.

d.

Definition:

Again without specifically using the term "*igguna*", the Talmud records several cases in which the Rabbis uses extraordinary legal means to release women from marriages they had entered into with defective consent, for example if their genuine consent was obtained in circumstances of coercion.

History:

I am not currently aware of any post-Talmudic cases in which this precedent has been applied.

B) The Contemporary Agunah

Popular discourse identifies the contemporary agunah as the "mesurevet get", the woman who wants a Jewish divorce but whose husband refuses to grant her one. This definition is simultaneously too broad and too narrow. It is too broad because it fails to account for the differing circumstances and

motivations for a husband's refusal, and it is too narrow because it excludes circumstances in which everyone agrees the divorce is still legitimately in process.

I therefore distinguish and define at least four separate categories of 'contemporary agunot'.

Definition:

- a) Women (in America) whose civil divorce is complete, or (in Israel) where a court agrees that good-faith negotiations over issues other than the get have ended.
- b) Women who remain in marriages because they fear that seeking divorce will not free them from an undesirable marriage, but rather lock them into a dead marriage.
- c) Women who are in the midst of divorce negotiations and are explicitly told that they must make concessions in order to receive the get.
- d) Women who are in the midst of divorce negotiations and worry that the husband may use get-refusal to demand concessions, even though he has never threatened this.

Values Approaches:

- a) Halakhic marriage is formally a contractual relationship that presumes, or at least makes considerable room for, a significantly integrated financial life and a joint endeavor to properly raise children. These aspects of marriage, perhaps even more so than the intimate emotional and physical elements of the relationship, necessitate the formalization of its ending. It is reasonable to argue that each spouse has a principled right to hold the other spouse in the relationship until a good faith effort has been made to resolve financial and custody issues. It is also reasonable to argue that neither party should have a right to hold the other's future hostage even if negotiations in good faith do not lead to what he or she thinks is a reasonable outcome.
- b) A prominent *dayyan* once argued to me – and I suspect that his position was not idiosyncratic among his colleagues – that diminishing the risk of get-refusal would generate an unfortunate rise in divorces, as women would then choose to exit marriages that could, with work, be salvaged. In my humble opinion, this is a perversion of Jewish values that needs to be named and fought vigorously. What kind of marriage can be sustained by the fear that one's spouse would rather hold you prisoner than allow you to leave? Is it not likely that many of the marriages thus sustained will be heavily abusive? The legitimate goal of improving marriage stability and lowering the divorce rate can and must be met without making marriage a prison and turning daughters of Israel into slaves and blackmail victims.
- c) Here significant subtlety is necessary. A reasonable person might hold the opinion that the secular divorce laws in a particular jurisdiction are biased against husbands, whether in the

realm of custody or of property of division. (One way to reach this conclusion is by assuming that wives halakhically are presumptively entitled to no more than the amount of their ketubah; those who properly wish to use beit din for the financial aspects of divorce should investigate the rulings of particular batei din in this regard.)

Furthermore, even in the most theoretically just system there will be cases where injustice seems the likely outcome, as for example when one side is financially desperate and therefore under extreme pressure to settle.

Under each of these circumstances, there is a strong temptation to see get-refusal as a legitimate means of obtaining justice. It is therefore critically important to understand that this argument is dangerously wrongheaded, and why. Here's why.

It is obviously wrong to use the get to extort money unjustly. But where the divorce is being litigated in civil court (and in the United States the courts will not recognize the decisions of arbitration panels with regard to custody, so all custody disputes must be litigated in civil court), the beit din will not have the capacity to determine whether the get is being used to obtain rather than to pervert justice. A beit din has no subpoena power, and no access to court records, and therefore cannot adequately investigate claims of hidden bank accounts, abuse, and the like. Every get-refusing husband will therefore claim that he only seeking to prevent an unjust court ruling, and the beit din will be powerless to distinguish the extortionists from the genuine among them. So we must use the classic rabbinic mechanism of "lo plug" – we do not make exceptions when doing so will undermine the rule.

- d) No negotiations should take place in the shadow of one party's capacity to torture the other with impunity and for any reason. This seems to me self-evident.

One special case is if the husband claims that he is withholding the get solely as a means of compelling the wife to litigate their financial issues in a beit din. Under such circumstances the bit din should compel the husband to demonstrate his sincerity by immediately signing a binding arbitration agreement naming a specific beit din as divorce arbiter, and to have a get written but not delivered. If the husband signs the agreement and orders the get written, and the wife refuses to sign the arbitration agreement as well, or to sign such an agreement naming an alternate reputable beit din, and the beit din feels that it would have access to sufficient information and expertise if the case came before it

C) The Meaning of “Systemic Solution”

One theme of the Agunah Summit was the need for a “systemic solution”. However, different speakers used the term to mean and exclude different things, and this led to frequent and unfortunate misunderstandings and failures of communication. I will therefore try here to develop a rigorous analysis of the term.

Systemic can mean

1. Comprehensive (antonym “ad hoc”)
2. Internal (antonym “external”)
3. Automatic (antonym “dependent”)

These three translations generate five specific uses:

- a) internal to the Halakhic system, rather than reliant on external forces, such as the secular courts
- b) capable of resolving all cases
- c) capable of resolving all cases without requiring any rabbi to exercise any form of halakhic discretion
- d) capable of resolving all cases without requiring specific men or women to exercise any form of discretion
- e) capable of resolving all cases without requiring any human being, rabbi or otherwise, to exercise any form of discretion

Each of these definitions likely represents a distinct values position. For example:

- a) the desire for an “internal solution” may stem from a concern for the moral reputation of Halakhah, and lead someone to prefer such a solution even if it is less effective than a solution that involves extrahalakhic forces or agencies;
- b) the desire for a comprehensive solution may reflect a belief that ad hoc solutions cannot be relied upon in advance, and so reliance on such solutions will leave women vulnerable to get-refusal blackmail or anxiety.
- c) the desire for a solution not dependent on rabbinic discretion may reflect a lack of trust that the rabbinic court system will properly use any new powers it might be given, or a general aversion to increasing rabbinic power;
- d) the desire for a solution not dependent on the discretion of non-rabbis may reflect a lack of trust that couples will take proper prudential measures before marriage, or a sense that accepting such a solution in principle will in practice enable rabbis to avoid their responsibility to fix the matter.

- e) The desire for a solution independent of any human discretion may reflect either a combination of c) and d) or else a sense that vulnerable people should not, if possible, be required to put their trust in others.

Furthermore, the contemporary agunah issue (see also the four manifestations discussed last post) affects three distinct groups of women:

- 1) Women who are currently in the midst of or have completed civil divorce proceedings
- 2) Women who are currently married but not considering divorce
- 3) Women who are not currently married.

A solution may be comprehensive for one or two but not all three of these groups. For example:
prenuptial agreements only help group 3;
postnuptial agreements might extend a similar solution to group 2;
but any solution requiring the husband to voluntarily accept new obligations cannot help group 1.

Furthermore, some solutions may work comprehensively, internally, or automatically in Israel but not in the United States, or vice versa. More on that below.

D) Comparing the American and Israeli Situations

One challenge to implementing any systemic solution for agunot is that the issue manifests differently in Israel and the United States, among other places.

Israel

Israel has no civil divorce. All marriages between two Jews must be ended by a get before either partner can remarry.

As a result, many Israelis without deep halakhic loyalty are subject to a system that binds them against their will.

Israeli agunot therefore **may** be women who would happily remarry without a get if they had a choice. They **may** happily accept any solution which frees them, regardless of their own evaluation of the halakhic or intellectual integrity of that solution.

For example, they would be effectively freed by a governmental decision to permit civil divorce even for parties who were married via valid *kiddushin*. They would also almost certainly be effectively freed by a governmental decision to recognize the marriage-ending declarations and rituals of nonOrthodox Judaism, or to recognize divorces issued by a highly idiosyncratic Orthodox beit din.

On the other hand – most **Israeli agunot would not be freed by any method that the government refused to recognize, no matter how solidly grounded that method is in Halakhah, or how broad a consensus of universally respected Orthodox poskim approved it.** As of now, the Israeli government allows the Chief Rabbinate to set its Jewish divorce standards.

United States

The US has secular divorce, and does not grant religious divorce any legal force. American Jewish women have the legal option to remarry without an Orthodox-recognized get if they so choose, either under secular or under nonOrthodox auspices.

A woman who self-identifies as an agunah in America is consciously rejecting these options.

She may reject them because they conflict with her personal commitments or ideology; or, she may reject them because they conflict with the commitments or ideology of the community or communities she identifies with and would seek a remarriage partner in.

American agunot therefore will not accept a solution that fails to satisfy their own and or their communities' standards of intellectual integrity and/or halakhic integrity and/or halakhic authority.

If they were willing to accept such solutions, they would already be free.

On the other hand – **American agunot and/or their communities have the autonomy to choose their own halakhic authorities and to evaluate halakhic arguments on their own.** Therefore a solution for

American agunot does not in principle require either rabbinic consensus or the approval of a particular rabbi or set of rabbis.

Note: Some Israeli women, and therefore likely some Israeli agunot, are like Americans in that they autonomously accept the authority of halakhah, or live in communities that do, and so can only accept solutions that meet their own religious standards.

Note: Some Israeli women would be willing to remarry illegally so long as they have a valid halakhic divorce.

Note: Canada is fundamentally the same as the US with regard to this section, but with secular legal differences we will discuss elsewhere. I do not have enough knowledge of other countries to discuss them individually.

E) Previously Proposed Systemic Solutions

The systemic solutions thus far proposed fall into the following categories, which I will discuss seriatim:

- 1) Preventing *kiddushin*
- 2) Retrospectively invalidating *kiddushin*
- 3) Constructing *kiddushin* that dissolve automatically in reaction to get-refusal
- 4) Creating a consent-independent mechanism for get-delivery
- 5) Creating a disincentive for get-refusal
- 6) Coercing get-delivery
- 7) Dissolving *kiddushin* by means other than a get

Preventing Kiddushin

One advocate at the Agunah Summit argued that the best way to prevent get-refusal is to prevent get-necessity. She accordingly suggested that woman be encouraged to find ways of formalizing relationships that do not count halakhically as *kiddushin*.

Rabbi Meir Simchah Feldblum z”l suggested – I have never been quite sure how seriously – that this had already happened in practice, on the ground that no contemporary woman actually intends to accept the terms of *kiddushin*, specifically the vulnerability to get-refusal.

This proposed solution, especially when proposed systemically and for both Israel and the United States, raises many, many halakhic and moral difficulties, and in any case would be ineffective. Here’s why:

1) It likely actively suborns sin. Halakhah forbids both men and women to engage in non-exclusive sexual relationships, (although the ground of the prohibition is different for men and women). Rabbi Feldblum and others noted that some or many medieval authorities permitted *pilagshut* = concubinage, which they understood to be a relationship that limited the woman to one partner but did not require her to receive a get for it to be dissolved. However, most commentators believe that Maimonides believed that *pilagshut* is Biblically forbidden to everyone but the monarch, and other authorities believe that it is rabbinically forbidden. It is therefore profoundly unlikely that this suggestion would be adopted by a significant percentage of the halakhically committed population.

2) It leaves women without the protection of marriage. *Kiddushin* provides women with the *ketubah*, which provided for her in the case of divorce or widowhood. While the *ketubah* is of little practical value today, this is because secular law has adopted the *ketubah* model – but again, only for married couples. Israeli law would not, so far as I know, recognize concubines as married. Woman would therefore run the risk of being left without any claim if the relationship ended. *Pilagshim* could still

obtain marriage licenses in the United States and marry secularly, so this objection does not apply in the United States.

3) Some authorities require a get to sever a *pilagshut* relationship. I suspect that many batei din, especially in Israel, would not permit a woman who had been formally designated a *pilegish* to remarry without a get.

4) Those authorities who do not require a get to sever a *pilagshut* relationship might nonetheless require the male to actively and willingly sever the relationship. (I have been unable to find a satisfying discussion of this question and welcome references).

The purported lack of need for a get therefore does not enhance the woman's legal position in any way, but rather harms it, because –

- a) she has none of the protections of marriage
- b) the male has none of the obligations of marriage
- c) there are no precedents for compelling or even pressuring the male to end the relationship, even if the female wishes to.
- d) Even if the male consents, the woman may be left with no proof that the relationship has ended.

In other words – it seems to me likely that woman who enter into such relationships will become agunot at the same or greater rate than present, and gain no other practical advantages. The proposal could only be effective if batei din accepted that such relationships could be contracted and sustained without requiring a get, or the husband's consent, to dissolve them, and batei din are not intellectually compelled or religiously desirous of accepting such proposals.

An alternative version of the proposal is for woman to eschew any and all relationships that have halakhic significance, on the grounds that either

- a) It is worth committing the sin of sex-outside-exclusive-relationship to avoid the risk of agunah, or
- b) Kiddushin is hopelessly sexist and should therefore be abandoned. The risk of agunah is symptomatic and emblematic of the fundamental problem that kiddushin involves a *kinyan* of the woman by the man.

This is sometimes described as “reverting to *kiddushei bnei Noach*” and/or solemnized with creative rituals and texts such as brit ahuvim.

With regard to b), my custom in premarital counseling is to mention Rabbi Shlomo Riskin's very plausible claim that substance of the *kinyan* of *kiddushin* is not that the man acquires the woman, but

rather that the man acquires his obligations *toward* the woman. The prima facie evidence for this claim is that *kiddushin* effected by document happen when the man transfers the *shtar* to the woman, and in commerce it is the seller who transfers the *shtar* to the buyer. A secondary supporting framework is that wives have no Biblical obligations toward husbands in marriage, whereas husbands are obligated to provide for their wives' food, clothing, and sexuality. Wives do have a one-way Biblical prohibition against sexual nonexclusivity, but that is an obligation to G-d rather than to the husband.

With regard to a), I think this approach runs the risk of blaming the victim. As I noted last week, agunot in America are always in a sense volitional – no one forces them to keep halakhah. Proposing “solutions” that require women to violate either the letter of the spirit of Halakhah as understood by their home communities will not diminish the incidence of agunah in America; it will only diminish sympathy for them.

Nor is it clear that this solution works in Israel for those not halakhically committed. Just as secular law in the United States recognizes “common-law marriage”, meaning that a couple who acts married for some period of time is treated legally as having married, so too batei din, via mechanisms we will discuss in the future in the context of conditional marriage.

However – and this is a big however – I think that it is intrinsically problematic for a halakhic system to have compulsory jurisdiction over people who fundamentally reject its assumptions, especially when that combination accidentally but inevitably generates severe human suffering. In Israel the absence of civil marriage creates this situation; in America having a valid *kiddushin* necessitates a valid get.

I have wondered for years whether Orthodox rabbis should officiate at weddings for the non-Orthodox in a culture where divorce is common and *gittin* rare. I have heard several stories about American rabbis deliberately making errors when officiating at weddings to forestall issues of *mamzerut*; perhaps the same kind of thing occurs in Israel to forestall agunah. Nowadays I tend to think that insisting on the prenup (which will of course be the subject of a later post) should allow a rabbi to educate such couples so that the risk that they will choose not to obtain a get should they divorce is minimal.

F) Retrospectively invalidating *kiddushin*

In Section E) I discussed various proposed methods for allowing a couple to deliberately live together in a formal and religiously recognized relationship without necessitating a get should they separate. I argued that such methods would generally be ineffective and even counterproductive.

