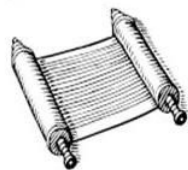


# 2016 CMTL Reader

Published by the Center for Modern Torah Leadership

*Center for Modern Torah Leadership*



חרות ואחריות

[www.TorahLeadership.org](http://www.TorahLeadership.org)

**"Taking Responsibility for Torah"**

*Unless otherwise noted, all pieces are by Rabbi Klapper and published on the CMTL website or blog.*

### Theology

<b>Immersion in Fire</b>	<b>4</b>
<b>Flagrant Consecration and Sacred Conflagration: The Unholy Sin of Nadav and Avihu (by Rabbi Shlomo Zuckier)</b>	<b>7</b>
<b>To Rebecca (published on <i>The Lehrhaus</i>)</b>	<b>10</b>

### Halakhic Process and Halakhic Authority

<b>When May One Ask for a Second Halakhic Opinion?</b>	<b>11</b>
<b>Sinai and Orthodox Authority</b>	<b>15</b>
<b>Authority or Anarchy?</b>	<b>18</b>
<b>Halakhic Flight Simulators? The Need for Laboratories of Law</b>	<b>20</b>
<b>The Delicate Balance of Halakhic Decisionmaking</b>	<b>23</b>
<b>The Market for Halakhic Authority: Some Reflections on Gadolnomics (published on <i>The Lehrhaus</i>)</b>	<b>26</b>
<b>Intro to Halakhah</b>	<b>31</b>
<b>Is There a Modern Orthodox Way to Decide Halakhah?</b>	<b>38</b>
<b>Women and Kriyat HaTorah: A Response to Rabbi Ysoscher Katz (published in <i>The Lindenbaum Center</i>)</b>	<b>44</b>

### Social Analysis

<b>Bully for Sodom</b>	<b>51</b>
<b>Korach and the Failure of Meritocracy (by Rabbi Avraham Bronstein)</b>	<b>54</b>
<b>Charisma Revisited, or: The Difference between Winning It All and Total Victory</b>	<b>56</b>
<b>The Way of the World is for a Man To Sacrifice Himself (by Tobie Harris)</b>	<b>58</b>
<b>What if Avraham Had Lived in America? Thoughts on the Political Implications of Human and Jewish Being</b>	<b>60</b>
<b>Instinctive Liberalism and Halakhic Conservatism: Netziv's Radical and Creative Approach and Its Implications for American Denominational Relationships (published in <i>The Jewish Press</i>)</b>	<b>63</b>
<b>Are Day Schools Worth the Money?</b>	<b>65</b>

## Gender and Sexuality

<b>Are Adam and Eve Modern Orthodox Role Models?</b>	<b>67</b>
<b>Feminism, Anti-Feminism and the Halakhic Process: Parashat Zakhor as a Case Study</b>	<b>70</b>
<b>Women as Halakhic Decisors: An Analysis from First Principles</b>	<b>73</b>
<b>Daf Yomi and Advanced Learning, Especially for Women</b>	<b>76</b>
<b>Spirituality, Sexuality and the Science of Desire</b>	<b>79</b>
<b>Halakhic Laboratory #1: Crossdressing</b>	<b>82</b>
<b>Partnership Minyanim and Women's Aliyot: A Maturing Conversation (published in <i>JOFA's Torch</i>)</b>	<b>85</b>
<b>Coercion in the Delivery of a Jewish Divorce</b>	<b>88</b>

## **Immersion in Fire**

February 11, 2016

*This past Sunday was the levayah of David Wachs, a student who became a deep friend and wise adviser, and whose generosity made many of my dreams possible. One theme at the levayah which resonated with many of our conversations was the constant kiddush Hashem he made at his workplace. This week's dvar Torah is dedicated to his memory as a first installment on a lifetime debt. יהי זכרו ברוך.*

The most recent episode of “Sherlock” included a scene at the Diogenes Club, where absolute silence is enforced. Watson attempts to communicate with the concierge via signs; radical misunderstanding and hilarity ensue. But is it truly funny?

I imagine that this scene is experienced very differently by those who speak Sign fluently. For most viewers, physical signs are terribly imprecise stand-ins for verbal signs. But for those who speak sign, any comedy of the scene results not from the inherent and inevitable imprecision of this mode of communication, but rather from Watson’s bumbling efforts to communicate in a foreign language. We are in the realm of “Ich bin ein Berliner” rather than the Three Stooges.

Reading Talmudic *aggada* sometimes makes me feel like Watson, in a world without living Sign speakers. The texts feel precise, but I don’t understand them well enough to capture that precision, and I don’t trust modern interpreters.

Why aren’t *aggadot* written straightforwardly? Sir Arthur Conan Doyle invented the Diogenes Club as an exercise in antisocialism, or privacy. Verbal speech imposes itself on all within earshot, whereas one can look away from visual signs. Somewhat analogously, Talmud imposes itself on all learning Jews, but aggadic esotericism protects them from truths they can’t handle.

The problem is that not everyone realizes their own linguistic deficiencies, and some go so far as to argue that the texts mean only what they appear on first glance to say. And, not everyone who speaks aggadic Sign can handle the truth.

Maimonides in an intended irony uses his own challenging metaphor, taken from *Mishlei* 25:11, to explain the Rabbis’ use of challenging metaphors: “Golden apples in silver filigree.” For Maimonides, codes that transform plaintext into gibberish are ineffective when everyone knows the text’s author was wise. What is needed is a code that creates an apparent meaning with enough value to pass for the true meaning. An effective code makes most people see a silver apple and never suspect that there is gold underneath. At the same time, the apple must be filigreed rather than silver plated, because there must be a way for the most perceptive to see through to the golden apple underneath.

At least, that’s what the metaphor appears to mean. But perhaps that meaning is intended to conceal as much as to reveal.

I want to take you rapidly through a Talmudic passage, which I argue is written in aggadic Sign, and several historical moments of interpretation; you can evaluate for yourselves which are gold, which silver filigree, and which dross. But I need two moments of introduction:

First, Rav Aharon Lichtenstein zt”l wrote that the rabbinic command to “Know what you will say in response to a heretic” applies to the heretic within: “There is a snake lurking within the finest of Edens.” On that basis it seems reasonable to argue that Talmudic dialogues with *minim* etc., like the first Rashi on *Chumash*, are often projections of internal struggles within the *frum* consciousness.

Second, a deep truth that was esoteric in Maimonides’ day, but seems exoteric in our own, is the utter incorporeality of G-d. But the difference may not be as stark as we presume; contemporary affirmations of incorporeality may often be mere catechismic recitation.

Here is the passage, from *Sanhedrin* 39a [edited on the basis of *Ayn Yaakov*]:

*A min said to Rabbi Abahu:  
 Your G-d is a Kohen,  
 as Scripture writes: "They must take me terumah"  
 and kohanim must not bury the dead,  
 and if they bury, they require immersion;  
 He, when He buried Mosheh, in what did He immerse?  
 If you were to say: In the sea.  
 But Scripture writes: "Who measured in his container all water,"  
 so what source of water would suffice for Him?  
 Rabbi Abahu said to him:  
 He immerses in fire, [as Scripture writes: "for behold G-d will enter fire."  
 The min said to him:  
 Since when is immersion in fire effective?  
 Rabbi Abahu said to him:  
 The genuine immersion is in fire, and we only pass through water what would be consumed by fire,  
 as Scripture writes: "All which cannot go into fire etc."*

Tosafot (ad loc.) point out that the *min* does not ask why G-d was *allowed* to bury Mosheh, but only how He immersed afterward. This is because Scripture calls us G-d's "children," and *kohanim* are not only permitted but obligated to become *tamei* when G-d forbid they bury their children.

Rabbi Yosef Dov Soloveitchik explained that this obligation is an expression of mourning; the death of a close relative properly alienates us from the sacred, and so mourning *kohanim* must make themselves ineligible for Temple service. *Tum'ah* is a valid and necessary reaction to the scandal of mortality.

So G-d not only buried Mosheh; He mourned him, and recognized that Mosheh's death diminished the sanctity of His name. Indeed, Mosheh's mortality was seen as so scandalous that some kabbalists denied it, and argued that the Torah's account of his burial was a silver filigree.

But Tosafot's answer is insufficient. Firstly, G-d is presumably no ordinary *Kohen*, but rather a *kohen gadol*, High Priest, who may **not** become *tamei* for the burial of relatives. Secondly, doesn't this logic require G-d to become *tamei* whenever **any** Jew dies? So the better answer is that Mosheh was a *meit mitzvah*, a corpse with no relatives available to bury him. Even a High Priest must become *tamei* if necessary to bury a *meit mitzvah*.

Yad Ramah, however, thinks this response still concedes too much:

*Rabbi Abahu did not answer the min with precision,  
 so as to fulfill "Answer a fool in accord with his foolishness."  
 What Rabbi Abahu meant was:  
 Within your assumptions:  
 Even if He needed to immerse,  
 I could say to you that He immerses in fire,  
 and you would not be able to challenge me from Scripture  
 the way you challenged yourself regarding water.*

**However –  
 G-d forbid that there is any tum'ah before The Holy Blessed One,  
 and nothing whatever sullies him so that He would need to immerse in fire or in anything  
 else.**

So far, so good. But Yad Ramah continues:

*Furthermore:  
 That which Scripture writes "He buried" –  
 it certainly did not happen via action,  
 rather it arose in thought before Him that he should be buried, and he was buried.*

So if G-d *had* “touched” Moshe’s corpse, He *would* require immersion?! The brief flash of gold we saw in Yad Ramah’s first answer seems newly and painfully obscured.

And yet, perhaps it would be a mistake to remove the filigree. In the 14<sup>th</sup> century, a converso would-be returnee to Judaism was caught and burnt at the stake without being given the opportunity to immerse. R. Moshe of Zurich was asked whether this martyr could be buried in a Jewish cemetery, seeing as the general practice was to require immersion before reintegrating conversos. His response was taken from our passage: Fire is the *lekhatchilah* immersion, and we use water only as a practical concession to mortality. The contemporary R. Yitzchak Zilberstein suggests that this would apply as well to a would-be convert lacking only immersion. These seem to me proper halakhic conclusions, but they come from the silver filigree, not from the gold apple.

And yet, should the *halakhah* really be different for martyrs killed by fire and those killed by the sword? Literalist reads of metaphors give with one hand but take with the other. Perhaps all those who die to sanctify the Name should be considered to have passed through flames.

Furthermore, let us note that dying *al Kiddush Hashem* is an absolute atonement, so that all such martyrs pass through the flames of *gehennom* unscathed.

Furthermore, perhaps all those whose lives sanctified the Name, such as David Wachs z”l, merit His involvement in their burial, as His truest children, and it is not beyond the pale to suggest that – a thousand times *kebeyakhol* – He needs immersion thereafter, because the sanctity of our world has been much diminished.

# **Flagrant Consecration and Sacred Conflagration: The Unholy Sin of Nadav and Avihu**

by Rabbi Shlomo Zuckier

April 1, 2016

## **The Story**

Our Parsha powerfully demonstrates the dangers of inappropriate approach to the Divine with the cautionary tale of Nadav and Avihu (Vay. 10:1-3):

וַיִּקְחוּ בְנֵי אַהֲרֹן נָדָב וַאֲבִיהוּא אֵישׁ מִחֶתְתּוֹ וַיִּתְּנוּ בָהֶן אֵשׁ וַיִּשְׂימוּ עָלֶיהָ קֶטֶרֶת וַיִּקְרְבוּ לִפְנֵי יְקֹוֹק אֵשׁ זָרָה אֲשֶׁר לֹא צִוָּה אֹתָם  
וַתֵּצֵא אֵשׁ מִלִּפְנֵי יְקֹוֹק וַתֹּאכַל אוֹתָם וַיָּמָתוּ לִפְנֵי יְקֹוֹק

וַיֹּאמֶר מֹשֶׁה אֶל אַהֲרֹן הוּא אֲשֶׁר דָּבַר יְקֹוֹק לְאֹמֶר בְּקֶרְבִי אֶקְדֹּשׁ וְעַל פְּנֵי כָל הָעַם אֶכְבֹּד וַיָּדַם אַהֲרֹן  
*Now Aaron's sons Nadav and Abihu each took his fire pan, put fire in it, and laid incense on it; and they offered before the Lord alien fire, which He had not enjoined upon them.*

*And fire came forth from the Lord and consumed them; thus they died at the instance of the Lord. Then Moses said to Aaron, "This is what the Lord meant when He said: 'Through those near to Me I show myself holy, and gain glory before all the people.'" And Aaron was silent.*

Moshe explains the fire that killed Nadav and Avihu by paraphrasing God's previous statement as בקרובי אקדש, literally "With those near to me I make myself holy," an explanation sufficient to silence Aharon.

## **Rashi's Explanation**

What does this phrase mean? Rashi's response (ad. loc.) is well-known:

הוא אשר דבר וגו' – היכן דבר ונועדתי שמה לבני ישראל ונקדש בכבודי (שמות כט מג). אל תקרי בכבודי אלא בכבודי. אמר לו משה לאהרן אהרן אחי יודע הייתי שיתקדש הבית במיודעיו של מקום והייתי סבור או בי או ברך, עכשיו רואה אני שהם גדולים ממני וממרך

*"This is what [God] said": Where did God speak this? "And there I will meet with the Israelites, and it shall be sanctified by My Honor[able Presence]" (Shem. 29:43). Do not read "by my Honor" but "by my honored ones." Moshe said to Aharon: 'My brother, you knew that this house would be sanctified by those whom God knew well, and you thought it will be me or you. Now I see that they [Nadav and Avihu] are greater than me and you.'*

On this reading, God receives honor, and thus the Tabernacle is consecrated, through what sounds like a human sacrifice – having a person close, or closest to God be incinerated. Moshe manages to console Aharon by emphasizing that Nadav and Avihu were killed not for what they did wrong *per se* but because of their closeness to God, maybe even being closer than Moshe himself!?

What is Rashi's basis for this claim? Did God really commit to taking an unwilling human sacrifice in the consecration of the Tabernacle? How are we to understand this? It may be worth consulting Rashi's source for this point to clarify matters. Ramban (ad. loc.) notes that Rashi's words stem from the Midrash, apparently Vayikra Rabbah Shemini 12:2.