That discussion was almost entirely *lekhatchilah* (beforehand), however. Faced by a modern *agunah* situation (and often in cases of *mamzerut* as well), any *beit din* will look to see if *bediavad* (after the fact) it is possible to declare that the relationship never constituted *kiddushin*, and therefore no get is necessary. (This technique must be sharply distinguished from *afk'inh*, or annulment, which may involve retroactively *causing* the relationship to never have constituted *kiddushin*. That will be discussed below). One can accomplish this *inter alia* by questioning

- A) whether the parties intended to enact *kiddushin*
- B) whether the parties entered into the relationship willingly
- C) whether the parties entered into the relationship adequately informed about each other
- D) whether the object of value (ring) belonged to the groom before being transferred to the bride
- E) whether the bride acquired something of value without giving equal value for it other than agreement to marry
- F) whether the bride and groom understood that the transfer of the object of value effected marriage
- G) whether the ceremony took place in the presence of valid witnesses.

In this post we'll discuss A).

Here we need to distinguish two kinds of cases: those in which no attempt was made to conform to the halakhic norms of *kiddushin*, and those in which such an attempt was made.

The most common case of the first kind is where the couple had a civil rather than a religious ceremony.

It might be thought obvious that in such cases no get is necessary. However, halakhic marriage can be effected via sexual relations as well as through ceremony, and the Talmud in various places established the principle *ein adam oseh beilato beilat znut* = "a man does not make his sexual act one of promiscuity". Now this obviously is not a claim that all male sexual acts are intended to accomplish marriage. Rather, it is a claim that in a marital context, a man will stipulate that he has whatever intentions are necessary to make his sexual acts marital. The halakhic tradition has sometimes taken this as a presumption that in a committed monogamous relationship, the first sexual act was intended to effect *kiddushin*. The great 20th century halakhic decisor Rabbi Yosef Eliyahu Henkin famously held this about couples who publicly identified as husband and wife in the presence of a Jewish community.

Rabbi Moshe Feinstein famously disagreed, and there is testimony that Rav Henkin did not hold to his position in cases of mamzerut. It is also possible to distinguish (either way) between

- a) situations in which there is a readily available option for ceremonial kiddushin (such as the United States) and opting for purely civil marriage likely expresses indifference to religion, and
- b) situations in which there is a readily available option for ceremonial kiddushin (such as Israel) and opting for purely civil marriage requires a trip to Cyprus and may express hostility to religion (although we should distinguish hostility to a particular rabbinic bureaucracy from hostility to Halakhah generally), and
- c) situations in which there is no readily available option for ceremonial kiddushin (such as under Communism in the USSR)

In cases of *agunah* I believe that most batei din would rely on Rabbi Feinstein in cases of purely civil marriage, or at the least refer the case to another beit din that relies on Rabbi Feinstein.

Another case of the first kind is where there was a religious ceremony that deliberately disassociated itself from halakhic *kiddushin*. For example, a Reform colleague and I years ago considered proposing that the Reform ceremony include the words “*shelo kedat Mosheh v’Yisroel*” = “not in accordance with the laws of Moses and Israel” to make explicit its rejection of *kiddushin*, from his perspective to avoid association with what he understood as a patriarchal institution (but see the discussion of *kinyan acharayut* last post), and from mine to prevent any risk that remarriage without a get would produce *mamzerut*. If it can be established that the couple was making the choice to avoid *kiddushin* consciously while committing to the relationship, i.e. that they did not consider themselves to be engaged in promiscuity, there should be no presumption that a later sexual act was intended to effect *kiddushin*, even according to Rav Henkin.

But this is not obvious. If one holds that intent-for-*kiddushin* requires specific religious content, the argument is compelling. Some argue, however, that intent for any relationship which both parties agree imposes a religious obligation of sexual fidelity on the woman constitutes *daat kiddushin*. If the parties reject other aspects of *kiddushin*, such as the husband’s physical obligations toward the wife, they are considered *matneh al mah shekatuv baTorah* = stipulating against Scripture. In such cases the rule is *maaseh kayam utenai batel* = the action takes legal effect but the stipulation is a nullity.

I think that this is too broad a definition of *kiddushin*. My preferred alternative is that we define *daat kiddushin* as intent for a relationship that imposes a religious obligation of sexual fidelity on the woman *that can be dissolved only via a get*. If the groom does not intend to impose such an obligation on the bride, as would be the case in all such ceremonies, then in fact no *kiddushin* can have happened and no

get is necessary, even though halakhically this means that all sexual acts during the relationship are considered *znut*.

I cannot say at this point whether/when batei din would accept my preferred formulation *lehalakhah*. However, my sense is that in cases of *agunah*, most batei din would adopt some formulation of *daat-kiddushin* that would allow the woman to remarry, or or at the least refer the case to another beit din that adopted a formulation sufficiently narrow to allow the woman to remarry.

Many Reform and most Conservative wedding ceremonies, however, do adopt or adapt halakhic language and ritual to an extent that make it very hard to argue that the couple explicitly intends to avoid *kiddushin*. Reasonably, most couples emerge from such ceremonies feeling that they have entered into whatever Judaism considers marriage. Factors other than lack of *daat kiddushin* are therefore necessary to free *agunot* who were married in such ceremonies.

H) Defining Willingness

Halakhic marriage is a contract between two parties, and accordingly the marriage is effective only if both parties intended to marry. However, how does the law know what the parties intend?

Mindreading cannot be a requirement for legal decisionmaking, so it follows that the law must use external behavior and commonsense reasoning to create presumptive intent.

The burden of proof must always be on the party who wishes to void an apparently valid contract, or put differently, the demonstration that X has signed or orally entered into a contract makes the contract presumptively binding on X. The halakhic phrase which enshrines this principle is דברים שבלב אינם דברים = “words in the heart are not words” when opposed to words from the lips or the pen, meaning that your present claim of past intent has no legal force against your past speech or signature.

(In most Orthodox wedding ceremonies, the bride indicates her willingness to marry by implication, rather than by speech.³¹ To my knowledge, however, all halakhic decisors have interpreted her acceptance of the ring as an act of entering into the marriage contract, so that the “words in the heart” principle applies.)

How can someone wishing to void a contract meet the burden of proof? The simplest way to accomplish this is *mesirat moda'a*, an advance statement before valid witnesses that one’s word or signature will not be sincere. This is not a device that can be employed retrospectively or conditionally, however, and therefore is not useful with regard to agunah.

A second way to satisfy the burden of proof is to demonstrate coercion, for example by producing witnesses to a threat. However, postfacto claims of coercion face two halakhic obstacles:

- a) סברה וקבלה = *savrah vekiblah* – if the contract was not a one-time affair, but rather involved a long-term relationship, halakhah considers the possibility that the coerced party eventually came to terms with the result and entered willingly into the contract.³² An agunah would likely have to prove the existence of an ongoing threat throughout the marriage in order to avoid needing a get.

³¹ When I am *mesader kiddushin*, I sometimes ask the bride explicitly whether she consents before the groom places the ring on her finger, and she replies “הרי אני מוכנה לקבל טבעת זו לשם קידושין כדת משה וישראל”. This seems to me preferable both halakhically and pastorally to silent acceptance, but obviously it should be done only if the couple wishes it.

³² From an analytic perspective, this is confusing, as it seems that the parties are entering into the contract at different times, and that party A is not aware of the moment that party B actually enters into the contract and therefore makes it binding on B. I have not seen an adequate treatment of this issue and would welcome references.

b) תליוה וזבין – if the end result of coercion is agreement to a fair contract, i.e. a contract that falls within the norms of the current marketplace, halakhah validates the contract even as it condemns the coercive behavior. This principle is applied to marriage on Bava Batra 48b.

Note: the Talmud there records Mar bar Rav Ashi's statement that in such circumstances we resort to *afk'inhu*, which we will discuss many posts hence, but I can say here that *afk'inhu* is rarely a reliable tactic for freeing Orthodox agunot.

Asserting that her marriage was coerced is therefore rarely if ever an independently successful rationale for freeing an agunah, at least one whose marriage endured past the first night.

However – coercion can play an important ancillary role. Next post we will discuss C), the claim that the marriage was entered into as the result of misinformation or missing information = מקח טעות = *mekach ta'ut*. A standard basis for such a claim is that a mental health condition was not disclosed prior to the wedding. However, unless made immediately after the wedding, such claims often run into a variation of סברה וקבלה – if the condition made marriage a nonstarter for the woman, why didn't she leave immediately after discovering it? She must have made her peace with it! One possible response is that she felt coerced to stay, and many abused woman correctly feel that leaving would be actively and physically dangerous.

We explained above that a claim that one's marriage was coerced requires evidence of coercion to succeed, because the action of accepting the ring creates a presumption of willingness. In this case, however, the action whose meaning we are seeking to interpret is not her acceptance of the ring, but rather her remaining with a man with whom she stood under a chuppah years ago.

A woman's acceptance of a ring in the context of a man's statement of marriage can reasonably be constructed as "silent speech", so that we can presumptively reject a claim that her consent was subject to unstated conditions. But I don't think we must or should apply this construction to her failure to leave immediately after finding out that her husband was mentally ill. We should instead treat that as an action whose meaning is indeterminate, and therefore her present claim that she remained because of coercion or fear would not be defeated by the "words in the heart" principle.

As an analogy –

an employer cannot renege on a signed contract by claiming that he or she signed it under threat, because of "words in the heart".

What if the employer seeks to void the contract on the ground that the potential employee seriously inflated his or her credentials?

If the employer can establish that the fraud was discovered after the hiring, the contract might well be voided.

What if the employer did not fire the employee immediately after discovering the fraud?
If the employer has a reasonable explanation for the delay – for example, fear that the employee would sabotage an ongoing project – the delay would not prevent the employer from terminating the contract (although the employee would be due appropriate wages for services rendered).

Therefore a plausible claim that coercion or fear of retaliation prevented a woman's immediate departure from the marital home should be sufficient to keep the focus on whether the original agreement to marry was validly consented to, and allow a claim of *mekach ta'ut* to proceed even if the woman remained in the marital home after discovering her error.

A COMMUNITY IS ACCOUNTABLE FOR ITS LEADERSHIP

Over the past year the Modern Orthodox community suffered through a series of very public rabbinic scandals. In two of these cases the bodies they led reacted rapidly and properly. In a third case – Rabbi Herschel Schachter’s recorded use of the word “schwartz” while speaking to a London rabbinic conference – Yeshiva University issued a belated condemnation, but Yeshivat Rabbi Yitzchak Elchanan, the YU affiliate that is his actual employer, said nothing and honored him at their annual dinner several weeks later. I need to note that the context – a Yiddish insertion into an English sentence for the purpose of describing a cellmate who might do horrible things – made it clear that the word was intended to conjure a racial stereotype to comic effect.

I recognize that this is properly a deeply emotional issue for Rabbi Schachter’s many, many students – even those who know that he uses such language in private conversation, and have had their respect for him compromised by that knowledge - and for all who appreciate not only his remarkable Torah knowledge and clarity but the courage with which he has spoken out or paskened on some important communal issues. Nor do I discount how hard it is to square the personal experience of kindness with evidence of serious moral error, even as I think everyone recognizes intellectually that arguments of the form “He’s nice to many people; therefore he can’t be a racist” are empirically false, on the order of “He gives lots of tzedakah, so he can’t be an embezzler”.

Furthermore, this issue has been tangled with his position regarding the reportage of abuse cases, for which I think he has been unjustly criticized – as best I can tell, based on the specific recording and his past writings and statements, he would prefer the establishment of rabbinic/psychological vetting boards for reports by third parties – not by victims – but until the establishment of such boards, he supports and even mandates immediate reporting of suspected abuse to the police. I myself think that such boards could not be effective in America, and I’m far from convinced that they have been effective in Israel, but theoretical advocacy for them should not be grounds for censure when in practice one declares that one can report without them.

Rav Schachter’s unrepentant self-report – once again, on the same recording - of his reaction to an alleged victim’s attempt to report abuse to him seems deeply disturbing in its pastoral insensitivity. But that is beyond the ambit of this week’s discussion, and in any case the question of YU’s reaction to abuse victims is being litigated.

Perhaps the most disturbing aspect of the recording is the failure of the numerous rabbis present to protest that the rosh yeshiva simply could not use such language in their presence; that the use of such language by a talmid chakham, or for that matter any Jew, is both a chillul Hashem and, potentially a mortal threat to members of our community. If anything should be forbidden mishum eivah – lest it

cause hatred, such language by an acknowledged Jewish leader is at the top of the list, and if ever there was a proper application of “in the context of chillul Hashem one must not be constrained by considerations of rabbinic honor”, this was it.

We don't always get the leadership we deserve – but we deserve the leadership we get if we do not hold our leadership morally accountable. The mechanism for this accountability should be open disagreement and critique, such as the Open Letter that Rabbi Barry Dollinger has written to Yeshiva. I hope that many other such letters have been or will be written – even as I know that I will disagree with them in whole or in part, as I do with Rabbi Dollinger's in part – and I encourage you to write them yourself, and ask your spiritual and communal leaders if they have done so. I believe that a public halakhic statement along the lines of the previous paragraph is necessary as well, for both practical reasons and for atonement. This, too, is a fulfillment of the prohibition against distorting judgment in favor of the great.

TALMUD TORAH AS THE SHARED SPIRITUAL LANGUAGE OF THE JEWISH PEOPLE

This week klal yisroel mourned the death of Rabbi David Hartman and celebrated the inaugural Knesset speech of Dr. Ruth Calderon³³. The connection between these events is direct, in that Dr. Calderon describes Rabbi Hartman as her mentor. But even more so, her speech represented a partial fulfillment of one of Rabbi Hartman's dreams, that Talmud Torah could function as the "shared spiritual language of the Jewish people"³⁴. This is a dream that continues to inform and challenge much of what I teach, and it is appropriate here to acknowledge again that my understanding of Religious Zionism is deeply indebted to Rabbi Hartman's "Joy and Responsibility". Yehi zikhro barukh.

Among Rabbi Hartman's arguments (as I understand and/or extend it) for the possibility that halakhic conversation could cross the boundaries of observance or legal commitment was the following: If one recognizes that Halakhah is one particular human concretization of the values expressed in Revelation, one can recognize that other people's nonhalakhic norms and behaviors might well be other such hypothetically possible concretizations, in the same way that we recognize rejected halakhic positions as nonetheless having the status of Torah, or "divrei Elokim chayyim". Differing behavior thus may not mean that our understandings of Revelation are incompatible, and certainly does not mean that conversation about how to understand Revelation is impossible.

This argument depends on the assumption that there is no impassable chasm between an understanding of Revelation as a source of Law and an understanding of Revelation as a source of values. This to me is not obviously true or false, and so I spend a lot of time in my classes at Gann Academy testing it. I thought today it might be appropriate to consider the text taught by Dr. Calderon in light of this question.

כי הא דרב רחומי
הוה שכיח קמיה דרבא במחוזא
הוה רגיל דהוה אתי לביתיה כל מעלי יומא דכיפורי
יומא חד - משכתייה שמעתא.
הוה מסכיא דביתהו: 'השתא אתי, השתא אתי'.
לא אתא.
חלש דעתה - אחית דמעטא מעינה.
הוה יתיב באיגרא - אפחית איגרא מתותיה, ונח נפשיה.

³³ An English translation of the speech, by SBM alum Rabbi Elli Fischer, is [here](#). The video of the original speech is [here](#).

³⁴ Rabbi Hartman's relevant essay is titled "Halakhah as a Ground for Creating a Shared Spiritual Language" ([Tradition 16:1](#)),. While the title refers to Halakhah specifically, I think it is at least as compatible with a form of Jewish discourse that integrates other modalities with the Halakhic, or that integrates them into the Halakhic.

In the manner of the following story about Rav Rechumai,
who was commonly found before Rava in Mechoza.

He regularly came to his house every Erev Yom Kippur.

One day – he was drawn in by his learning.

His wife was waiting: ‘Now he comes, now he comes’.

He did not come.

She was depressed – a tear fell from here eye.

He was sitting on the roof – the roof collapsed under him, and he died.

Dr. Calderon makes a number of beautiful and insightful interpretive comments, but I want to focus on the remarkable conclusions she drew.