## **God's Earlier Statement**

Significantly, that Midrash (uncited for reasons of space) appears to focus not on Shem. 29:43 but on 29:44, so it is worthwhile to read both in tandem:

וַנְעֻדְתִּי שָׁמָּה לְבְנֵי יִשְׂרָאֵל וְנִקְדַּשׁ בְּכַבְדִּי  
וְקִדְשִׁתִּי אֶת אֹהֶל מוֹעֵד וְאֶת הַמִּזְבֵּחַ וְאֶת אַהֲרֹן וְאֶת בְּנָיו אֶקְדֹּשׁ לְכַהֵן לִי

*And there I will meet with the Israelites, and it shall be sanctified by My Honor[able Presence]. I will sanctify the Tent of Meeting and the altar, and I will consecrate Aaron and his sons to serve Me as priests.*

Note that Rashi's themes appear over these two verses: the Temple is sanctified through God's Glory (וּנְקַדְשׁ בְּכְבוֹדֵי), which, in turn, is accomplished through the sanctification of Aharon and his sons. What is interesting is that this Pasuk explicitly names Aharon and his sons, making it clearer why Moshe would have expected them to be singled out. They are to be "sanctified," understood to mean that they not (just) be set aside for divine service, but be consumed totally for the glory of the Divine.

But it remains problematic that God would be interested in having human sacrifice, given the objections to that prospect throughout the Torah. Moreover, as Chazal make very clear, and with ample biblical basis, Nadav and Avihu were not destined to be burnt before God, and were only consumed as punishment for a sin! How can the approach of Rashi/Midrash coexist with the understanding that Nadav and Avihu were punished?

Given a certain understanding of their sin, it may be possible to fit together these disparate strands.

### **Nadav and Avihu's Sin**

The chapter immediately prior to Nadav and Avihu's tragedy emphasizes the leitmotif of coming close (ב.ק.ר.ב). Multiple times Aharon's approach (*Vayikrav*), a sort of overture, precedes his offering (*Vayakrev*). In fact, the priests come close as well, to observe and assist Aharon's actions.

Nadav and Avihu's actions represent the polar opposite of this activity. Right after a fire emanating from God burned the offerings, scaring the nation and spurring them to fall on their faces (9:24), Nadav and Avihu impetuously grab the various implements and offer incense, not approaching God but rather imposing their offering upon the Lord. Midrashim elaborate upon their sin in various ways, including saying that they entered the Tent of Meeting while drunk, certainly an impetuous and ill-prepared advance.

### **Returning to Our Pasuk**

The words בקרובי אקדש, "With those near to me I make myself holy," present an ambiguity, relating to the preposition *bet*. It could be an instrumental *bet* – "through the *actions* of those who are close to me I will be sanctified" – or a material *bet* – "with the *bodies* of those who are close to me I will be sanctified." In other words, God is sanctified through those close to him –with them serving as either the Gavra or as the Cheftza.

This ambiguity is parallel to its "sister verse" that the Midrash referred to, which includes an ambiguity of its own (this one semantic rather than syntactic), regarding the words וְאֶת אַהֲרֹן וְאֶת בְּנָיָיו אֶקְדֹּשׁ לְכֹהֵן לִי, "and I will consecrate Aaron and his sons to serve Me (as priests)." This could mean that Aharon and his sons are sanctified as priests, such that they might first come close and then bring close offerings. But the word אקדש, "I will sanctify," has a second meaning as well; it might signify the option that God will make Aharon and his sons into sanctified items, i.e. קדשים, sacrifices.

For each of these verses, there were two scenarios in which the Temple might be consecrated. In one, Aharon and his sons are inaugurated into the priesthood, and function in that role– with all the appropriate safeguards, approaching first and only then offering. In such a structure, which Aharon followed, God and the Mishkan would be sanctified by the *actions of* those coming close. However, if they failed to serve appropriately as priests, and they rashly brought close (*makriv*) without first coming close (*karev*) and apprehensively asking for permission, they faced the prospect of becoming the sacrifice themselves.

It is therefore relevant that, following this unfortunate story, there is such an emphasis on proper priestly preparation prior to bringing Korbanos, with the prohibition against drinking wine and entering the Temple (10:8-11) immediately following the story. And this is precisely what Hakdasha, consecration (lit., making sacred) is all about – taking the necessary preparatory steps before coming close to God – in fact, not drinking is said to distinguish the sacred from profane (10:10).



We see this association between Hakravah (bringing close) and Hakdashah (consecration) not only in our story with its juxtaposition of the words בקרובי אקדש, “with those near to me I make myself holy,” but also throughout Chazal. It is not for naught that sacrifices, called קרבנות (lit., that which is brought close) in the Torah, are usually called קדשים (lit., consecrated things) in Chazal. To give another example, the Sifra glosses תמים יקריבנו “he should *bring close* his offering without blemish,” in Vayikra 1:3 as תמים יקדישנו, “he should *sanctify* his offering without blemish,” demonstrating the importance of preparation and setting aside the animal as holy even before bringing it to the Mikdash. Finally, as discussed at length by Rav Soloveitchik, the Kohen Gadol’s seven day seclusion prior to Yom Kippur is not only for purposes of purity (Tahara) but also of sanctity (Kedusha), that he be properly prepared for his role of stepping into the קודש הקדשים, the Holy of Holies.

The asymptotic striving towards the Holy One requires preparation. Increasing one’s proximity to sanctity only escalates the urgency of that need. Nadav and Avihu’s unholy failure teaches that we must constantly affirm our role as agents of God’s sanctity in this world, while avoiding the temptation of presumptuous overstepping.

*Shlomo Zuckier (SBM 2012) is Associate Rabbi and JLIC Co-Director at the Slifka Center for Jewish Life at Yale, a PhD student in Judaic Studies at Yale, a Tikvah, Wexner, and Kupietzky Kodshim Fellow, and Editorial Assistant for Tradition magazine.*

## **To Rebecca**

Originally published in *The Lehrhaus*  
November 24, 2016

I

Beauty as barrier.  
Often the flash of a blade  
sharper than its edge.

II

Imagined death kills.  
Wife and son lost together  
To the flashing blade.

III

Angelic voices  
crying against Eden. Stop!  
Touch not, wound never.

IV

The tears of angels  
blind. To see past sympathy  
is more than human.

V

Together—no more.  
The living and the dead live  
too different lives.

VI

Body and Spirit.  
Pleasure delayed forever  
is the purest pain.

VII

With you as my wife  
I think I yet reach Eden  
and restore my life.

## When May One Ask for a Second Halakhic Opinion?

September 9, 2016

Dear Rabbi Klapper,

Yesterday, I asked the rabbi of my shul a halakhic sh'eilah, and he gave me a machmir answer that feels wrong, and that I think may damage my relationship with my husband. I think you would give a different answer. I've always felt that "shitah-shopping" lacked integrity, so I feel very stuck. Am I permitted to ask you the same question, and would you consider answering it?

Sincerely,

Jane Tzviyah

Dear Ms. Tzviyah,

Your sense that shopping for a lenient opinion lacks integrity is deeply rooted in our masoret.

The Talmud in three places (Berakhot 63b, Chullin 44b, Niddah 30b) cites the following beraita:

חכם שטמא – אין חברו רשאי לטהר  
אסר – אין חברו רשאי להתיר  
*A sage who ruled 'impure' – his colleague is not authorized to rule 'pure';  
(A sage who) forbade – his colleague is not authorized to permit.*

The dominant explanation for this rule is that asking a sh'eilah to a halakhist is the moral and legal equivalent of taking a *neder* (oath) to act in accordance with that posek's answer. A secondary explanation is that issuing the second ruling is an act of disrespect toward the first scholar. So there is no question that asking for a psak creates a binding obligation to follow the answer.

A *beraita* on Eiruvim 6b provides further grounds for rejecting shitah-shopping.

לעולם הלכה כבית הלל,  
והרוצה לעשות כדברי בית שמאי – עושה;  
כדברי בית הלל – עושה.  
מקולי בית שמאי ומקולי בית הלל – רשע;  
מחומרי בית שמאי ומחומרי בית הלל –  
"עליו הכתוב אומר" הכסיל בחשך הולך.  
*The law actually follows Beit Hillel  
But one who wishes to act according to Beit Shammai – may do so;  
According to Beit Hillel – may do so.  
From the leniencies of Beit Shammai and from the leniencies of Beit Hillel – he is wicked;  
From the stringencies of Beit Shammai and the Stringencies of Beit Hillel –  
of him Scripture says "the fool walks in darkness".*

Talmud 7a explains that this applies to all disputes among rabbis of equal rank; one is entitled to follow any one rabbi or school consistently, but one who cherry-picks the leniencies of both sides is considered wicked. The problem of asking the question to a second halakhist is therefore intensified when one does so only after receiving stringent rulings, and especially if the question was originally asked to one's usual posek.

Please note, however, that the Talmud has no general objection to asking different questions to multiple rabbis. The *beraita* discusses only circumstances in which the answers of Beit Shammai and Beit Hillel were known in advance, and where the primary ground for choosing among them was leniency. There is no objection to directing questions to rabbis who are experts in particular fields, or who know your mind and soul better with regard to specific issues, or who share your values in particular areas. The phrase "*asei lekha rav*", meaning that one should seek to have a primary Torah mentor, is often excellent advice, but pretending that such a relationship exists when it does not can do great harm. In its original contexts

(Pirkei Avot 1:6 and 1:16) *aseh lekha rav* it does not relate to asking live halakhic sheilot, and indeed R. Ovadiah miBartenura in his commentary there emphasizes that one should learn halakhic reasoning and application from multiple teachers.

Furthermore, a key marker of authentic Torah is that דרכיה דרכי נעם, “All her ways are pleasantness”, and it violates the nature and purpose of halakhah when a psak causes unnecessary moral discomfort or emotional anguish, let alone harms a marriage. We each have a responsibility to prevent this. One way of accomplishing this is to ask again when a psak seems not to meet the “pleasantness” standard.

Is there a way to distinguish this from the “shitah-shopping” that you correctly deplore?

Let’s take a few minutes to go through some of the mekorot now, and develop a preliminary theory. Maybe we can do the topic more justice together in our iyyun shiur over the next several weeks.

On Niddah 20b, the gemara cites our beraita to challenge an incident in which Yalta, the wife of Rav Nachman, brought a stain to Rabbah bar Bar Channah, who declared it *tamei*; and then to R. Yitzchak son of Rabbi Yehudah, who declared it *tahor*. How could R. Yitzchak do this? The gemara says that Yalta told him that Rabbah bar Bar Channah himself had in the past ruled similar stains *tahor*, but had trouble with his eyes that day. Later the gemara suggests that R. Yitzchak thought the answer was obviously *tahor*, and so did not see himself as issuing a ruling, but rather as informing her of the definite halakhah.

The category “ruling” applies only when the posek was confronted by a genuine choice, and the beraita’s rule never prevents a posek from reversing a colleague’s error.

Now of course the questioner cannot determine on their own that the first answer was an error, and not merely a poor use of discretion. Tosafot (see also Tosafot Chullin 44b, AZ 7a) therefore concludes that the beraita does not constrain people from asking; rather, it gives guidelines to halakhists as to when they can overrule the previous answer. At most, it obligates the questioner to tell the halakhist about the previous ruling.

דקפידא לא הויא אשואל אלא אחכם  
אבל השואל ישאל כל מה שירצה  
דמתוך כך ידקדקו בדבר  
ופעמים שהראשון טועה ויצא הדבר לאורה  
*the objection is not on the asker but rather on the sage  
but the asker – should ask everything he wishes  
since as a result they will be rigorous on the issue  
and sometimes the first will have erred, and this way the matter will be seen in its true light*

Rabbi Menasheh Klein pointed out that the possibility of double-checking is beneficial by itself, in that scholars will likely be more careful lest their errors be exposed.

Tosafot Bava Kamma 100a makes a more far-reaching claim.

ולא דמי למראה דינר לשולחני  
דכיון שהראהו לשולחני שוב לא היה לו להראותו לאחר  
אבל גבי פרה  
כשאסרה לו חכם זה  
לא היה לו למהר להאכילה לכלבים או לערבים עם פירות  
והיה לו לישאל עדיין לחכם אחר  
*This is not like showing a dinar-coin to a banker (to determine its authenticity)  
where once he showed it to the banker, he should not have shown it to another  
but regarding a cow  
when this sage forbade it to him (=declared it not kosher),  
he should not have hurried to feed it to dogs . . .  
rather he should yet have asked it another sage.*

The question there is whether a halakhist is financially liable for incorrectly ruling something not kosher, if the financial consequences can no longer be corrected. The answer is: No, because the questioner should not have followed the incorrect ruling without asking another halakhist, especially when the consequence is that food fit for human is fed to dogs! Here Tosafot say that questioners have not only the right but the obligation to ask for second opinions on halakhic issues where the answer has real-world consequences, just as responsible people seek second opinions on medical issues.

Rabbi Hershel Reichman reports a fascinating explanation of this from Rabbi Yosef Dov Soloveitchik (Reshimot Shiurim Bava Kamma 100a):

דשאני הוראת חכם  
 שאינה הבעת דעת מומחה בעלמא  
 כמו הבעת דעת שולחני  
 אלא מהווה חלות שם בפני עצמה בדיני התורה  
 וכדכתיב (דברים י"ז: ח')  
 כי יפלא ממך דבר למשפט בין דם לדם ובין דין לדין כו'  
 וקמת ועלית אל המקום וכו' ובאת אל הכהנים הלויים ואל השופט אשר יהיה בימים ההם  
 ודרשת והגידו לך את דבר המשפט  
 ומעצם דיני ההוראה הוא שהוראת חכם ניתנת לבירור נוסף,  
 שכל הוראת חכם הוי' חפצא של תורה וממסורת התורה היא,  
 ותורה ניתנת לבירור לפי המשא ומתן שבין החכמים.  
 ולכן לא היו להם לבעלים לסמוך רק על החכם ששאלו בראשונה,  
 כי יתכן שבמשך בירור ההלכה עם חכמים אחרים  
 הוראתו תשתנה ותבוטל,  
 משא"כ בשולחני

*The ruling of a halakhist is different  
 It is not the pronouncement-of-opinion of a mere expert,  
 like the pronouncement-of-opinion of a banker  
 rather it constitutes the creation of an independent status in the laws of Torah  
 as Scripture writes (Devarim 17:8):*

*“Should something be beyond you in judgment – between blood and blood, or verdict and verdict ...  
 You must rise and go up to the place ... to the Levite Kohanim and to the judge who will be in those days  
 you will seek and they will tell you the matter of judgment”  
 among the very laws of ruling is that the ruling of a sage is open to further clarification/sifting  
 since every ruling of a sage is reified Torah and integral to Torah tradition  
 and Torah is given over to clarification/sifting via the give-and-take among sages.  
 Therefore, the owners should not have relied exclusively on the ruling of the sage they first asked  
 since it is plausible that in the course of clarifying/sifting the law with other sages  
 his ruling would change or be annulled  
 which is not the case regarding a banker.*

All this makes clear that you have not only the right, but the obligation, to ask for a second halakhic opinion when the first answer you receive feels wrong.