- a) One must not indulge one’s devotion to Torah at the expense of sensitivity to human beings.
- b) In Talmudic disagreements, one must assume that both sides have some aspect of truth. So Rav Rechumai must also be justified partially. The underlying point is that both those who see themselves as maintaining the nation practically (the wife, and the chilonim) and those who maintain the nation culturally/religiously/intellectually (Rav Rechumai, the charedim) see themselves as maintaining it alone while the others are gambling on Tel Aviv beaches or living on the public dole. A call for שווי בנטל, equality of burden-bearing, must go both ways, i.e. those who want the charedim to work for the state must recognize their own responsibility for the continuity of Torah, and devote significant resources to Torah study.

The first of these seems a highly plausible reading, and the second at least possible, if perhaps a little generous.

Both of these readings, however, rest on abstracting values from the story. Here I want to put the story in its Talmudic context.

The sugya begins with a Mishnah that states

– התלמידים יוצאין לתלמוד תורה שלא ברשות –
שלשים יום

Students (of Torah) may leave (their homes) for the study of Torah without permission (from their wives)
– for thirty days.

The Mishnah continues by stating that laborers may leave only for a week, and then provides a list of professions (including laborer) and the period defining the sexual obligations of each type of worker. It concludes by stating that some or all of the above represent the position of Rabbi Eliezer.

In the Talmud, Rav Ada bar Ahavah reports a tradition that the first line was the position of Rabbi Eliezer, whereas the Sages held that students of Torah may leave even for years without permission. Rava comments:

סמכו רבנן אדרב אדא בר אהבה ועבדי עובדא בנפשייהו

The rabbis relied on Rav Ada bar Ahavah and acted thus in practice *benafshaihu*.

The story of Rav Rechumai is offered as an illustration of the behavior described by Rava.

A normative reader of this story might relate to Dr. Calderon's points as follows:

- a) The issue is not how to balance devotion to Torah with human sensitivity, but rather how one balances devotion to Torah study with practical halakhic obligations, or at least with practical halakhic obligations toward other human beings – in this case the husband's obligation of *onah*. My preference is for Dr. Calderon's reading because the purely halakhic reading does not properly account for the wife's tear causing the death. But a fuller analysis would require us to decide whether Rav Rechumai came home specifically on Yom Kippur because on that day marital intimacy is forbidden (in which case the story cannot be about his halakhic obligation).
- b) While it is often true that "These and those are the words of the living G-d", this does not relieve us of the burden of deciding which position may be followed in practice. Here, if Rashi is convincing when he translates "benafshaihu" as "at the cost of their lives" rather than as "themselves" (cf. Yebamot 64b and Ketubot 22b), the whole thrust of the sugya is to reject the position of the students who leave for years, and Rav Rechumai is introduced as an example of someone who will die for his misdeed.

Dr. Calderon here tries to realize Rabbi Hartman's vision from the opposite side – by presenting her vision through a (very generous) Talmudic parallel, she hopes to engage the charedi community in a real conversation about the extent to which the secular community can be expected to economically support their current social arrangements. Ironically, I think it is precisely the parts of her reading which are most generous to them – the identification of their society with the Torah-passionate Rav Rechumai, and the presumption that Rav Rechumai's position carries practical weight – that may seem most alien to them.

Nonetheless, it seems to me that the effort more than deserves a sustained response. Perhaps, if we cannot quite achieve a fully shared language, we can at least develop reliable translation protocols that enable serious conversation. The key responsibility will then fall on those of us who can speak both dialects well – I think we should welcome it.

[A New Definition of Chillul Hashem](#)

In one of my classes this week at Gann Academy, a reading mentioned a responsum by Rav Moshe Feinstein. One student reading it said to me: “I think I heard of him. Isn’t he the one whose grandson or something is abusing his wife by denying her a get even though they’re divorced?” This seems to me the new dictionary definition of *chillul Hashem* – to act in a way that reduces a gadol hador in the view of many Jews to the (great)grandfather of a *meagen* (get-refuser).

It doesn’t matter whether Avrohonm Meir Weiss has real claims; we cannot allow him to use the get as a weapon. This is true for many reasons, but the reality of *chillul Hashem* should be enough to close the discussion.

[In Memoriam: R. Ovadiah Yosef of Blessed Memory](#)

. . . all the teshuvot I have read of Rav Ovadyah impress me not only for their scholarship but for their deep humanity. He, as no other posek I have been touched by, made sure that halakhah was compatible with both noam and shalom. When issues of personal status came up, in beit din or outside, it was tremendously reassuring that, when it was clear what the answer should be, but I didn't have the head to justify that answer or the shoulders to carry it out, the question could be sent to Rav Ovadyah with complete confidence that the right answer would be given, justified, and carried out – no one would suffer unnecessarily because a posek lacked knowledge, courage, or compassion. His death is therefore a great personal loss, one I am far from coming to terms with, and diminishes klal yisroel immensely. Yehi zikhro barukh.

Scholarship and Sense

Chumash, like every narrative, must choose which information to convey, when, and from whose perspective. In a Divine narrative, such choices should be perfectly made, and a choice awkwardly made or executed must be explained.

As an illustration, take Jonah 1:9-10:

ויאמר אליהם
עברי אנכי
ואת יקוק א-להי השמים אני ירא
אשר עשה את הים ואת היבשה:
וייראו האנשים יראה גדולה
ויאמרו אליו
מה זאת עשית
כי ידעו האנשים
כי מלפני יקוק הוא ברח
כי הגיד להם:
He said to them:
“I am a Hebrew
It is Hashem the G-d of Heaven I fear,
Who made the sea and the dry land”.
The men feared a great fear
They said to him:
“What is this you have done?”
Because the men knew
that he was fleeing from before G-d
because he had told them.

The shift from Yonah’s perspective to the sailors’ is jarring and unnecessary, and telling us what the sailors’ knew after providing their reaction is simply odd. My explanation is that the narrator intends both to ensure that readers don’t learn yet why Yonah is fleeing from G-d, and to ensure that readers are aware that the information is being withheld.

In last week’s parashah, we were told by the narrator that Reuven’s intervention was intended “to save Yosef from his brothers, to return him to his father”. But this is redundant, both because we were told

just before that Reuven “saved him from their hands”, and because why else would Reuven have intervened?

My suggestion is that the narrator is emphasizing Reuven’s futility – Reuven *intends* to save Yosef via this suggestion, but in fact he simply encourages the brothers to carry out their original plan “Let us go kill him; we will throw him in one of the pits . . .” What’s worse, he makes the suggestion “Throw him into this pit . . .” *after* he has already successfully saved Yosef. His initial statement “Let us not strike him dead” called the brothers to their sense. At that point, he could have solved everything by threatening to tell on them to his father. He chooses not to do this – perhaps he did not wish to be a talebearer like Yosef – and so he is left merely with good intentions.

Yehudah, by contrast, makes a suggestion that would actually save Yosef. The text emphasizes Yehudah’s relative effectiveness by bracketing the story with two “hearings” – Reuven hears (*vayishma*) and saves him at the outset; at the end the brothers *heed* (*vayishme’u*) Yehudah.

The beginning of this week’s parshah contains another odd narrational choice. The imprisoned brothers finally admit their guilt:

“But surely we are guilty about our brother
For we saw the suffering of his soul
when he pleaded with us
but we did not heed
therefore this suffering comes upon us”.

Why are their brother’s “pleadings” first mentioned here, rather than when Yosef was actually in the pit?

Meir Sternberg argues that Yosef’s pleadings are revealed now to ensure that we don’t lose our affection for Yosef as he torments his brothers – they deserve all he can give them – but I’m not convinced this is a sufficient explanation.

Note also Reuven’s reaction to the brother’s confession. He does not congratulate them on their new spiritual self-knowledge and humility; rather, he says “I told you so”. What’s worse, he seems to somewhat exaggerate what he had actually told them, claiming that he had told them “not to sin regarding the child” when we have seen him only opposing direct murder and – albeit with the best of intentions – endorsing throwing Yosef into a pit.

Finally, note that both Reuven and the brothers mention the latter's failure to "hear": They confess "we did not heed" (lo shoma'nu), and he accuses them "you did not heed" (velo she'ma'tem).

My suggestion is that the dialogue here is about Reuven, rather than Yosef. It was Reuven who pleaded with them, and they failed to heed him. The brother's repentance, then, is for their failure to listen to Reuven. Reuven then reminds them of what he had said *before* he advised throwing Yosef into the pit – his words here are an expansion of "let us not strike him dead". It is Reuven's words that reduce Yosef to tears – tears he never shed when the brothers assaulted him – but that also justify him in imprisoning Shimon and continuing to test his brothers.

Perhaps a broad theory of Reuven's character is this: He properly understands the moral dimensions of a situation, but does not correctly match prescription to diagnosis. He does the wrong thing for the right reason. Perhaps Yaakov should have gone out of his way to favor Leah after Rachel's death; certainly Yaakov needed to agree to send Binyamin down to Egypt. But Reuven's responses to each of these situations made things worse rather than better.

Effective leaders need both good moral and good practical sense. At the outset, Reuven has the moral sense, and Yehudah the practical sense. Yehudah learns from Reuven, but Reuven does not learn from Yehudah, and so Yehudah becomes the brothers' leader.

This is a message that fans of the ivory tower beit midrash should take to heart.

Honor and Humility

בראשית פרק יח:

ויקח חמאה וחלב ובן הבקר אשר עשה

ויתן לפניהם

והוא עמד עליהם תחת העץ

ויאכלו:

Genesis 18:8

He took butter and milk, and the calf which he had made;

he placed it before them;

(He was standing over them under the tree)

They ate.

Heart of Gold, the improbable spaceship in Douglas Adams' five-volume "Hitchhiker's' Trilogy", produces a liquid that is "almost, but not entirely, unlike tea". Somehow this line comes to mind when I think about the concept that human beings are created "b'tzelem Elokim" in conjunction with Rambam's claim that no analogy between G-d and human beings is viable. Rambam translates Elo-im differently, but for most of us tzelem must mean "almost but not entirely unlike".

Rambam nonetheless champions the obligation of human beings to be like G-d, "lehidamot lo kemah she'efshar". Why does this not require a viable analogy? We imitate His actions, and the character attributes that His actions would reflect in a human being, without claiming that we genuinely resemble Him.

The problem is that this imitation is selective – we emulate those Divine actions that reflect compassion, but not those that reflect cruelty; we imitate His healing of the sick but not His making them sick in the first place. The analogy between human and Divine continually fails, and yet we cannot help making it.

This week I'd like to play that issue out through an analysis of the dynamics of dignity.

A sugya on Kiddushin 32b begins by citing Rav Ashi as follows:

אפילו למ"ד הרב שמחל על כבודו –
כבודו מחול,
נשיא שמחל על כבודו –
אין כבודו מחול.

Even according to the side of the argument that holds that if a *Rav* forgoes *kavod* -
others may treat him without the *kavod* due a *rav*,
if a *nasi* forgoes *kavod* -
others may not treat him without the *kavod* due a *rav*.

The sugya then cites a *beraita* to attack this statement, and concludes that its initial version was incorrect. The emended version reads as follows:

אפילו למ"ד הרב שמחל על כבודו –
כבודו מחול,
נשיא שמחל על כבודו –
אין כבודו מחול.

Even according to the side of the argument that holds that if a *nasi* forgoes *kavod* -
others may treat him without the *kavod* due a *nasi*,
if a *melekh* forgoes *kavod* -
others may not treat him without the *kavod* due a *melekh*..

The difference between the two versions of Rav Ashi is whether a position exists that holds that a *nasi* may effectively forgo *kavod*, and it follows that the *beraita* cited to attack the initial position must contain such a position. Here is the *beraita*:

מעשה ברבי אליעזר ורבי יהושע ורבי צדוק
שהיו מסובין בבית המשתה בנו של רבן גמליאל,
והיה רבן גמליאל עומד ומשקה עליהם.
נתן הכוס לר' אליעזר, ולא נטלו; נתנו לר' יהושע, וקיבלו.
אמר לו רבי אליעזר:
מה זה, יהושע, אנו יושבין ורבן גמליאל עומד ומשקה עלינו?!
אמר ליה:
מצינו גדול ממנו ששמש!
אברהם גדול הדור היה,
וכתוב בו "והוא עומד עליהם!"
ושמא תאמרו: כמלאכי השרת נדמו לו -
לא נדמו לו אלא לערביים,
ואנו לא יהא רבן גמליאל ברבי עומד ומשקה עלינו?!

אמר להם רבי צדוק:

עד מתי אתם מניחים כבודו של מקום ואתם עוסקים בכבוד הבריות!?
הקב"ה משיב רוחות ומעלה נשיאים ומוריד מטר ומצמיח אדמה,
ועורך שולחן לפני כל אחד ואחד,

ואנו לא יהא רבן גמליאל ברבי עומד ומשקה עלינו!?

A story of Rabbi Eliezer, Rabbi Yehoshua, and Rabbi Tzadok
who were reclining at the wedding feast of Rabban Gamliel's son
and Rabban Gamliel was standing over them serving drinks.

He gave the cup to Rabbi Eliezer, who did not take it; to Rabbi Yehoshua, who took it.

Rabbi Eliezer said to him:

What is this, Yehoshua – we sit, and Rabban Gamleil stands over us serving drinks!?

He replied:

We have found one greater than he who served!

Avraham Avinu was the Great Man of his generation

yet Scripture writes regarding him “He stood over them”!

And lest you say: They seemed to him to be angels –

No, they appeared to him to be itinerant merchants.

So why should we not sit while Rabban Gamliel stands over us serving drinks?!

Rabbi Tzadok said to them:

How long will you abandon the kavod of the Omnipresent and engage with human kavod?!

*The Holy Blessed One blows winds, raises clouds, drops rain, and causes the earth to sprout
and sets the table before each and every one*

So why should we not sit while Rabban Gamliel stands over us serving drinks?!

In the context of this sugya³⁵, the conversation between the rabbis is understood as purely legal. Rabbi Eliezer, by refusing the cup, enacts the position that the *nasi* Rabban Gamliel cannot effectively forgo his *kavod*, whereas Rabban Gamliel (by offering the cup), Rabbi Yehoshua (by accepting the cup), and Rabbi Tzadok (by defending Rabbi Yehoshua) enact the position that a *nasi* can effectively forgo his *kavod*.

³⁵ The story in its own terms should likely be understood very differently. Rabban Gamliel may offer the drink as a gesture that he fully expects must and will be turned down; Rabbi Yehoshua may respond defensively rather than halakhically; and Rabbi Tzadok may be trying to mediate rather than offer a formal defense of Rabbi Yehoshua. In my play about the relationship among these rabbis, I assume that this interaction takes place soon after Rabban Gamliel's inauguration; that the choice of a young Rabban Gamliel was controversial, and seen as motivated by heredity rather than ability; and that Rabbi Yehoshua may not have understood that Rabban Gamliel was making a gesture, perhaps because he generally moved in less genteel social circles outside the beit midrash. But even without narrative assumptions, one might argue that the rabbis disputed whether it was a violation of *kavod* to accept drinks, rather than about whether a *nasiv* can effectively forgo *kavod*.

Rabbi Yehoshua's argument rests on an analogy between Avraham Avinu and Rabban Gamliel. In formal terms, he argues that if a *gadol hador* can effectively forgo his honor, so too can a *nasi* (and see also Genesis 23:6, where Avraham is called *nasi*). Rabbi Tzadok's argument, however, rests on an analogy between Hashem and Rabban Gamliel, and this analogy is obviously flawed in many ways. For example – human beings cannot eat without accepting His service. Would Rabbi Eliezer refuse a drink from Rabban Gamliel even at the cost of dying of thirst?

Rabbi Tzadok's argument also leads in a direction that our sugya cannot abide. The same analogy can presumably be made between Hashem and kings; if Hashem can effectively forgo his honor, so too can kings. But this contradicts the revised version of Rav Ashi, which asserts that there is universal agreement that kings cannot effectively forgo their honor!?

Maharsha, Arukh Laner, and Rav Ovadiah Yosef – I assume many others as well – all offer rationales as to why Hashem's capacity to forgive His honor does not demonstrate that a king can do so as well. In other words, they each break the analogy between Divine and human. But these arguments, however correct on their own terms, cannot explain our sugya, because our sugya depends on that analogy holding with regard to the *nasi*! Saying that the honor of a *nasi* differs from the honor of a king is no help, as the issue with regard to a *nasi* is precisely whether he is legally comparable to a king, and therefore Rabbi Tzadok's argument cannot effectively distinguish between them. It is quite odd to find a Rabbi claiming that G-d is not comparable to a *melekh*, despite all the references to Him as *melekh* in our liturgy, and yet that He **is** comparable to a lesser official.

An anomaly within the *beraita*, quite apart from its role in our *sugya*, is that Rabbi Tzadok presents himself as critiquing **both** Rabbi Eliezer and Rabbi Yehoshua for prioritizing human *kavod* over Divine *kavod*, even though the substance of his argument supports Rabbi Yehoshua's conclusion. He must therefore be critiquing Rabbi Yehoshua's argument, not his action. What is the critique?

I suggest that Rabbi Tzadok feels that all discussions of *kavod* must take place in the realization that human beings have *kavod* only insofar as the analogy to the Divine holds; as the Rav argues in *Lonely Man of Faith*, all human dignity is a product of Chapter One of Genesis, where human beings are created *b'tzelem Elokim*. To insist on one's *kavod* is to insist on the analogy; to forgo one's *kavod* is to recognize its weakness, which the Rav there sees as the fundamental stance of Adam in Chapters 2 and 3.

Rabbi Tzadok correctly intuits that Rabbi Yehoshua is arguing less for Rabban Gamliel's right to forgo his *kavod*, and more for his own right to be treated by Rabban Gamliel as an equal. If Avraham Avinu served mere itinerant merchants, surely Rabban Gamliel can serve us!? In *Mekhilta* and *Sifra's* version

of the story Rabbi Yehoshua makes the *kal vachomer* explicitly: If Avraham served apparent idolaters, surely Rabban Gamliel can serve us, who are engaged intensely in Torah!?

Rabbi Tzadok recognizes that that all dignity distinctions among human beings are artificial, and therefore arguing from Divine to human is never logically compelling, and a demand for unequal *kavod* can never survive philosophical scrutiny. But it is not only Rabbi Eliezer who erroneously assumes that the *nasi* has an inherent *kavod* rather than one created by specific social constructions; by arguing that if Avraham could forgo his *kavod*, so too Rabban Gamliel, Rabbi Yehoshua makes the same error.

Ultimately, *kavod* beyond the generic *kavod* due every human being can safely be demanded only by those who are fully conscious that they do not deserve it.

Truth and Reconciliation

Yosef was not a Modern Orthodox Jew, or at least not the kind of Modern Orthodox Jew I aspire to be. He lived a bifurcated rather than an integrated life, with different names for different environments, and constantly (at best) balancing his own values against the interests of his masters.

Those were the good times. When the brothers show up in Egypt, Yosef faces the harder challenge of dual loyalties. Now he has to balance not only values against interests, but interests against interests. His testing of his brothers may be an understandable expression of his hope that they are not worthy of deep loyalty, and therefore unlikely to force him into hard and deeply uncomfortable positions. A similar dynamic may explain some aspects of American Jews' relationship with the State of Israel.

Yehudah's task in the monologue that opens Parashat VaYigash is to bring Yosef to the point where he is willing to confront that challenge. Bereishis Rabbah 93:4 offers two powerful, beautiful, and complementary metaphors to explain how Yehudah accomplishes this.

A. Scripture writes (Proverbs 20): "Deep waters are the *eitza* (considerations) in the heart of man, but a man of *tevunah* (depth wisdom) can draw it up" –

This can be compared to a deep well of cool water, with its waters cool and clear, from which no one could drink. A man came and tied rope to rope and string to string and thread to thread, drew water up from it, and drank.

Then everyone began to draw and drink.

So too – Yehudah did not leave off responding to Yosef, matter after matter, until he was "omeid al libo".

B. Scripture writes (Proverbs 25) "Golden apples in silver filigree – a word spoken *al ofanav*" –

Just as a wheel (*ofan*) shows a face in all directions, so too the words of Yosef were *nir'im lekhol tzad* when he spoke with Yosef.

The first metaphor – which the rabbis elsewhere use reflexively, to describe the role of metaphors in teaching philosophy – teaches that Yehudah's words must be read as psychologically sequential, as leading Yosef step-by-step through the emotional stages that will enable him to acknowledge his family.

The second metaphor – here I will be reflexive – can itself be understood in multiple ways.

One meaning, offered by R. Chiyya bar Abba (B.R. 93:6), is that Yehudah conveyed different emotional content to different audiences simultaneously.

א"ר חייא בר אבא:

כל הדברים שאת קורא שדיבר יהודה ליוסף בפני אחיו עד שאת מגיע "ולא יכול יוסף להתאפק",
היה בהם פיוס ליוסף, ופיוס לאחיו, ופיוס לבנימין:

Said R. Chiyya bar Abba:

All the words you read that Yehudah spoke to Yosef before his brothers up until "Yosef could not etc." included appeasement toward Yosef, toward his brothers, and toward Binyamin:

פיוס ליוסף,

לומר ראו היך הוא נותן נפשו על בניה של רחל,

פיוס לאחיו,

לומר ראו היאך הוא נותן נפשו על אחיו,

פיוס לבנימין,

אמר לו כשם שנתתי נפשי עליך, כך אני נותן נפשי על אחיך,

toward Yosef:

See how I offer by life for a son of Rachel;

toward his brothers:

see how he offers his life for his brothers;

toward Binyamin:

just as I offer my life for you, so too I (?would?) offer my life for your brother(s?)

A second meaning, offered by Rashi, is that Yehudah conveyed a range of possible meanings *to Yosef* simultaneously.

דבר באזני אדני - יכנסו דברי באזניך:

ואל יחר אפך - מכאן אתה למד שדבר אליו קשות:

כי כמוך כפרעה –

א.חשוב אתה בעיני כמלך.

זה פשוטו.

ב.ומדרשו:

סופך ללקות עליו בצרעת,

כמו שלקה פרעה על ידי זקנתי שרה על לילה אחת שעכבה.

ג.דבר אחר:

מה פרעה גוזר ואינו מקיים, מבטיח ואינו עושה, אף אתה כן –

וכי זו היא שימת עין שאמרת לשום עינך עליו?!

ד.דבר אחר:

"כי כמוך כפרעה" –

אם תקניטני, אהרוג אותך ואת אדוניך:

"A word in my master's ears" – may my words enter your ears

- “and let your wrath not flare”- from here you learn that he spoke harsh things to him
 “for you and Pharaoh are alike” –
- a. I regard you as equal to a king.
 This is its pshat.
 - b. But its midrash is:
 You will eventually be plagued with tzora’at over him,
 just as Pharaoh was plagued with tzora’at regarding his foremother Sarah for the one night he
 detained her
 - c. Another interpretation:
 Just as Pharaoh decrees but does not fulfill, promised but does not act, so too you –
 is this the ‘placing of eyes on’ that you intended when saying ‘I will place my eyes on him’?
 - d. Another interpretation:
 “For you and Pharaoh are alike” –
 if you antagonize me, I will kill you and your master

Each of these are necessary tactics. Yehudah cannot himself expose Yosef, lest Yosef respond defensively and seek to demonstrate his Egyptian loyalty by rejecting his brothers. Nor can he risk having the rest of the brothers abandon Binyamin – and thereby let Yosef justify abandoning all of them – or even worse, having Binyamin turn on the brothers.

At the same time, Yehudah has to give Yosef a motive for changing. Yosef has known all along who the brothers are, and not dropped the charade that they are strangers, so Yehudah has to find the right combination of carrots and sticks to enable Yosef to find the courage to expose himself.

What encourages Yehudah, I suggest, is that Yosef has already exposed himself to at least one Egyptian. Somebody had to plant the cup in Binyamin’s bag (as Bekhor Shor notes, with Ramban following in his wake), and that someone both makes Yosef vulnerable and demonstrates that at least in part he wants that vulnerability.

The art of moral politics, and the aim of moral political rhetoric, is often to get people to act in accordance with what they already believe but cannot find the courage to act on. Sometimes that requires jettisoning an alluring but deceptive complexity for the sake of moral clarity – this was the teshuvah-process of Yehudah, and his hardwon clarity enables him to bring all his powers to bear on the task of winning over Yosef. Sometimes, as for Yosef here, it requires facing complexity at the expense of an alluring but disingenuous clarity.

Modern Orthodoxy in America faces both these challenges; may we, as we read Yehudah's words and Yosef's reaction, be inspired to meet both with courage and integrity.

Avram, Abravanel and the Knightly Virtues

Among the challenges and joys of studying rishonim on chumash are the times when their interpretations obviously emerge from a cultural context radically different than ours, and we must decide whether to acknowledge the gap, to bring them to us through a bridging interpretation/cultural translation, or to cross over to them via a willing suspension of cultural assumptions.

Abravanel, because he thinks monarchy is halakhically optional and because his questions are more known than his answers, is often thought of as “more modern” than other classical commentators. But Ben Zion Netanyahu’s biography radically undermines that impression, even with regard to the specific example of monarchy, and I want to argue that Avram’s immersion in courtier culture – even when he bitterly catalogues its flaws – actually makes him more distant than most from contemporary America Jews.

Let us study how he understands the aftermath of Avraham’s war to rescue Lot, and then consider whether to bridge, and if yes, which direction(s) traffic should move in.

Genesis 15:1 quotes a three-part message of G-d to Avram:

אל תירא אברם

אנכי מגן לך

שכרך הרבה מאד:

Do not fear, Avram

I (G-d) am your shield

Your reward is very much

The relationship between the parts is not stated, so that plausible disambiguating translations include

1. Do not fear, Avram, because I am your shield and your reward is very much
2. Do not fear, Avram: I am your shield, and your reward is very much
3. Do not fear, Avram, because I am your shield. Also, your reward is very much.

Abravanel seems to adopt the last version. He argues that Avram had two concerns following the war: that the defeated kings would regroup and attack him, and that it would have been better to keep the property of Sodom rather than returning it to its king. His description of Avram’s fear is noteworthy both for its poetic force and for its apparent willingness to separate the pride/shame axis from the right/wrong axis.

Here is his psychological description of Avram:

Avram . . . had until now travelled through life naively and with utter security, working his land untroubled by any nemesis or animosity and sleeping “the sweet sleep of the laborer”, . . . now he would of necessity be in constant fear each day and night, “sixty warriors surrounding” him “each grasping

their sword out of fear” of enemies - this is doubtless a painful duration, especially for a man who has not been accustomed to that lifestyle - and the contingency of his life would constantly be evident to him.

In other words, Avram was afraid that he had entered politics. G-d therefore assures him that He would send angels to guard him, so that he would not need to live within Secret Service protection and with constant vigilance.

Note that Abravanel – unlike many previous and subsequent Rabbinic commentators – does not think Avram was in any way morally troubled by his own actions during the war, and therefore his Avram does not worry about punishment. According to Ibn Ezra et al, G-d reassures Avram that he will be rewarded rather than punished for arousing himself to rescue the oppressed from their oppressors, that he has “cleared the brambles from the vineyard” and not killed innocents. For Abravanel, Avram’s concern is that those who rescue innocents are generally compelled thereafter to continue playing the chivalric part, and he has not been socially prepared to handle the stress of that role. Avram is not worried about being killed; he is worried about the lifestyle necessary to avoid being killed.

Because Abravanel’s Avram does not need *moral* reassurance, his Divine Word does not need to contrast Avram with those he fought against. This yields the to-my-mind amazing result that Abravanel thinks the defeated kings would be justified in seeking to kill Avram:

יראה שאברהם,
אחרי שנצח המלכים והחזיר את הרכוש למלך סדום,
היה ירא ממה שעשה נגד המלכים
פן יבואו עליו ויכוהו –
כי הנקמה ראויה לגדולי הנפש . . .
It appears that Avraham,
after he defeated the kings and returned the property to the King of Sodom,
was afraid because of what he had done to the kings,
lest they come against him and strike him –
because vengeance is appropriate for the great-souled . . .

In a dvar Torah some years ago, I discussed Abravanel’s reading of Parshat Zakhor as intended to maintain the appropriate passion of revenge among the Jews against any notion of moral equivalence that might arise during a historical cycle of violence. As a reader of Gerald Morris’ Arthur series, my instinctive reaction to the knightly code is heavily colored by satiric condescension. But Abravanel’s reading, as perhaps no other, accounts for the fact that Avram fights on the side of the kings whose cultures will shortly be described as so evil that G-d wipes them out utterly. Perhaps it is worth exploring Aristotle on great-souledness, and reading Mallory straightforwardly.

Abravanel's willingness to endorse knightly virtue as a value per se, rather than as a means to moral ends, emerges as well in his explanation of G-d's response to Avram's second concern. Avram is worried that he has enabled evil; G-d's response is that it is inappropriate for one who receives a reward from a great king to receive a small reward from someone else, because this is a shame for him; I'm not sure whether the shame attaches to the receiver, or the giver; more likely the latter. Either way, the response to Avram's pragmatic, consequentialist worry is that concerns of social honor are more important.

Here sympathizing with Abravanel is a bridge too far for me – I do not wish to understand either Avram or G-d as endorsing such a values hierarchy. At the same time, I acknowledge that Abravanel solves a serious issue – doesn't Avram know that "one should not serve the master for the sake of receiving a reward"? Why then, does G-d need to reassure him that "his reward is very much"? Abravanel answers that the size of the reward is mentioned *to explain why* Avram's actions were correct.

However, Abravanel does not explain well the transition to the next verse, in which Avram seems to question the meaningfulness of the reward in light of his childlessness.

I welcome alternative explanations of G-d's answer that leave Avram acting *lishmoh* while explaining the flow of the conversation.

אברבנאל בראשית פרק טו

אחר הדברים האלה היה דבר ה' אל אברם במחזה לאמר אל תירא אברם אנכי מגן לך שכרך הרבה מאד. יראה שאברהם, אחרי שנצח המלכים והחזיר את הרכוש למלך סדום, היה ירא ממה שעשה נגד המלכים פן יבואו עליו ויכוהו - **כי הנקמה ראויה לגדולי הנפש** - וחשב אברם שהיה עד עתה הולך בתום ילך בטח עובד אדמתו אין שטן ואין פגע רע ומתוקה שנת העובד, ושעתה יצטרך להיות בפחד תמיד כל היום וכל הלילה ששים גבורים סביב לו כלם אחוזי חרב מפחד אויב, וזה בלא ספק עמל מכאיב, אף כי לאיש אשר לא נוסה ללכת באלה ויהיו תמיד חיי תלויים מנגד.

וגם נסתפק אם היטיב בהחזירו את הרכוש למלך סדום בהיות הוא ואנשיו רעים וחטאים לה' מאד, ואולי היה יותר טוב להביא את הרכוש אל ביתו ולתתו לאכול את השומרים את ראשו. הנה בעבור היות שתי המחשבות האלה בלבו של אברהם אמר לו ית': אם לראשונה - אל תירא אברם אנכי מגן לך,

ר"ל שלא יירא מהמלכים ולא מהמונם כי הוא ית' יהיה לו מגן להושיע ולא יצטרך לגבורים שישמרוהו, כי מלאכיו יצוה לו, והוא יהיה תמיד מגן אברהם.