So how is this different than shitah-shopping?

A first-level formulation is that shitah-shopping is when you have no intellectual or moral interest in the outcome, but are looking only for convenience. But that is not practically sufficient, as many people will either misidentify their motives or else be paralyzed by doubt as to their motives.

A deeper formulation recognizes that asking the question again is tantamount to asking for *hatarat nedarim*, to be freed of one's oath of obedience. Under some circumstances, a formal *hatarah* would be needed in order to follow the second ruling. This means that transparency with the second halakhist is vital. More importantly for our purposes, it means that the second question is not “shopping”, but rather asking whether the initial psak was genuinely wrong.

You should be aware that halakhah recognizes many types of error. It is universally acknowledged that a psak can be overturned if its author missed a vital legal precedent, and reasonable to contend the same in nonfinancial cases if the author misevaluated the weight of various authorities. It is less clear how to handle answers that are technically defensible but nonetheless wrong in the particular situation for particular people.

As an example: There is unquestionably a range of legitimate positions as to whether and to what extent married women may use birth control while they complete their formal educations. But a psak that all forms of contraception are forbidden absolutely until the couple has both a male and a female child – with the concomitant risk that the mother will never be able to complete her degree – is wrong for women who have built sincere Orthodox lives to that point on very different and equally legitimate assumptions about the halakhah.

The decision to ask the sh'eilah to such a poseik, and the willingness of the poseik to answer it, likely reflects a fundamental lack of mutual understanding and dramatic overestimation of the *asei lekha rav* relationship. It happens that in the course of asking a sheilah and teshuvah a fundamental clash of values is revealed. Psak that emerges from such a clash is generally authoritarian and unhealthy. [1]

My sense is that there is a sliding scale – the more “wrong” the psak is, and the worse the consequences of a psak’s “wrongness”, the easier to overturn it.

I therefore encourage you to re-ask your question to me, and to anyone else whose judgment, scholarship, and integrity you trust, recognizing that we must decide not only how but also whether to answer.

There is much more to say – see you in shiur!

Bivrakhah,  
Aryeh Klapper

---

Notes:

1. It is possible, as Rav Moshe Kahn has argued, that in areas which are deeply personal, and on which the range of legitimate halakhic options is widely known, any psak will be authoritarian and unhealthy.

Great poskim often “talk through the sheilah” before answering it, and “pasken” only when it is clear that for whatever reason the questioner is “stuck”. In an era and society which prize autonomy and in which halakhic knowledge has been significantly democratized, “talking through the sh'eilah” should probably be the default mode.

## **Sinai and Orthodox Authority**

January 28, 2016

The Jewish people are a political community bound by religious law. This proposition emerges from the *Aseret HaDibrot* and indeed all of Torah and is a fundamental necessary assumption of any halakhic Judaism.

‘Political’ means that we take collective responsibility for the distribution and exercise of power in our community.

‘Religious’ means that we see Jewish law as deriving its authority from G-d’s will.

A community is bound by religious law, but not political, if it sees obedience to that law by members of that community as solely a matter of personal choice.

The easiest way to accomplish this reasonably is to restrict religious law to ritual and allow a parallel, non-religious system to take responsibility for issues such as the distribution of material goods (economic policy, *Choshen Mishpat*), the regulation of information (libel and slander laws, *lashon hora*), criminal justice (*dinei nefashot*), and even of membership in the community (immigration policy, *gerut*).

I contend that an authentically halakhic Judaism has a principled opposition to such restriction.

But, I need to qualify that statement immediately by saying that an authentic halakhic Judaism may accept or even advocate for such restriction in particular circumstances, on practical or moral grounds.

For example: when the Jewish community is practically unable to use physical force against its members, criminal law needs to be handled by other agencies.

Or: when many segments of the Jewish community fundamentally reject the authority of *halakhah*, coercing obedience to it is both practically counterproductive and morally offensive.

A community is political, but not bound by religious law, if it grounds the legitimacy of power on a basis other than Divine Will.

But, I need to qualify that statement immediately by saying that it need not ground the legitimacy of power *exclusively* on the basis of Divine Will, nor on the basis of *direct* Divine Will.

In fact, I contend that halakhic Judaism has always rejected both. Halakhic Judaism has always held that the legitimacy of power requires heteronomous and autonomous grounds.

The simplest basis for this claim is that the Torah became binding when we accepted it, not when G-d gave it.

Furthermore, many features of *halakhah* are specifically and explicitly intended to distance direct Divine Will from power. The clearest illustration of this is Rabbi Yehoshua’s use of the Biblical clause לא בשמים היא, “It is not in Heaven” in the Oven of Akhnai story. The point of this story is not to celebrate autonomy but rather to legitimate the use of coercive authority by some human beings against others, specifically against others who claim the right to act on the basis of their own experience of Divine Will.

Halakhic Judaism is therefore, like many contemporary systems of government, an intricate dance that revolves around the dynamic interaction of autonomy and authority. That dance must be enacted differently in different contexts. Contemporary Orthodox versions incorporate the reality that formal halakhic authority is greatly diminished, in three interconnected ways:

First, the halakhic community has little-to-no access to any means of power other than social suasion. (This is true even in the State of Israel for the overwhelming majority of halakhic issues.)

Second, there is almost no formal framework for granting halakhic authority within the community, especially outside Israel. Even those who believe that titles matter need not hold that having met the minimal standards for *semikhah* confers more than minimal authority.

Third, many of the mechanisms within *halakhah* for granting authority have been sidelined. *Midrash Halakhah* is not used to generate law; legislation is binding at most on narrow local communities; mechanisms for seizing property or annulling marriages are used only in directly precedented cases; there is no mechanism for taking a binding vote on issues of controversy.

If we stay with the dance metaphor, the weakening of one partner does not properly lead to the other asserting more and more dominance. Rather, as in all relationships, one proper response to weakness is to make greater efforts at self-restraint, to ensure that one's partner is still given the fullest possible capacity for self-expression and influence in your shared being.

So one can argue that the proper response to the weakening of formal halakhic authority is not exuberant celebration of halakhic autonomy, but rather voluntary restriction of that autonomy, especially in areas where the stakes are lower. (Note that both halakhic autonomy and its restriction may play out differently for those who formally make decisions only about their own actions, and those who formally make decisions with the intent to set halakhic precedents.)

A strong-form statement of this argument is: In the absence of formal authority, the preservation of *halakhah* as law requires us to seek to constitute informal authority whenever and wherever possible.

But I think this is false. *Halakhah* restricts the authority of direct Divine Will not because it mistrusts G-d, but rather because it mistrusts humans who would be the conduits of that Will, or would claim to be. Therefore, *halakhah* has no brief for giving similar authority to human beings on any other basis. So an authentic halakhic system must always allow for authority to be religiously challenged, rebuked, or even disobeyed.

But there must be an authority to challenge, rebuke, or even disobey. A paradox of modernity is that one may be obligated to establish authority in order to disobey it.

So the issue of non-Orthodox halakhic-ness cannot be about, or at least not only about, whether Orthodoxy is generally and/or fundamentally right or wrong about gender roles, or about sexuality. The issue is not even whether Orthodoxy generally and/or fundamentally excludes the objectively correct positions on such issues.

The question is whether it is possible to reject the informal Orthodox authority exercised on such issues and still authentically maintain a conception of the Jewish people as a political community bound by religious law, and sustain the dance of autonomy and authority in one's individual and communal life.

In the context of that question, I want to make a descriptive sociological claim that may have significant normative implications: The claim is that it is perfectly coherent to describe someone, or for someone to describe themselves, as non-observant Orthodox, but that it is incoherent to describe someone, or for someone to describe themselves, as non-observant Halakhic non-Orthodox. If one doesn't practice *halakhah*, then the *halakhah* one doesn't practice is Orthodox.

Assuming I am correct, Orthodox identity exists prior to and independent of praxis, whereas non-Orthodox halakhic identity is constituted by practice. I don't claim that this was always true, or is inevitably true. But if it is true now, it certainly reflects the failure of American Conservative Judaism to develop a successful non-Orthodox basis for grounding halakhic obligation. With rare individual exceptions, Jews today who identify as both halakhic and as non-Orthodox are an epiphenomenon of Orthodoxy. They have rationales for their rejection of specific Orthodox rulings, but they have no independent rationale for accepting the rest of the system.

One might be able to both summarize and generalize this by saying that:



(a) no one has yet successfully developed a Jewish theology that both accepts Higher Biblical Criticism and convinces Jews that they are obligated to subordinate their immediate perception of the Divine Will to the perception of others who are more grounded in Jewish tradition; and

(b) no one has yet successfully developed a non-Orthodox *halakhah* that Jews see as authoritative whether or not they experience its observance as immediately religiously meaningful.

I want to be clear that the successful development of such a theology or *halakhah* would not necessarily lead me to see it as religiously legitimate. The tradition I see as authoritative has often utterly excluded positions that were genuinely halakhic, meaning that they held with integrity that the Jewish people are a political community bound by religious law. Take for example the Sadducees, or *lehavdil elef alfei havdalot*, Beit Shammai.

On the other hand, I also want to be clear that Orthodoxy is not a magic word, in two ways:

First, the Orthodoxy of today includes positions that are halakhically legitimate but evil, not because they offer intellectually implausible readings of traditional texts, but because they offend against an objective moral order. If I had my choice, I would exclude them. As I do not have the social power to accomplish this, Orthodox identification instead requires that I take responsibility for them. Yigal Amir is Orthodox; at least some of the “price-tag” terrorists are Orthodox; there are virulent racists in American Orthodoxy; and so on. It is *davka* Orthodox Jews who need to denounce them and work toward making such positions unacceptable in their community to the point that they are no longer Orthodox.

Second, the Orthodoxy of tomorrow may become halakhically illegitimate. If tomorrow all the Orthodox synagogues in the world introduce idol worship, with the approval of their rabbis, DON'T LISTEN!

Third, Orthodoxy today or tomorrow may choose to exclude halakhic people or community for completely illegitimate reasons, and if it chooses to exclude a sustainably halakhic community, that community would be entitled to see Orthodoxy rather than itself as violating *lo titgodedu*, the prohibition against factionalism.

What I want to suggest overall is that the interests of Torah are better served in our day if:

- (1) People who have moral problems with specific areas of *halakhah*, but recognize the religious necessity of authority, make their critiques within the Orthodox system rather than excluding themselves.
- (2) People who have authority within the halakhic system recognize the religious value and necessity of internal moral and intellectual critique, and see those who engage in such critique—even when they go to the extent of civil disobedience—as vital positive members of their community. (Note that civil disobedience, which involves acceptance of the legitimacy of penalties, must be sharply distinguished from secession or rebellion.)
- (3) People who have authority within the halakhic system recognize that authority is constituted not by agreement but by eagerness to engage and willingness to obey in the face of disagreement.

I believe that these recognitions would lead to different and better handling of current and future controversies within and on the borders of Modern Orthodoxy.

I also suggest cautiously that Modern Orthodox leaders should recognize the extent to which their own community's continued presence in the Orthodox coalition is not inevitable. I say cautiously because the recognition of insecurity can lead to the persecution of alleged heretics to prove one's own loyalty. But it can also lead to a mature recognition of the dangers posed by zealots, and concerted effort to prevent them from unnecessarily burning bridges, or grain silos.

## Authority or Anarchy?

September 26, 2016

### Three stories about public halakhic policy from the past few days

Should Orthodox rabbis have authority over each other? This issue has come to the fore in three episodes over the past few days. In the brief essay below I try to explain how each episode helps illuminate the issue and to argue that we have been avoiding hard choices that we really have to make.

1) The RCA passed a resolution **mandating** that its members use a halakhic agunah-prevention prenup when officiating at weddings.

Modern Orthodox discussions on social media have generally cheered this.

SBM alum Yeshayahu Ginsburg deserves great credit for pointing out an underlying process issue – should rabbinic organizations or institutions be able to impose their will on rabbis with whom they have substantive halakhic, hashkafic, or sociological disagreements?

The RCA also recently passed a resolution forbidding its members from hiring women as clergy.

Modern Orthodox discussions on social media have generally booed this.

Bluntly – if you support prenuptial agreements *and* women as clergy, is it possible or legitimate to expect the RCA to effectively enforce the first while asking RCA members to ignore the latter?

2) The Chief Rabbinate failed to automatically approve conversions certified by two of the RCA's formal Halakhic authorities, Rabbi Gedaliah Dov Schwartz and my teacher Rabbi Mordechai Willig.

The Chief Rabbinate's decisions reveal yet again the hollowness of its supposed deal with the RCA on conversions. As I have written many times before, its procedures in this regard violate the numerous Torah prohibitions against oppressing converts, Jews, and human beings. Its blatant disregard for American Orthodoxy damages respect for Torah and halakhah. We need to come up with and fight for immediate plausible alternatives to a rabbinic bureaucracy that seems incompetent at its best and often much, much worse.

It is fair to argue that with Israel out of the picture, the entire RCA drive to centralize US conversions via the GPS system becomes an obvious mistake, and should be dismantled. The argument is that the GPS system's standards are so restrictive that many Orthodox rabbis end up taking converts elsewhere, and so it leads to a proliferation of Orthodox converts who are not recognized universally in Orthodoxy. Moreover, the system has applied its standards retroactively, so that many past Orthodox converts (and Orthodox children of Orthodox converts!) are being forced to reconvert. As with the Chief Rabbinate's policy, this means that every legitimate convert must live in constant fear for their own Jewish status, and for that of their descendants *ad biat goel*. This violates all the same Torah prohibitions mentioned above.