ואמנם לענין הרכוש שהחזיר - אמר שכרך הרבה מאד, כלומר הטיבות במה שהשיבות את הרכוש אל מלך סדום, כי הנה שכרך הרבה מאד הלא הוא כמוס עמדי

חתום באוצרותי, והמקבל פרס ממלך גדול אין ראוי שיקבל דבר מועט מאדם אחר, כי חרפה היא לו.

It appears that Avraham, after he defeated the kings and returned the property to the King of Sodom, was afraid because of what he had done to the kings, lest they come against him and strike him – **because vengeance is appropriate for the great-souled** – and Avram, who had until now travelled through life naively and with utter security, working his land untroubled by any nemesis or animosity and sleeping “the sweet sleep of the laborer”, though that now he would of necessity be in constant fear each day and night, “sixty warriors surrounding” him “each grasping their sword out of fear” of enemies” - this is doubtless a painful durance, especially for a man who has not been accustomed to that lifestyle - and the contingency of his life would constantly be evident to him.

He was also in doubt as to whether he had done well by returning the property to the King of Sodom, seeing as he (King of Sodom) and his minions were evil and great sinners against G-d, so that perhaps it would have been better to bring the property to his (Avram's) own house and use it to feed those who guarded his (Avram's) head.

Because these two thoughts were in Avram's heart. The Blessed said to him:

Regarding the first – “Do not be afraid, Avram, I am your shield”,

meaning that Avram should not be afraid of the kings or of their multitudes, because He the Blessed would be a shield for him to save him, and Avram would not need warriors to guard him, “because Hashem would command His angels regarding him”, and he would constantly be the Shield of Avraham.

And regarding the property that he returned – Hashem said “your reward is very great”,

which means to say that you have done well in returning the property to the King of Sodom, because your reward is very great “behold it is concealed with Me sealed in My vaults”, and it is inappropriate for one who receives a reward from a great king to receive a small reward from someone else, because this is a shame for him.

Purim, Anti-Anti-Semitism, and Modern Orthodoxy

³⁶Megillat Esther opens with a massive all-male drinking party at King Achashverosh's palace, then cuts to an all-female drinking party at the queen's palace. Disaster strikes when the king demands that Queen Vashti switch parties* while "wearing the crown of royalty, so as to show the nations and the officers her beauty". The midrashic suggestion that she was ordered to come wearing *only* the crown captures the atmosphere of the verse perfectly, although the specific facts necessary to create that atmosphere may well be culturally dependent.

Vashti refuses, and the king (at least) banishes her and removes her queenship. It's not clear whether we are supposed to sympathize with her, ignore her, or celebrate her downfall.

A key question is whether Achashverosh's demand of Vashti is a breach of Persian morals or not. If it is, it generates a total social breakdown, as all the virgins in Persia are now put on display for the king, and all the women are put on notice that they may not refuse any of their husbands' requests. Ironically, it is precisely this breakdown that enables the reversal of fortune at the megillah's end – Esther invites the king and Haman, both males, to drinking parties, and Haman's fate is sealed when the king reasonably suspects that such drinking parties lead to debauchery.

Now how do the Jews relate to all this? The midrash reasonably assumes that they participate in the party, and there is no hint in the text of Jewish objections to the chauvinist decree or the taking of the virgins. To all accounts they participate כדף*, in accordance with the law – a term which appears in 1:8 (describing the drinking), in 1:15 (regarding Vashti's fate), and in 2:8 and 2:12 (regarding the collection and preparation of the virgins, described as "in accordance with the דף of women").

But Haman does not see it that way. The Jews, he declares in 3:8, have different דפים than any other nation, and they do not follow the דפים of the king. Is he right? Or is this an anti-Semitic projection? Regardless, in 3:15 the king's דף becomes that the Jews are to be exterminated.

The truth is that one Jew – Mordechai – refuses to obey one order of the king – bowing down to Haman. I suggested to Rabbi Silber that Mordechai sees Haman as ambitious and a threat to the king, whose life Mordechai has already saved. ונהפוך הוא - Mordechai's loyalty ironically exposes him to the charge of being a Vashti. At the same time, we learn that Haman may be somewhat hen-pecked, despite the king's banishment of Vashti and its aftermath.

³⁶ I had the pleasure of listening as Rabbi David Silber taught Megillat Esther to one of my tenth grade classes, and thought that several of his ideas deserved to be passed on. So this dvar Torah is admittedly derivative, although of course I take full responsibility for any errors. I have asterisked points I recall specifically from Rabbi Silber.

In 4:16, the plot turns when Esther agrees to approach Achashverosh **לא כדת**, after protesting that all the people of all the nations know better. In other words, she makes Haman's charge true – her **דת** is not the king's, and different from those of all other nations. In 8:13 the king overwrites his **דת** of extermination, and in 9:13 we learn that the new Jewish **דת** involves hanging the ten sons of Haman.

Is that all there is to Persian Judaism – does **ונהפוך הוא** (see 9:1) change only who's on top and who on bottom, but not the nature of society?

As of 8:17, that seems to be the case – the Jewish reaction to victory is – a drinking party!* in which they are apparently joined by many others, who are now afraid of them. In other words, they have become Achashverosh.

But in 9:19, a new feature (mitzvah – **דת?**) is added to the day – now in addition to the drinking, there must also be **משלוח מנות**, some recognition of community. In 9:22, we learn of a radically new **דת** – **מתנות לאביונים**, gifts to the poor.*

Until 9:22, the Megillah is a court farce, and one might be forgiven for thinking that the entire plot relates only to the wealthy elite –perhaps the extermination plan seemed total to them because they simply didn't consider the poor. But over time, the Jews – perhaps prodded by Mordechai and Esther – recognize that this episode should cause them to question the whole moral structure of Persian society, and so their **דתות** in fact become different than those of other nations.*

Most specifically, the Jews become the antithesis of Amalek, which attacks specifically the weak.* We reject the evolutionary imperative and preserve those who cannot protect themselves.

The challenge of Rabbi Silber's reading is that it makes anti-Semitism the spur of Jewish morality. We are blessed to live in a society in which caring for the less fortunate or less able is an almost universally agreed upon **דת**, although we disagree strongly about how best to accomplish that. But there are other areas in which there is profound pressure to fall into step with the immoral moral expectations – the **דתיים** – of the society that surrounds us.

This is especially true of Modern Orthodoxy. I confess that the first chapter of the Megillah always puts me in mind of a group of male Orthodox college students I once knew who would drink themselves into oblivion each Friday night, but tried hard to send the female students home (to their own parties?) before they completely lost control.

Nonetheless, I don't think that self-ghettoization is effective, and it has its own corruptions. The yetzer hora/evil inclination finds its way through cracks in the walls, and is all the more effective when unrecognized.

But openness to influence must be balanced with a firm sense of identity and moral self-confidence – we must be willing to be out of step, even if that causes us to pay a heavy social price – even if we are no longer invited to the parties, or lose influence in political parties. “Everyone thinks that” is no more an excuse for us than it was for Esther.

Inspiring Reverence is Worth the Risk of Inspiring Worship

Genesis 23:6

שמענו אדני

נשיא א-להים אתה בתוכנו

במבחר קברינו

קבר את מתך

איש ממנו

את קברו לא יכלה ממך

מקבר מתך:

Heed us, my lord:

Nesi Elo?im you are in our midst;
in the choicest of our burial plots –

bury your dead

Any man from among us
will not withhold his burial plot from you
from burying your dead.

How should Jews manage their image in the non-Jewish world?

The word alef lamed hey yud mem/*elo?im* in Biblical Hebrew has at least five meanings: powerful, judge, angel, god, and G-d. The Halakhic difference between the last meaning and the first four is between *kodesh* and *chol*, i.e. whether the word must be treated as an unerasable Name etc.

Like most legal categorizations, this one can fail to account for the full complexity of a specific case. For example, how does one categorize usages that are intended to be initially misunderstood, or deliberately ambiguous, or deliberately multivalent? (See in this regard for example Tehillim 82, and Moreh Nevukhim 1:2.)

Chazal categorize our verse both ways. According to *Masekhet Soferim* 4, “*nesi Elo?im* is *kodesh*”, and the meaning presumably is that Avraham represents G-d in the midst of the Hittites – he is the *nesi* of Elokim. *Bereshit Rabbah* 42, however, reads *nesi and elo?im* as sequential hyperbolic descriptions of Avraham – “You are a prince! (No,) a god! in our midst”. In that reading *elo?im* is clearly *chol*.

It seems to me that in *Soferim*'s reading Avraham has perfectly managed his image, so that he becomes the cause of pagans mentioning G-d with reverence. He has been *mekadesh shem shomayim*. But in

Midrash Rabbah's version, something is awry – Avraham has become an object of *avodah zarah*, a living idol! Recall that Rambam's theory is that idolatry originates when people mistake the agent/representative for the master/represented.

Mishnat Rabbi Eliezer praises Avraham for bowing to the Hittites and thereby displaying humility even as they sought to crown him. Yet readers of Shakespeare cannot help hearing in the back of their minds: "Did this in Avraham seem ambitious"? Gestures of humility are often politically beneficial. Perhaps Avraham saw at least the potential for idolatry, and thought bowing to them would prevent this, but humility as well can seem a Divine attribute – גדול ענותנותו של הקב"ה.

So is it ever possible to be revered without risking idolatry? But do we really wish Avraham had acted in a manner less likely to inspire reverence?

Or Hachayyim points out yet another minefield. Were the Hittites expressing

- a) their admiration for Avraham, or rather
- b) their pragmatic recognition that he had the power to take what we wanted?

The second reading carries with it the implicit threat that Sarah will be disinterred, and her burial plot reclaimed, the moment Avraham's power dissipates. Avraham needs to know that they are sincere in their flattery – but if he is genuinely more powerful than they are, how can he ever know?

Or HaChayyim has a textual answer, but for me, this is the challenge Satan poses to G-d in Sefer Iyov, and the bitterly ironic answer is that the powerful can become certain they are loved only by behaving in a manner undeserving of love. And yet – choosing powerlessness is rarely a moral good. At the very least it is an almost inevitable violation of "Do not place a stumbling block before the blind".

The bottom line is that one cannot control the way others react to their perception of you, and there is no formula for knowing when their stated perceptions of you are sincere. But we can act in ways more likely to create positive perceptions, and more likely to encourage sincerity without abdicating responsibility. Authentic behavior that inspires reverence is worth the risk of inspiring worship, and acting so as to deserve love is worth the risk of being deceived.

WHAT IS THE PURPOSE OF THEOLOGY (Part 1)

Some time has now passed since Rabbi Zev Farber's online articles provoked a heated public discussion about Orthodoxy and Higher Biblical Criticism, and perhaps it is now possible to address the issue with more dispassion than previously.

Rabbi Farber raised two sorts of issues, which I think are best separated:

- 1) Is the position standard in universities today, that the Torah was composed by multiple human authors, more in line with the evidence than the position standard in contemporary Orthodox Judaism, that the Torah was composed by a single Divine author?

Or more strongly –

Is the position standard in universities today *so much* more in line with the evidence than the position standard in contemporary Orthodoxy, that only profound faith can justify continued belief in the Orthodox position?

- 2) Should it be possible to reject the standard Orthodox position in favor of the standard university position and yet remain a member in good standing of the Orthodox community?

I have articulated elsewhere³⁷ some of my reasons for answering the first question in the negative, and Rabbi Farber's specific arguments did not move or trouble me.

But while I am fully comfortable maintaining the standard Orthodox position, I acknowledge that a significant number of identified Orthodox Jews, including dedicated Torah scholars of great halakhic punctiliousness, disagree with me. Furthermore, even if I find Rabbi Farber's specific arguments very weak, I acknowledge that a reasonable person could find reasonable grounds for reaching his conclusion.

Now it is possible to argue that people are responsible for beliefs in the same way that they are responsible for actions, so that a person's failure to maintain Orthodox standards of belief should elicit no more sympathy than his or her failure to maintain Orthodox standards of behavior. Alternatively, one can argue in the Maimonidean tradition that intellectual error must reflect a character flaw, so that Jews who reach unacceptable intellectual conclusions are obligated to engage in self-analysis until they change their minds, and culpable for failing to do so. Or one can argue in the vein of Rav Elchanan Wasserman that an intellectual error with regard to religion must reflect a specific concession to desire. Finally, we can separate status from responsibility; a *nebbikh apikoros* (=pitiable heretic) is nonetheless an *apikoros*, as the yeshivish saying has it.

³⁷ http://www.torahleadership.org/categories/who_wrote_the_torah_6.doc

I prefer to argue differently. Maharatz Chajes in Mishpat HaHora'ah asserts that the proper role of a rabbi is to justify rather than condemn the idiosyncratic customs of a generally observant community, even if that requires relying halakhically on a forced interpretation of a minority position. This likely reflects an underlying assumption that the rabbinic default position should be in favor of including the generally observant within the Orthodox community rather than excluding them. I may not be willing to go quite so far as Maharatz Chajes with regard to idiosyncratic practice, but I think that his approach is generally correct with regard to idiosyncratic beliefs as well.

R. Nati Helfgot published on Morethodoxy just such a response to R. Farber's initial summary presentation. R. Helfgot sought to portray R. Farber's position as a tenable extension of a variety of positions held by various rishonim (=medieval Jewish authorities) regarding the last eight verses of the Torah et al. My sense, however, is that R. Helfgot's attempt was superseded by events, namely Rabbi Farber's subsequent full-length presentation of his position. This made clear that R. Farber's position relates to all of Torah, and in other ways diverges so radically from all proposed precedents that any such attempt will fail.

There are ways of formulating acceptance of Higher Criticism that are not as obviously discontinuous with the Orthodox theological past, and perhaps we will return to those later. But for now I want to pose and face the challenge directly: Is precedent the only way to justify including those of nonstandard belief within Orthodoxy?

If one believes that hashkafah can and should be paskened in the same way as halakhah, perhaps this question is a nonstarter. But my sense is that this is not the case, although I am quick to add that this does not mean that it cannot ever be paskened.

Here an excursus on the nature and purpose of theological requirements is necessary.

For Rambam, truth is its own justification, and the goal of human existence is to know as many and as important truths as possible. Thus it is necessary to believe things that are in fact true, and to reject things that are in fact false, and to distinguish rigorously between the known truths, i.e. the demonstrable, and the believed truths, which are the product of opinion.

Now Rambam runs into a paradox. On the one hand, he defines G-d as utterly unknowable, to the point that all linguistic statements about G-d bear no relationship to the same statements as made about human beings. On the other hand, he sets true knowledge of G-d as the telos of human existence. I find the critiques of this position by Ralbag and others logically compelling, although that does not at all mean that I reject the position.

In the post-Kantian world, we have an additional problem with Rambam. We have lost confidence in a necessary relationship between logical demonstration and actual truth, since Kant demonstrated to our satisfaction that our evaluation of such demonstrations is necessarily bound by ineluctable human categories of thought. We therefore have philosophic difficulty accepting the idea that there is intrinsic value in believing a given set of propositions about anything, let alone G-d, simply because those propositions are important truths, as we do not know of any way to demonstrate that those propositions are true.

Rabbi Norman Lamm in his important essay “Faith and Doubt” distinguishes (as best I recall) between “cognitive” and “affective” belief. He argues that Judaism requires “faith” only in the sense that one *acts* as if particular propositions are unquestionably true, whereas – following Rav Saadia Gaon and Descartes - the very act of considering whether something is true involves doubting its truth.

It follows from Rabbi Lamm that beliefs are important *because they generate action*. It follows further that, if divergent beliefs generated identical actions, Judaism would not be motivated to choose among such beliefs on truth grounds.

If we accept this approach, it would no longer be necessary or preferable to evaluate theological positions in terms of their correspondence with past beliefs, but rather in terms of their capacity to generate actions that correspond with actions valorized by Torah. So for example: If it could be demonstrated under practical reason that belief in multiple human authorship enhanced halakhic observance, or led to increased performance of actions “straight and good in the eyes of Hashem”, there might even be a religious interest in fostering such belief. (I anticipate addressing in a subsequent section whether or to what extent such a claim might be credible today.)

This raises the question: How do beliefs generate actions?³⁸

I think they do so in two distinct ways:

A. Deductively -

People reason that it would be a contradiction, and therefore a violation of integrity, to believe X and yet behave Y.

For example: If I believe that G-d commanded Jews not to eat pork, and that I am a Jew, and that I ought to obey G-d’s commands, it would be a violation of integrity for me to eat pork.

³⁸ I am aware that one could deny the premise of the question, and argue that actions generate beliefs rather than vice versa – אחרֵי המעשים נמשכים הלבבות. One might claim that beliefs are simply epiphenomena. But I think such positions, while intellectually entertaining, raise their own theological challenges – for example, they tend to correlate strongly with deterministic beliefs – and as such are beyond the scope of this article.

B. Sociologically –

People identify with a social group on the basis of the shared belief X, and therefore conform their behaviors to the norm Y associated with that group.

For example: If I believe that G-d commanded Jews not to eat pork, and in the social circles of Jews who believe that G-d commanded Jews not to eat pork, it is also standard to avoid carrying umbrellas on Shabbat – therefore I conform and avoid carrying umbrellas on Shabbat, even though I am nowhere near as convinced that G-d commanded Jews not to carry umbrellas on Shabbat.

Or to combine the two ways:

People identify with a social group on the basis of the shared belief X, and therefore also adopt the belief Y associated with that group, and reason that it would be a violation of integrity to believe Y and yet behave Z.

For example: If I believe that G-d commanded Jews not to eat pork, and in the social circles of Jews who believe that G-d commanded Jews not to eat pork, it is also standard to believe that G-d commanded Jews not to carry umbrellas on Shabbat - therefore I conform and believe that G-d commanded Jews not to carry umbrellas on Shabbat, and therefore I see it as a violation of integrity to carry an umbrella on Shabbat.

Now there has been much discussion about the proper way to identify *ikkarei emunah* (=root principles of faith).

R. Yosef Albo suggested that they should be the premises from which the rest of the system is deducible. It is not clear how Albo would relate to someone who stubbornly makes a logical error and believes that the system can survive without a particular premise. For example, I might believe that the notion of *mitzvah* is only comprehensible if we presume that human choices have genuine capacity to affect events in the physical world, but R. Tzadok HaKohen of Lublin likely disagreed – must I therefore consider him a heretic?

Rambam seems to identify his list as those necessary for entrance to the World to Come, but this begs the question – how can we know which beliefs are necessary for that purpose?

I suggest that following Rabbi Lamm's argument we can argue that the critical Jewish beliefs – the *ikkarei emunah* – are those which will either

- a. cause people to experience acting in Jewishly illegitimate fashion as a direct or indirect violation of their integrity, or
- b. cause people to identify socially with a group whose norm is to act exclusively in Jewishly legitimate fashion.

Using these criteria, it is theoretically possible to evaluate genuinely original and creative theologies on the grounds of their consequences, even if they do not conform to precedent. We can specifically address the acceptability of particular theologies that accept the position that the Torah was composed by multiple human authors. Our questions will be:

- a) Will those who internalize this theology experience counter-Torah actions as violations of their integrity?
- b) Will those who internalize this theology identify with the Jewish group or groups whose norm-in-action is conformity with Torah?

Here we should ask a logically prior question – why should belief in unified Divine authorship matter?

I think Rambam's first answer would be that ultimately every human being is responsible for his or her own actions. Halakhah does not accept the Nuremberg defense that "I was just following orders" - אין שליח לדבר עבירה. But – this is true only with regard to orders that human beings arrive at themselves from first principles. Human beings *can* legitimately defend themselves on the ground that they were following Divine orders. The authority of Torah therefore requires the claim that it contains a set of unmediated and fully consistent Divine laws. Once we allow a human element into the text, it cannot legitimately override a later human's conscience – who says your soul is purer than mine? Perhaps I understand G-d better than you do!

In other words – without the belief in unified Divine authorship, why should anyone follow the Torah when it diverges from our legal, ethical, and moral intuition?

I think Rambam's second answer would be that Divine authorship is not enough – we need unique Divine authorship, so that no one can argue for counter-Torah action on the basis of their own Revelation. And certainly theologians of other religions have argued that conscience is a form of Revelation? To override such claims of conscience, we need specifically Mosaic authorship and the Biblical promise that his prophecy would ever remain unique, meaning for Rambam that Moshe alone was capable of accurately reducing Revelation to regulation.

I find this argument compelling.

However, I acknowledge the existence of people who are reliably observant of Orthodox Halahah, even when they have deep difficulties with a law, and even though they do not accept unified Divine authorship. Acknowledging their existence, I argued above, generates an obligation upon me to seek

limmudei zekhut (post-facto justifications) for them, or, if that is not possible, to develop intellectual structures that will give them “permission to believe” with integrity.³⁹

One closing note is necessary. What I have discussed those far are those who with reasonable comfort observe currently standard Orthodox Halakhah. There are others, however, who engage in nonstandard practices which they argue are consistent with Orthodox Halakhah, or who observe standard Orthodox Halakhah while advocating for fundamental changes. Each of these stances deserves sympathetic treatment when they are not linked to idiosyncratic theological stances. The combination of radical theology with radical halakhah, however, is *prima facie* a recipe for sectarianism, and thus in my humble opinion may not make as strong a claim on our generosity, although it certainly deserves to be evaluated with great integrity and rigor and, at least with regard to individual Jews who identify as Orthodox, a bias toward inclusion.

³⁹ The forthcoming second part of this essay will be devoted largely to that end.

GROUNDHOG DAY – MOVIE AND SERMON

(A version of this talk was delivered at Congregation Or Torah in Skokie)

Good Shabbos.

When Rabbi Engel called – I believe it was Tuesday - to ask whether I would give this derashah, I was honored, grateful – and more than a little bit nervous.

Why was I nervous?

First of all, I know that he's an excellent speaker, and so the bar is set very high for any substitute. Second, I generally give shiurim rather than derashot, so the genre is a challenge for me. So if you'll indulge me, I'll start by giving a minishiur –perhaps even a microshiur - on the difference between a shiur and a derashah.

What is the difference between a shiur and a derashah?

In a shiur, the speaker *presents* what he or she alleges is the *objectively correct* reading of a Torah text or set of Torah texts – *this is what these words mean*. The goal is the achievement of a truth that applies equally to every Jew, or depending on the topic, to every human being. A shiur strives to be *convincing*, and in no way depends on any relationship with the maggid shiur.

In a derashah, by contrast, the speaker *shares* a *subjectively powerful* reading of a Torah text or set of Torah texts – *this is what these words mean to me*. The goal is the presentation of a truth that applies to every Jew, or depending on the topic, to every human being, whose soul resonated to the same notes as the souls of the speaker. A derashah strives to be *compelling*, and it's success depends largely on the extent to which the listeners see themselves as in relationship with the *darshan*.

So to give a successful *derashah*, it is necessary for me first to introduce myself to you.

I am the son in-law of Ed and Ruth Reingold, whom this shul – this community – has taken into your hearts and cared for so well over the past fifteen years, through good times and bad. Rabbi Engel has been a remarkable mara d'atra and friend to them. So I stand before you, and in his place, as someone who feels an enormous sense of hakarat hatov, of gratitude. May you and he continue מחיל אל חיל.

So that's who I am. Now for the derashah.

Devarim 7:22 reads:

ונשל ה' א-להיך את הגוים האל מפניך מעט מעט
לא תוכל כלתם מהר
פן תרבה עליך חית השדה:

Hashem will pick off those nations from before you little by little
Lo tukhal to eliminate them rapidly
lest the beasts of the field become too numerous for you.

What does *lo tukhal* mean? The simplest literal translation is “You will not be able”, as seems certainly correct in Devarim 28:27 and Devarim 28:35.

But if that is the correct translation, why do we need the reason “lest the beasts of the field become too numerous for you”? Nobody says “You will not be able to outrun a cheetah, because you’ll be too tired afterward”!

Rashi therefore assumes that we should in fact be able to eliminate the Canaanites rapidly – after all, the verse begins by declaring G-d our ally, so rapid victory should certainly be within our grasp.

This raises a different question for him –

והלא אם עושין רצונו של מקום, אין מתיראין מן החיה,
שנאמר "וחית השדה השלמה לך"!!?

*But if they do the will of the Omnipresent, they need not fear the beasts,
as per Iyov 5:23: “and the beasts of the field will make peace with you”!?*

Rabbi El’azar ben Azaryah (Sifrei Ekev 50) answered Rashi’s question by saying that the Jews had already sinned, and were therefore unworthy of rapid victory. However, this answer is problematic because the first mention of the bit-by-bit decree is in Shmot 23:29-30, before the Golden Calf, which was the first major sin after Revelation!?

So Rashi radically alters the midrash, as follows:

אלא גלוי היה לפניו שעתידין לחטוא:

It was clear to Him that they would in the future sin.

The 13th century Ashkenazi commentator Rabbi Chaim Paltiel notes that this Rashi seems to contradict the principle that G-d judges us only for our present, not our future, sins - באשר הוא שם - the reason that G-d listens to the dying Yishmael’s cries in the desert regardless of His knowledge that he would

grow up to sin. R. Paltiel responds simply that here He had their good in mind, saving them from wild beasts – באשר הוא שם – is a one-way principle that only prevents advance punishment.

This does not seem to me a compelling explanation, so I want to leave Rashi for the moment בצריך עיון – still needing explanation.

Rabbi Yosef Bekhor Shor, one of the greatest of the *pashtanim*, notes that *lo tukhal* does not always mean “you will not be able”. Sometimes it means “You must not”, as in Devarim 16:5 and 22. But that seems an unlikely meaning in our context- why should rapid conquest have been forbidden? So Bekhro Shor concludes that the meaning of *lo tukhal* here is “You will not be able *because* you understand the consequences”, as in Genesis 42:22 and Ruth 4:6. So here, “You will not be able to conquer them rapidly, because you will be afraid lest the beasts of the field become too numerous for you”.

S

o now I have a question: Is it a good thing for a human being to be unable to act for fear of consequences?

I want to approach that question by analyzing what I consider to be one of the great mussar works of the 20th Century - the movie **Groundhog Day**, starring Bill Murray.

For those of you who have not seen it - Murray’s character starts out completely self-absorbed, incapable of factoring the needs, rights, or desires of other human beings into his decisions. He wakes up one morning to discover that it is yesterday all over again- nothing has changed except that he remembers going through yesterday. He is being given a second chance. And then he is given a third, and a fourth – an infinite series of do-overs. He tries everything – including suicide – until one day he finally gets it right - he understands love, and decides accordingly – and so his life returns to its normal temporal course.

The apparent moral of the movie is that every human being can be redeemed, but I wonder if that’s really what it means. Suppose Murray’s character makes a bad decision the next day – will he get yet more do-overs? Will his repentance, or his choices in general, be meaningful if he *knows* that he always gets as many do-overs as it takes?

Each of us, when we face a tough decision, know that it could have gone the other way, and that even if we made the correct choice this time, put us in the same situation again and there’s no guarantee we’ll

get it right. Put us in the same situation infinite times and we're guaranteed to get it right some times, and wrong other times. What makes a choice meaningful is that we **don't** get to make it infinite times.

This idea may give us insight into the first recorded human choice, to eat the Fruit of the Tree of Knowledge of Good and Evil. Seforno to Bereishis 2:9 writes that eating the Fruit gave human beings the capacity

לבחור הערב אף על פי שיזיק,
ולמאוס הבלתי ערב אף על פי שיועיל
*To choose the sweet even though it damages,
and to reject the not-sweet even though it is healthy.*

The problem is that the Snake told Chavah that eating the fruit would make them like G-d, and It seems that G-d confirms that this has happened - just before He exiles them. In what way does the capacity to choose dessert over broccoli make us more like G-d?

I suggest the following. One midrash translates “נעשה אדם” as a question: G-d asks a group of angels: “Should we create human beings?” Their answer is no – human beings will sin. How does G-d respond? He destroys them! Then He calls in a second group and asks them the same question – they give the same response, and he destroys them too! He then calls in a third group and asks the question again. Their response is “Truth does not seem to be the best policy here”, and so He creates humanity. (After the flood they come and say “We told You so!”)

The angels represent G-d's best interests – His sovereignty is unchallenged until human beings exist. His choice to create them nonetheless is a choice of the sweet over the healthy. And by acquiring the capacity to choose the unhealthy sweet, human beings become more like Him. When we are paralyzed by fear of consequences, we become less like Him.

Now this does not mean that we must choose ice cream over broccoli in order to imitate G-d. Not every choice of the sweet over the effective is G-dly. But the capacity to take risks for the sake of relationships is. When we learn Bill Murray's lesson, that relationship is worth sacrificing self-interest, or alternatively that developing genuine relationships is an ultimate self-interest, we imitate Him.

So G-d creates human beings, even though He knows that they will sin, so that He can relate to them.

And now back to our Rashi, which argues that His decision to slow the conquest was taken because He knew that we would sin.

Another medieval French *pashtan*, R. Yitzchak Kara, explains that having the capacity to choose carries the consequence of never completely fulfilling one's potential – there are always the other choices one could have made, and always the choices one has yet to make.

Given infinite time, though, we could, and would, make every possible choice – back to Groundhog Day. G-d's reaction to our acquiring the capacity to choose the unhealthy sweet is to make us mortal – not as punishment, but rather because mortality is necessary for our choices to be meaningful, for it to matter that we make *this* choice even though we could have made *that* choice – *that* choice will never become actualized, but *this* choice will.

Rashi on the first verse of Genesis writes that G-d initially thought of creating the world with pure justice, but saw that it could not survive, so He partnered mercy with justice and created. In other versions, G-d creates worlds with justice and then destroys them – our world is the first to survive. And *kb'yakhol* – as if it were possible to say, and with all necessary theological caveats – His goal in Creation is a universe in which choice is meaningful, i.e. in which there is mortality, and yet free-willed beings can survive.

So perhaps we can construct a middle ground between Rashi and his source midrash – perhaps G-d did not allow a rapid conquest of Israel because He knew that the Jews *could* and *might* sin, and He always constructs the world so that our choices are meaningful, and yet so that our choices lead to more choices.

May this community continue to use His blessing to develop the deepest and most profound of caring human relationships.

MERCY: A COST-BENEFIT ANALYSIS (“Drashah Nugget” for RIETS Rabbinic Alumni)

Key Sources: Rashi Bereshit 1:1, Menachot 29b, Michtav MeiEliyahu גר"כ

Description: Rashi cites a Midrash explaining why G-d is called Elokim in the first Chapter of Bereishis and Hashem Elokim in the second chapter. The answer is that G-d initially thought – *alah bemachshavah* - of creating the world purely with the attribute of justice, but He saw that it would not survive, and so He partnered mercy with justice and then created. But why is the inclusion of mercy *bediavad* – why wasn't mercy part of the original plan of Creation?

Menachot 29b has G-d showing Mosheh Rabbeinu the classroom of Rabbi Akiva. Mosheh is overwhelmed by Rabbi Akiva, wonders why G-d would give the Torah through him, and asks to see Rabbi Akiva's reward – and is shown Rabbi Akiva dying gruesomely. When he asks why, G-d tells him: “*Shtok! Kakh alah bemachshavah lefanai*”. How is this responsive?

Rav Dessler argues that the two “*alah bemachshavah*”s are connected – what G-d told Mosheh was that Rabbi Akiva had merited the opportunity to live in a world of pure din. He did not survive – as the world would not have. But just the opportunity was a reward.