I think this argument is substantively correct. Except – it assumes that the alternative is a better world in which almost all Orthodox converts are generally recognized by almost everyone in Orthodoxy. We have to consider the possibility that the alternative is one in which, let's say, 49% of RCA members adopt the policy of the Chief Rabbinate and view every past and present conversion as presumptively invalid.

In other words: given that we can't actually impose authority, reach genuine consensus, or achieve universal mutual recognition, would complete anarchy be better or worse than what happens now?

3) Yeshivat Chovevei Torah released a responsum by Rabbi Ysoscher Katz permitting women to lead selichot services (or, more technically, permitting groups coming together for selichot to designate themselves as ensembles of individuals rather than as congregations).

The responsum was released at a time that gave halakhic authorities no opportunity to consider its arguments, let alone a chance for public consideration of its merits, and yet seemed intended to generate immediate practice. Rabbi Katz and YCT acknowledged that YCT Rosh Yeshiva Rabbi Dov Linzer had previously issued a responsum with a different practical conclusion.

When creative arguments are proposed for new practices that are clearly both halakhically and sociologically controversial, halakhically serious leaders and congregations should engage in serious deliberation before acting. I hope that this has now been the case regarding women leading selichot in all congregations and communities that aspire to halakhic seriousness, including partnership minyanim.

Let's suppose that the overwhelming majority of RCA members conclude that Rabbi Katz's responsum is totally wrong. Would it be legitimate for them to pass an enforceable resolution declaring that rabbis must not permit women to lead selichot? What can an Orthodox halakhist, or an Orthodox organization, legitimately say about a halakhic decision made by an acknowledged colleague that does not leave their lay audience saying "these and those are the words of the living G-d", and we can act as we please? (If the answer is nothing, the only recourse left is delegitimizing the author of the decision, i.e. denying collegiality.) Under what circumstances should individual halakhists be bound by majority decisions, especially majorities of lesser scholars? Is there a difference between majorities and overwhelming majorities?

Bottom line: We need a much deeper and more sophisticated conversation about rabbinic and halakhic authority. We need to recognize that granting authority always involves agreeing to follow rulings we disagree with, and that denying authority always involves letting people do things we disagree with. We need to develop ways of denying the *l'maaseh* legitimacy of a psak without denying the Orthodoxy or learning of the posek. We need to acknowledge that halakhah legitimately has its own politics, and that if we persist in shallow or scorched-earth tactics, Orthodox society will soon resemble the US Congress or worse.

## Halakhic Flight Simulators? The Need for Laboratories of Law

September 2, 2016

Modern Orthodoxy faces serious moral, intellectual, and spiritual challenges. Gender, sexuality, Zionism, and history each raise questions that deserve sustained, thoughtful, creative, and sensitive treatments better than those we've developed so far. Very likely we need big, radical ideas to accomplish this.

We are also properly conscious that most big, radical ideas are wrong, dangerous, or both. On average, we are better off sticking with the tried-and-true than following a series of brilliant flavors of the month.

Halakhah classically tried to find a middle ground by using the intellectual elite as a filter. Ideas were first floated to fellow talmidei chakhamim, and with genuine statements that they could be implemented only after they had gained support from the elite of the elite.

This method has broken down in our day. There is much to celebrate about the democratization of Halakhah – מי יתן והיה כל העם חכמים – but one loss has been the capacity for scholars great and minor to speculate without risk of immediate consequences. Nowadays, the move from blog to minhag happens at light speed.

A discussion rooted in this week's parashah may offer a way forward.

The Torah states that when a Jewish city is seduced into idolatry (*ir hanidachat*), it is the obligation of the rest of Israel to make war against that city, execute its (guilty) inhabitants, and burn all its spoils. Halakhah insists that each individual inhabitant be tried separately and with due process of law. That seems impractical; in a wholly corrupted society, who can bear reliable witness to another's crimes?

Perhaps it is not intended to be practical. Sanhedrin 71a records a beraita which states that the *ir hanidachat* "never was, and never will be". The Talmud identifies this bold assertion with the halakhic position of Rabbi Eliezer, who holds that the presence of even one mezuzah (or phylactery or Torah scroll) in the city prevents it from being declared an *ir hanidachat*. It then asserts that Rabbi Eliezer's position is based on Devarim 13:17, which requires the Jews to gather "*kol shelalah*" = "**all** the spoils" of the city and burn them. Since burning the Name of G-d is forbidden, it follows that this obligation cannot be carried out in a city which contains even one mezuzah.

But does it really follow? It would be at least equally reasonable to interpret "all the spoils" as meaning "all the spoils that may halakhically be burnt", in which case one could spare the mezuzah and yet spoil the city. (This interpretation is found in Sifre.)

A deeper question is the relationship here between Biblical interpretation and halakhic outcome. Here are three possibilities:

1. Rabbi Eliezer began by understanding the verse. On the basis of that understanding, he decided that the law was purely theoretical.
2. Rabbi Eliezer already held, on different grounds, that the law was purely theoretical. Therefore, he was able to adopt an interpretation that made the law impractical.
3. Rabbi Eliezer wanted the law to be only theoretical. He adopted this interpretation *because* it had that implication.

Mishnah Sanhedrin 10:6 records the following anonymous position (also brought as a second option in Sifre):

*"Its spoils" – but not the spoils belonging to Heaven.*

*Based on this they said:*

*The objects in (an ir hanidachat) that were dedicated to the Temple – should be redeemed (and returned to ordinary use);*

*The terumah (in it) – should rot (i.e., neither burnt nor consumed by human beings);  
The sacred writings in it – should be hidden away (i.e., neither burnt nor used).*

This position clearly holds that there can be sacred writings in an *ir hanidachat*. Sanhedrin 123a therefore states that this Mishnah disagrees with Rabbi Eliezer, who holds that the presence of sacred writings means that the status of *ir hanidachat* cannot apply.

Does this mean that the Mishnah held that *ir hanidachat* is practical law?

On Sanhedrin 71a, the Amora Rabbi Yonatan responds to the positions that the *ir hanidachat* and rebellious son (*ben sorer umoreh*) ‘never were and never will be’ by stating that he saw them and sat on their tomb and tell, respectively. Many commentators note that Rabbi Yonatan was a Kohen and had no business sitting in such places. Furthermore, Rabbi Yonatan lived long after the Sanhedrin surrendered capital jurisdiction. Finally, the tomb and tell might not be evidence for the correct halakhah but rather markers of grave injustices committed by sectarians. For example, Josephus records the trial of Herod’s sons under the *ben sorer umoreh* rubric, and neither the substance nor the form of the trial conform to our halakhah. It therefore seems likely that Rabbi Yonatan was not testifying from experience but rather asserting that these beraitot **must** be wrong, and that he was so sure of this that it was *as if* he had seen the executions.

Rabbi Yonatan offers no textual or legal grounds for this certainty. He does not argue with Rabbi Eliezer’s reading of “all its spoils”. Rather, he declares the idea of a purely theoretical law intrinsically implausible: why would the Torah contain these laws if they never happen in real life?