Why was it a reward? In a world of mercy, some of our actions have consequences, and some do not. There is a loss of dignity when we are not held responsible for all of our actions, and the ultimate expression of kavod is accountability.

G-d keb'yakhol “realized” that human beings were not capable of living with complete accountability. We do not live in Rabbi Akiva's world of din, and we seek on the Yamim Noraim to arouse His Mercy k'b'yakhol over and above His Judgment. But we – individuals and community - should realize that being judged, specially by the Ultimate Judge, is a privilege and an honor, and seek to be worthy of responsibility rather than seeking to evade accountability.

Practical Application: Understand that no human being, including yourself, can be perfect; show mercy to yourself and others for failure. At the same time, try to hold people morally accountable because you respect them; the more you respect them, the more you should and can expect of them. Have enough self-respect to hold yourself accountable for your failures, but also to see yourself as capable of better.

Key Words: responsibility, respect, dignity, self-respect, accountability, mercy

Additional Sources: Ayn Rand, “How Does One Lead a Rational Life in an Irrational Society”

NOT EVERYTHING WE DO HAS TO MAKE SENSE

In Shemot 4:1-5 ... G-d orders Mosheh to throw his staff down. Mosheh obeys, and the staff turns into a snake. Mosheh flees, only to be told to by Hashem to reach out and grab its tail. When Mosheh obeys, the snake turns back into a staff. Why does Mosheh flee – did he think that G-d could not find any born-snakes, or means other than snakes, to kill him with if necessary?

Shmot Rabbah puts this challenge in the mouth of a Roman matron:

A Roman matron said to Rabbi Yose:

My God is greater than your-G-d!

He said to her:

Why?

She said to him:

*At the time that your divinity was revealed to Mosheh in the bush, Mosheh concealed his face;
But when Mosheh saw the snake, which is my god, immediately "Mosheh fled from before it"!*

The answer Rabbi Yose gives is that one can escape a snake by running away, whereas one cannot escape Hashem anywhere. But even leaving aside Sefer Yonah, this merely begs or even intensifies the question: Why should Mosheh flee from an imaginary god, and why would he not see the snake as an emissary of Hashem? . . .

Ramban meets the challenge directly.

ולכן נאמנו דברי רבותינו (שמו"ר ג טז)
שהיה לו הראשון רמז שספר עליהן לשון הרע,
והשני להענישו בו,
וזה טעם "וינס משה מפניו",
כי פחד שמא יענש וינשכו הנחש,

וכל אדם מתרחק מן המזיק לו אף על פי שידע שאם יהיה כן בחפץ השם אין מציל מידו.

This establishes the truth of our teachers' words (in Shemot Rabbah), that the first (the staff becoming a snake) was a hint that he has spoken lashon hora about the Jews, and the second (his hand becoming leprous) was to punish him for doing so, and this is the explanation for "Mosheh fled from before it", that he was scared lest he be punished and bitten by the snake, and indeed every human being distances himself from what might harm him even though he knows that if Hashem wishes there is nought that can save one from His hands

In other words, even prophets do not always act in rational accordance with their theological beliefs.

This position troubles R. Zadok Hakohen MiLublin:

וקשה לומר כן על משה רבינו ע"ה שיהיה מנוסתו מן הנחש כדרך העולם - והלא אם היה סבור שה' יתברך הראה לו הנחש להזיקו, מה יועיל מה שנס מפניו!?

It is difficult to say this about Mosheh Rabbeinu, peace be upon him, that his fleeing from the snake was in accordance with the way of the world – if he thought that Hashem the Blessed was showing him a snake so as to harm him, how would it help to flee from it?

But my sense is that Ramban is fundamentally correct and necessary regardless of how one understands the symbolism of the snake. Psychologically sound people do not allow themselves to be imprisoned by abstractions. All the rationally compelling argument is the world for determinism will not convince us to act as if our choices are predetermined, and all the arguments for materialism will not shake our sense of ourselves as inhering in a body rather than consisting of a body. Perhaps the Torah records Mosheh's flight to teach us that this is not only how it is, but how it should be.

SPIRITUAL LUCK

Can the morality of an action depend on luck?

The philosopher Bernard Williams addressed the following scenario. Imagine a successfully married man, with three children, in a stable and remunerative profession, who abruptly leaves everyone and everything behind to become a painter in the South Seas. Imagine further that he succeeds, and becomes one of the great painters of the day (here I leave you to make your own evaluation of Gauguin's work). Is the decision to abandon family retrospectively justified by the works of art he produces?

One might argue that a decision can only be evaluated based on the information available to the "decider" at the time of decision. The player could not know that his shot would go in; Gauguin could not know that he would produce great art; but they could each reasonably estimate the chances. The moral question then is whether the X percent chance of becoming a great artist justified the inevitable emotional harm inflicted by the decision. On this analysis, the outcome of the decision – whether the shot goes in or not – is irrelevant to the evaluation of the decision. There is no such thing as moral luck. But Williams' scenario was deliberately constructed to raise the possibility that an action can be justified despite being unethical. Perhaps when one is comparing apples to apples, odds are relevant. But when one is comparing apples to pottery, when there is no joint axis of value along which to make the comparison, the only metric of justification is success.

In other words, there may be no such thing as ethical luck, but if one believes that actions can be justified along multiple axes – ethics, moral, and holiness, to name a few – then justification may depend on luck, on how one's decisions actually turn out.

This is a radical suggestion, and one that I admit makes me uncomfortable. At the same time – as Mrs. Deborah Klapper realized immediately when I read her Rabbi Jonathan Sacks' presentation of and response to Williams in The Great Partnership – it puts me in mind of one of my favorite medieval sources, Rabbi Chaim Or Zarua's discussion of the apparent contradiction between the numerous Talmudic passages unequivocally condemning the learning of Torah not *lishmoh* and the famous statement of Rav Yehudah in the name of Rav encouraging learning not *lishmoh* because it leads to learning *lishmoh*. Here is the discussion:

שו"ת מהר"ח אור זרוע סימן קסג

ושלא לשמה, הואיל ואתא לידן, נימא ביה מילתא –
כי ר"ת אומר שני עניני שלא לשמה יש, חד אסיר וחד שרי,
ואני הדיוט ופעוט אומר דכל שלא לשמה חד הוא וכולם עבירה,
א[ך] אותה עבירה הותרה, שסופה לבא לידי מצוה,
כמו מציל אשה בנהר ומפקח גל בשבת.
וכן משמע בנזיר, שמדמה אותה למעשה די'על.
אבל מי שמקשה ערפו לעולם לא יעשה מצוה, נוח לו שלא נברא.

Once *shelo lishmoh* has come up, I'll say something else about it.

R. Tam said there are two types of *shelo lishmoh*, one forbidden and one permitted.

But I, insignificant and small, say that all *shelo lishmoh* is the same, and all are transgressive.

But that transgression is permitted if it will lead in the end to a mitzvah,

like when a man saves a woman in a river or digs someone out of a pile on Shabbat.

This is also implied in Tractate Nazir by the comparison (of a mitzvah *shelo lishmah*) to Yael (whose seduction of Sisera is called a "sin *lishmoh*").

But one who stiffens his neck, never will he do the mitzvah, better for him not to have been created.

The key question of interpretation is whether R. Chaim Or Zarua means that

"one who stiffens his neck and *never intends to do* the mitzvah" is better off not having been born, or rather

"one who stiffens his neck and *in fact never does* the mitzvah".

The comparison to saving lives by transgressing Shabbat or Bal Tikrevu⁴⁰ may tend to indicate the former⁴¹; the comparison to Yael is worthy of study; but the argument itself strongly favors the latter.

Why? He critiques Rabbeinu Tam for saying that there are two kinds of *lo lishmoh*; but read the first way, he would himself be distinguishing between *lo lishmoh* with intent to reach *lishmoh*, and *lo lishmoh* without such intent.

It therefore seems to me that he means that the action of learning *lo lishmoh* can only be justified if one eventually comes to learn *shelo lishmoh*, regardless of what one initially intended **or of what the odds were of succeeding in getting to *lishmoh*.**

⁴⁰ Or whatever other prohibition(s) one thinks are implicated when men save drowning women

⁴¹ Many thanks to Will Friedman and Jason Rubenstein for pointing out my sloppiness last week in stating without qualification that birkat erusin was a birkat hamitzvah. Let me try to do better here - I do not intend to imply that it is obvious that one does not sin when

- a) one violates Shabbat in the reasonable conviction that a life may be in danger, when it turns out that such was not the case, let alone when
- b) one violates Shabbat in the reasonable conviction that one might thereby save a life that is actually in danger, but it turns out that one's assistance was either unneeded or ineffectual.

I generally use this responsum to raise the question of whether Judaism recognizes the validity, or necessity, of spiritual risk – particularly, whether one should understand Halakhic observance as a means of eliminating the chance that one will be held accountable for decisions that were properly made but turned out badly. Rabbi Sacks, by introducing me to Williams, has made me realize that acknowledging the reality of spiritual risk⁴² may entail acknowledging the reality of spiritual luc

⁴² Spiritual risk may regardless be real in the sense that required actions may place one in situations where the odds of sinning are raised. In that sense, mens' decisions to save attractive married-to-other-men women from drowning place them in spiritual risk. However, there is no question that those decisions in and of themselves are correct, and will retrospectively be valorized regardless of what happens afterward.

G-d-Intoxication and Avodah Zarah

Vayikra 9:23 – 10:2

He - Moshe and Aharon –
went in to Ohel Moed
They came out
They blessed the populace
It was revealed - the Glory of Hashem –
to the entire populace
It came out – a fire – from before Hashem
it consumed on the altar
the *olah* and the fats
The whole populace saw
Vayaronu
They fell on their faces
They took –
the sons of Aharon, Nadav and Avihu –
each man his pan –
They put fire in them
They placed incense on top of it
They brought near before Hashem
a fire – alien -
Who had not commanded them
It came out – a fire - from before Hashem
It consumed them
They died before Hashem

ויקרא ט:כג – י:א-ב

וַיָּבֵא מֹשֶׁה וְאַהֲרֹן
אֶל אֹהֶל מוֹעֵד
וַיֵּצְאוּ
וַיְבָרְכוּ אֶת הָעָם
וַיֵּרָא כְבוֹד ה'
אֶל כָּל הָעָם:
וַתֵּצֵא אֵשׁ מִלִּפְנֵי ה'
וַתֹּאכַל עַל הַמִּזְבֵּחַ
אֶת הָעֹלָה וְאֶת הַחֲלִבִּים
וַיֵּרָא כָּל הָעָם
וַיִּרְנּוּ
וַיִּפְּלוּ עַל פְּנֵיהֶם:
וַיִּקְחוּ
בְנֵי אֹהֲרֹן נָדָב וַאֲבִיהוּא
אִישׁ מִחַתָּתוֹ
וַיִּתְּנוּ בָהֶן אֵשׁ
וַיִּשִׂימוּ עָלֶיהָ קִטְרֹת
וַיִּקְרְבוּ לִפְנֵי ה'
אֵשׁ זָרָה
אֲשֶׁר לֹא צִוָּה אֹתָם:
וַתֵּצֵא אֵשׁ מִלִּפְנֵי ה'
וַתֹּאכַל אוֹתָם
וַיָּמָתוּ לִפְנֵי ה':

We conventionally but inaccurately translate the Hebrew עבודה זרה as “idolatry” – the literal translation is “worship that is alien”. My suspicion is that this a euphemism of the same sort that eventually causes עבודה זרה to be replaced in most Rabbinic text by עבודת כוכבים, which literally means “worship of stars” – it provides a convenient way of telling Christians that the category does not apply to them. We make the test of acceptability an abstract theological principle – is one worshipping the correct G-d? rather than the concrete question – is one worshipping G-d correctly? My contention is that the term עבודה זרה derives directly from the אש זרה of Nadav and Avihu, where it seems that the sole criterion is whether He commanded the worship or not.

Another accidental obstacle to a correct understanding of this episode is the chapter break (which is not of Jewish origin). It is critical to understand that Nadav and Avihu did not merely introduce a fire into the Tabernacle hastily, rather than waiting for Divine command or miraculous fire – rather they introduced their own fire into the Tabernacle *immediately after* miraculous Divine fire had descended onto the altar and consumed sacrifices as the climax to a Divinely scripted week of sacrificial ritual. In response, Divine fire comes forth again and consumes them.

Why would Nadav and Avihu do this? Following the strain in our tradition that seeks to valorize rather than villainize them⁴³, and in the footsteps of the Rav's theology, we can suggest that there are two proper responses to miracles:

- 1) Awe, leading to the recognition that G-d's actions are inimitable
- 2) Inspiration, leading to the burning desire to imitate His actions

There may be no clear algorithm for deciding which is appropriate, and Nadav and Avihu wrongly picked inspiration over awe.

But this is not a sufficient explanation. *Everyone* saw the Divine Fire emerge, but only Nadav and Avihu were moved to bring their own fire. Perhaps this was simply because they were the children of Aharon, and so felt uniquely empowered to bring sacrifices, but this is the *inauguration* of the Tabernacle and of the Aharonite priesthood.

It therefore seems to me worth rigorously exploring the Torah's description of everyone else's reaction.

The verse says that when the fire came out from before Hashem, the entire populace did three things:

- 1) See/recognize
- 2) וירנו
- 3) Fall on their faces

וירנו literally seems to mean "made loud sounds", and such sounds – in nature and in Tanakh – can convey a variety of emotions⁴⁴. How might we determine the emotional content here?

R. Chaim Paltiel, as available on the Bar Ilan disk, writes the following:

Onkelos translates וירנו as "and they praised",
but he did not explicate what praises they said,
But we can say "Learn the sealed from the explicit",

⁴³ A strain with much textual justification, such as בקרובי אקדש , although I tend to think that the textual case for villainization somewhat stronger

⁴⁴ See Isaiah 42:11, 1Kings 22:36

as regarding Eliyahu Scripture writes

The entire people saw – *vayaronoo* – They fell on their faces

They said:

“Hashem is *the* Divinity!

Hashem is *the* Divinity!

The argument seems to be that the reaction of the people in 1Kings 18:39, where Eliyahu elicits the Divine fire, is identical to here – they see, *vayaronoo*, they fall on their faces – but Kings provides the content of their רנה, presumably offered *while* fallen. We can presume that the content here was similar.

Toladot Yitzchak makes an important methodological contribution by collecting what he asserts are *the* 12 instances in which Divine fire appears.⁴⁵ Six of them demonstrate that sacrifices have been found pleasing, and six of them take vengeance.

⁴⁵תולדות יצחק ויקרא פרק ט פסוק כד

ותצא אש מלפני ה' ותאכל על המזבח את העלה ואת החלבים וירא כל העם וירנו ויפלו על פניהם
"ותצא אש מלפני ה' ותאכל על המזבח את העולה" –

ביום השמיני שנתחנך המשכן בקרבנות שבאו לכפר על מעשה העגל, ירדה אש מן השמים לקבל אותם,
והאש הזאת עמדה עד דורו של שלמה שבנה הבית, וכל ימי הבית היתה האש קיימת, ולא כבתה עד שחרב,
וזהו שאמר [לעיל ו] אש תמיד תוקד על המזבח לא תכבה,

וכן מצינו שנים עשר אשות שנפלו מן השמים בזמנים חלוקים,
ששה מהם היו לקבלת הקרבנות דרך רצון,

וששה דרך נקמה

הראשונה

היא האש הזאת,

השניה

לגדעון כשאמר למלאך [שופטים ו יז] ועשית לי אות שאתה מדבר עמי, וכתוב [שם יט] וגדעון בא ויעש גדי עזים, ויגע בבשר
ובמצות ותעל האש מן הצור [שם כב],

השלישית

האש שירדה בימי מנוח, כשנגלה המלאך לאשתו, דכתיב [שם יג יט] ויקח מנוח את גדי העזים ואת המנחה ויעל על הצור לה'
וכתיב [שם כ] ויהיה בעלות הלהב מעל המזבח השמימה, ותחלה קראו צור ואחר שנתקבל הקרבן קראו מזבח,

הרביעית

לדוד שקנה המקום בגורן ארנן היבوسی,

וכתיב [דה"י - א כא כו] ויבן שם מזבח לה' ויעל עולות ושלמים ויקרא אל ה' ויענהו ה' באש מן השמים על מזבח

העולה,

החמישית

לשלמה כשנשלם בנין בית המקדש

דכתיב [דבה"י - ב ז א] וככלות שלמה להתפלל והאש ירדה מן השמים ותאכל (את) העולה (ואת) (השלמים)

[הזבחים] וכבוד ה' מלא את הבית,

השישית

לאלהו שאמר [מ"א יח לז] ענני ה' ענני וירד אש

שנאמר [שם לח] ותפול אש ה' ותאכל את העולה ואת העצים וגו'.

והששה שירדו דרך נקמה

אחת

אש לנדב ואביהוא

שנאמר [להלן י ב] ותצא אש מלפני ה' ותאכל אותם,

השנית בתבערה

שנאמר [במדבר יא א] ויהיה העם כמתאוונים

Pleasing:

- 1) The initial fire here
- 2) Gideon
- 3) Manoach
- 4) David (after buying the land for a Temple)
- 5) Shlomoh (when completing the Temple)
- 6) Eliyahu at Mount Carmel

Vengeance:

- 1) Nadav and Avihu
- 2) Tav'erah
- 3) Korach
- 4) Iyov's children
- 5,6) Eliyahu and Ahab's army

We can quibble with several citations – for example, Gideon and Manoach experience ascending, rather than descending, fire – but I suggest that Toladot Yitzchak's evidence is sufficient to demonstrate that the experience of Divine Fire always carries an element of risk.

With that context, we can return to Rabbi Paltiel's suggestion that our story should be read together with the wonderfully ambivalent story of the prophets' duel at Mount Carmel. It is, on the one hand, a great triumph for Eliyahu, in which the people finally decide for Hashem over Ba'al and massacre Baal's prophets. But it is also a stinging defeat, as the very next day Queen Izevel correctly asserts that no one will intervene on his behalf against her. In the long run, I contend that Eliyahu's precedent makes it impossible for extra-Temple sacrificing ever to be eliminated. And yet – in the *very* long run, perhaps the memory of that moment is what enables Judaism to vanquish the impulse for idolatry.

In other words – Eliyahu acted outside the law at Mount Carmel. He pleaded with G-d to send the fire, rather than having it come as a consequence of his following a Divine command. He risked worshiping G-d incorrectly to ensure that the Jews would worship the correct G-d. However, rather than bringing his own fire, he built the wait for the Divine fire into his own script. We can speculate that he prayed in full awareness that the answer to his prayers might consume him as well as his sacrifice.

וכתיב [שם] ותבער במ אש ה',
השלישית
במחלוקתו של קרח
דכתיב [שם טז לה] ותצא אש מלפני ה' ותאכל את החמשים ומאתים איש, הרביעית בענין
איוב שנאמר [א טז] אש א-להים נפלה מן השמים,
החמישית והששית,
על ידי אליהו
שירדה אש מן השמים, ושרפה לשר חמשים וחמשין [מ"ב א יח],
וגם פעם שנית לשר חמשים וחמשין,
שנאמר [שם יב] ותרד אש מן השמים ותאכל אותו ואת חמשיו.

Perhaps the sin of Nadav and Avihu was their failure to realize this, their inability to imagine that spiritually intoxicated and/or intoxicating worship of the true G-d might nonetheless be *avodah zarah*.

Midrash is Not Versocentric

Midrash is popularly understood as “atomistic”, or “versocentric”, meaning that it focuses on specific details of a text rather than seeking to understand the text as a whole. This understanding is generally cited to contrast midrash invidiously with “the literary method”, which looks for large structures and overall context.

Now this understanding is plainly wrong in at least one sense – the midrashists all saw the entire Torah as a theological unity, and thus never offered interpretations that conflicted with their sense of the whole. Midrashic “atomization” does not bear comparison with the atomistic techniques used by members of some sects of the Documentary Hypothesisarians, who attribute radical theological positions to fragments of comfortably unified text.

But I think it is also wrong more fundamentally, that midrash is actually deeply concerned with immediate and overall literary context, that the rabbis **read** with questions of literary context explicitly in mind. They sometimes sacrifice *immediate* narrative or legal context for the sake of *structural* context, and some scholars have mistaken these sacrifices for an independent justification of acontextual reading. Here is one illustration.⁴⁶

ויקרא פרק יב": א-ב

וַיִּדְבֹר ה' אֶל מֹשֶׁה לֵאמֹר:

"דַּבֵּר אֶל בְּנֵי יִשְׂרָאֵל לֵאמֹר

'אִשָּׁה כִּי תִזְרִיעַ וַיִּלְדָּה זָכָר . . ."

Vayikra 12:1-2

Hashem spoke to Mosheh, saying:

“Speak to Benei Yisroel, saying:

‘A woman – when she is *mazria* and *yaldah* a male . . .’”

The standard midrashic reading here begins from the extraneity of *כי תזריע*; whatever physiological phenomenon it refers to presumptively occurs in all pregnancies, and therefore the text should simply have said “אשה כי תלד זכר”. As a result, the Rabbis translate *זכר וילדה* as declarative – “she will (subsequently) give birth to a male” – rather than as part of the conditional “. . . and give birth to a male”.

This raises the question – what are the prior conditions that will generate the birth of the male?

⁴⁶ As with many of my comments on midrash, I am influenced by shiurim given by my friend Rabbi Nachman Levine, but I of course am responsible for any errors and for all elements of the specific examples here..

The answer from direct context is *אשה כי תזריע*, and this generates a somewhat risqué discussion on Niddah 31a as to how husbands can ensure that their wives are *מזריע* before they are *מזריע*.⁴⁷

However, Shavuot 18b records three other answers:

- a) If husband and wife separate close to her projected *niddah* time, rather than waiting for her to actually become *temeiah* (Rabbi Chiyya bar Abba in the name of Rabbi Yochanan)
- b) If he makes *havdalah* over a grape beverage on Saturday night (Rabbi Chiyya bar Abba in the name of Rabbi Yochanan)
- c) If he sanctifies himself (makes himself *קדוש*) during intercourse (Rabbi Binyamin bar Yefet in the name of Rabbi Elazar)

a) and b) are claims that this verse follows directly from the preceding verse, which reads:

להבדיל בין הטמא ובין הטהור

ובין החיה הנאכלת ובין החיה אשר לא תאכל: פ

To separate between the *tamei* and the *tahor* and

between the beast that is eaten and the beast which must not be eaten.

Each answer claims that *זכר וילדה זכר* is a consequence of being *מבדיל בין טמא לטהור*, although they offer different examples of *how* one can be *מבדיל בין טמא לטהור*. Otzar Midrashim cites a version in which the issue is care regarding immersion, and Midrash Tanchuma a version that inter alia includes concern for not eating forbidden animal species, which is not only the last topic, but its overall topic. For our purpose, it should be obvious that each of these versions reads the verse in context, and that the examples are non-exclusive of one another, but rather choices of emphasis – a) and b) are from the same person, after all.

What about c)?

It relates two or three verses back.

כי אני ה' א-להיכם

והתקדשתם והייתם קדשים

כי קדוש אני

ולא תטמאו את נפשתיכם בכל השרץ הרמש על הארץ:

כי אני ה'

המעלה אתכם מארץ מצרים להיות לכם לא-להים

והייתם קדשים

כי קדוש אני:

זאת תורת הבהמה והעוף וכל נפש החיה הרמשת במים ולכל נפש השרצת על הארץ:

להבדיל בין הטמא ובין הטהור ובין החיה הנאכלת ובין החיה אשר לא תאכל: פ

⁴⁷ Rashbam may have thought that the question was why *אשה כי תזריע* is connected to the birth of the *זכר* rather than the *נקבה*, and accordingly seeks to forestall the midrash by asserting that *אשה כי תזריע* relates both to the immediate *זכר* and the later *תלד נקבה*. In my understanding, however, the Rabbis knew that possibility well, but rejected it as failing to explain why *אשה כי תזריע* is in the text at all.

Why does Rabbi Binyamin bar Yefet skip the immediate context? Professor Richard Steiner has argued powerfully that “Rashbam discovered inclusio” among the rishonim; I contend here that Rabbi Binyamin bar Yefet preceded Rashbam. The chapter opens

וַיְדַבֵּר ה' אֶל מֹשֶׁה וְאֶל אֶהֱרֹן לֵאמֹר אֲלֵהֶם:

דַּבְּרוּ אֶל בְּנֵי יִשְׂרָאֵל לֵאמֹר

זאת החיה אשר תאכלו מכל הבהמה אשר על הארץ:

and ends

זאת תורת הבהמה והעוף וכל נפש החיה הרמשת במים וילכל נפש השרצת על הארץ:

להבדיל בין הטמא ובין הטהור ובין החיה הנאכלת ובין החיה אשר לא תאכל:

Rabbi bar Yefet saw the inclusio, realized that זאת תורת הבהמה was a summary of the preceding chapter, and went one stop further, arguing that the next chapter should therefore be read in the context of the last *new substantive* point in the preceding chapter.

Rabbi Yehoshua ben Levi comments on both a) and b) that such behavior will not generate ordinary sons, but rather sons competent to issue halakhic rulings להוראה. This is a reference yet one paragraph further back.

וַיְדַבֵּר ה' אֶל אֶהֱרֹן לֵאמֹר:

וַיֵּן וְשָׁכַר אֶל תַּשְׁתֶּה אֶתְּךָ וּבְנֵיךָ אֶתְּךָ בְּבִאֲכֶם אֶל אֹהֶל מוֹעֵד וְלֹא תִמְתּוּ

חֻקַּת עוֹלָם לְדֹרֹתֵיכֶם:

וּלְהַבְדִּיל בֵּין הַקֹּדֶשׁ וּבֵין הַחַל וּבֵין הַטָּמֵא וּבֵין הַטָּהוֹר:

ולהורות את בני ישראל את כל החקים אשר דבר ה' אליהם ביד משה: פ

וַיְדַבֵּר יְקִיֵּק אֶל מֹשֶׁה וְאֶל אֶהֱרֹן לֵאמֹר אֲלֵהֶם:

דַּבְּרוּ אֶל בְּנֵי יִשְׂרָאֵל לֵאמֹר

זאת החיה אשר תאכלו מכל הבהמה אשר על הארץ.

Why does he go so far back? Note first that he sees זכר וילדה as connected to both contexts. However, he sees the use of הטהור והין הטמא in both contexts as connecting them, and therefore anything connected to one is connected to the other as well.

I hope it is clear that the entire midrashic enterprise here is about understanding a phrase in context, and not “versocentric” at all.

Midrash does Not Simplify Character

בראשית פרק כט:יג-טו

ויהי כשמע לבן

את שמע יעקב בן אחתו

וירץ לקראתו ויחבק לו וינשק לו ויביאהו אל ביתו

ויספר ללבן את כל הדברים האלה:

ויאמר לו לבן אך עצמי ובשרי אתה

וישב עמו חדש ימים:

ויאמר לבן ליעקב

הכי אחי אתה ועבדתני חנם

הגידה לי מה משכרתך:

It happened that when Lavan heard/*kishmoa* Lavan

the repute/*sheima* of Yaakov, son of his sister,

He ran to greet him; he hugged him; he kissed him; he brought him to his house;

He told Lavan all those things/*devarim*.

Lavan said to him: *akh* my bone and flesh you are.

He dwelled with him for a month of days.

Lavan said to Yaakov:

Are you my brother, and work for me for nothing?

Tell me your salary!

At a recent conversion interview, I asked a candidate who was worse: Lavan or Pharaoh. He answered Pharaoh, of course; any reader of Torah would, unless the Passover Hagadah had drilled into him that “whereas Pharaoh decreed only against the males. Laban sought to uproot all”. But he knew from Rashi that Lavan had hugged and kissed Yaakov only so as to frisk him for jewels.

One common source of resentment against midrash is a feeling that the Rabbis unfairly blacken Esav. One should in this regard see Ephraim Kishon’s “Unfair to Goliath”, which explains how Jews have blackened the name of a great and moral warrior who was decapitated by a barbaric child terrorist in an early example of asymmetric warfare. But I’m interested in the lack of any similar pro-Lavan backlash.

The reason may be that Esav’s wrongdoings are subdued, at least as presented in the text of chumash; he marries the wrong women, and he plans to (but does not actually) kill Yaakov. Lavan, by contrast, is spectacular, with the wedding trick an unquestioned all-time classic.

And yet - that Lavan's flaws are on display does not mean that he is all flaws. The question is whether his later trickery entitles us to read deception into his earlier behavior, as the tradition cited by Rashi does, especially when the same description of the same behavior, if applied to a different character, would be read as an endorsement.

The brief Torah excerpt above contains a number of obvious ambiguities: What did Lavan initially here about "Yaakov, son of his sister"? What additional *devarim* did Yaakov then tell him? But my focus will be on the word phrase "*akh* my bone and flesh you are". This is likely to be an instance of the "unexpressed implication" in Biblical dialogue – Lavan never speaks out the consequences of his acknowledgement of the blood-relationship. The narrator adds that Yaakov then stayed with him a month before Lavan raised the question of salary.

How is *akh* best translated?

The standard options are "however" and "verily".

The first translation implies a reservation on Lavan's part –

either "however, **you** are my bone and flesh" – but someone else is not;

or else "however, you **are** my bone and flesh" – even though I would prefer not to acknowledge the relationship.

The second states Lavan's rejection of any reservation –

"verily you are my bone and flesh" - even though you or others might have thought I would refuse to acknowledge the relationship.

Targum Yonatan, for example, thinks that Lavan hears of Yaakov's outwitting Esav and celebrates – Yaakov is his bone and flesh, a trickster just like he is! Malbim argues that Lavan is saying that Yaakov is his bone and flesh *but Esav is not*, because Lavan loves only whomever his sister loves.

Malbim is in tension with Maharsha, who adopts here the Rabbinic notion that the bones are contributed from the father, but the flesh from the mother – Lavan is therefore conflicted. But Maharsha, as all the kabbalists note, is in tension with Genesis 2, where Adam responds to Eve by saying

זאת הפעם

עצם מעצמי

ובשר מבשרי

This time

Bone from my bone

And flesh from my flesh

The rabbinic reading is that Adam's relationship to Eve was unique – *only* in their case were both bone and flesh shared, whereas thereafter children shared the bone from one and the flesh from the other. But *literarily*, it seems that Lavan is comparing his relationship with Yaakov to the marital relationship. Perhaps this foreshadows his intent to marry his daughters to Yaakov. It may even be a declaration of intent.

All this places Lavan in stark contrast to Esav, who is plotting fratricide. Esav, so far as we can tell, sees himself as related to his parents and only to his parents – in Rabbi Soloveitchik's famous categories, he shares a fate with them, and perhaps even with Yaakov, but not a destiny. Lavan, through his daughters, shares Yaakov's destiny.

I cannot adequately account for the Haggadah's animus toward Lavan. But I do want to note that even Lavan's most vociferous critics acknowledge that even after he was disappointed by Yaakov's poverty, he still let Yaakov stay in his home for at least a month. The larger point here is that midrashic enlargements of vices and virtues do not necessarily override complexity, but can instead highlight complexity. At the same time, as I learned from Professor Jeffrey Rosen, *lashon hora* is forbidden even when true because it makes the audience see the subject as disproportionately wicked.