Now the beraitot themselves ask and answer this question:

*If it is so (that these laws never were and never will be), why were they written?  
Derosh vekabel sakhar = seek/expound and receive reward.*

Why does Rabbi Yonatan find their answer insufficient?

In stereotypically Talmudic fashion, the best route to answering this question may be asking more questions. Are the content and experience of Torah study different when one is studying purely theoretical law? If yes, how?

Perhaps Rav Yonatan felt that taking responsibility for consequences is an essential component of *talmud Torah*, which otherwise degenerates into an intellectual game. Perhaps he felt that consequence-free halakhic conversations are meaningless, since there is no way of testing whether a particular position is correct.

One interesting way to parse the dispute is as follows: Rabbi Eliezer believed that because halakhah is derived in a way that crosses all disciplinary boundaries, so that, for example, conversations about temple sacrifices affect the laws of divorce, there is no loss of responsibility in making an area of law purely theoretical. There will still be consequences. But Rabbi Yonatan felt that this was not enough to prevent beit midrash discussions from deteriorating.

Or we can frame Rabbi Eliezer’s position more positively. Perhaps he held that there is a need for areas of halakhah which are delimited as consequence-free *because* they will enable radical creativity, and he felt that such creativity is essential *because* it will expand the options available to poskim in the practical area of halakhah. *Ben sorer umoreh* and *ir hanidachat* are the laboratories of halakhah, or its DARPA.

Do we have examples of this working?

Perhaps. All the positions we have seen agree that the mezuzot of an *ir hanidachat* are not burnt. This outcome can be challenged on formal grounds. A general principle of halakhah, formulated as *aseh docheh lo taaseh*, is that when a positive commandment is defined in a way that necessarily involves the violation of a negative commandment, the positive commandment wins out. A host of acharonim

therefore ask: Why doesn't the positive commandment to burn the spoils of an *ir hanidachat* override the prohibition against destroying G-d's Name?

Minchat Chinukh 142 and Rav Moshe Feinstein (cited by Daf al Daf Sanhedrin 113a from Merapsin Igrei) give answers that can be seen as either identical or else as diametrically opposed. Minchat Chinukh suggests that the principle should apply, but the Sages overrode the law in order to prevent the degradation of the Divine Name. Rav Moshe says that the principle does not apply when the negative commandment relates to the Honor of Heaven.

These are far-reaching, even breathtaking, claims.

Minchat Chinukh implies that Chazal overrode Biblical law when its consequences seemed intolerable to their spiritually sensibilities, even when no ethical issue was involved. Should they not have worried about being "more righteous than their Creator", or of being arrogantly "zealous for His sake"?

Rav Moshe weights Biblical laws by their content and theme rather than by objective formal criteria. What happened to "being careful with the light mitzvot as with the heavy"? Can we use criteria of this sort in every area of halakhah, and without significant basis in precedent?

The answer, I tend to think, is that we can, but in practice very rarely, and only when the need is great. "Big ideas" are cannon; using them to kill fleas rarely works, and often causes immense collateral damage.

Fear of that damage, well-grounded in bitter experience, often generates an instinctive negation of big ideas. This too is dangerous. Some problems require wholesale rather than retail solutions.

Perhaps Rabbi Eliezer thought of *ir hanidachat* as a "halakhic flight simulator", which let him try out designs without risking actual passengers.

I'm not at all sure how it would work today. A fundamental misunderstanding that plagues Modern Orthodoxy is the notion that the existence of an intellectual possibility in Torah constitutes a sufficient basis for action, and that the choice among these possibilities is simply a matter of taste. This makes it very hard to keep even the unstated implications of halakhic conversations purely theoretical. But Modern Orthodoxy desperately needs to create forums which allow for radical ideas to be floated and examined without being immediately seized on as the basis for radical practice.

## **The Delicate Balance of Halakhic Decisionmaking**

January 18, 2016

Halakhic decision-making requires the careful balancing of (at least) three disparate factors: The meaning of authoritative texts, the authority behind or against particular legal positions, and meta-halakhic considerations. In the spectacular just-concluded inaugural Men's Winter Beit Midrash of the Center for Modern Torah Leadership, we came across an excellent illustration of such balancing in a responsum of Rabbi Eliezer Waldenberg Z"l, *Tzitz Eliezer* 8:37. I hope the following presentation of that responsum will give you a taste of serious halakhic process and of the learning at WBM, and that you will be inspired to think about how studying Torah in this way can produce an exciting new generation of male and female Modern Orthodox leadership.

Rabbi Waldenberg is responding (in 1961) to an *agunah* case referred to him by a former student serving as the rabbi of a synagogue in Mexico. The husband in the case has refused to divorce his wife for five years, and the question is whether the original marriage can be invalidated so as to allow the wife her freedom without a *get*. The Mexican rabbi affirms that the designated witnesses at the wedding were halakhically ineligible. As a valid halakhic marriage ceremony requires the presence of eligible witnesses this should suffice to free the wife. However, there is a small chance that at least two eligible witnesses were present at the wedding as guests.

The technical question raised by this case is whether the presence of such witnesses would validate the marriage ceremony. There are two ways to argue that it should not: (a) the designation of specific witnesses for a marriage ceremony makes all other witnesses ineligible for the purposes of that ceremony; and (b) the halakhic rule that: "*If one of the witnesses is discovered to be (ineligible because) they are related (to either party or to each other) or pasul (because of their own violations of Halakhah) – the entire set of witnesses (to which they belong) becomes legally null*" applies here even though the ineligible witnesses were designated and the eligible ones were not designated.

The Mexican rabbi cites a responsum of the late Sefardi Chief Rabbi Ben Tziyyon Uziel (*Mishpetei Uziel Even HaEzer* 2:57) which uses this reasoning (together with other approaches) to free an *agunah*. Rabbi Uziel acknowledges that he is ruling against a responsum of the Chatam Sofer, and seeks to demonstrate that Chatam's Sofer's evidence is not compelling. But he is also perfectly clear that he sees freeing the *agunah* as the metahalakhically correct result, and therefore seems willing to rule against Chatam Sofer so long as he can undo his proofs:

מצוה עלינו מפי רבותינו הקדמונים  
לחפש בכל צדדי היתר להציל אשה מעגונה,  
ולכן כמצווה ועושה הנני נטפל בדבר זה  
להשיב כהלכה כאשר יורוני מן השמים

*It is a commandment upon us from the mouth of our earliest rabbis  
to seek all aspects of permission so as to rescue a woman from the condition of agunah.  
Therefore it is as one "who is commanded and acts" that I engage with this matter  
so as to respond in accordance with Halakhah and as they direct me from Heaven . . .*

Chatam Sofer's highly creative argument was that: (a) guests at a wedding can function as witnesses to the wedding even if they do not hear the groom's declaration or see him place the ring on the bride's finger, because knowledge obtained by overwhelmingly powerful inference can be considered testimony; and (b) the principle that "If one witness is ineligible etc." does not apply to cases where the witnesses are testifying via different legal mechanisms. Thus the designated ineligible witnesses, who testify on the basis of direct vision, do not invalidate the undesignated witnesses, who testify on the basis of overwhelming inference.

Tzitz Eliezer does not contend that R. Uziel is demonstrably or even probably incorrect to reject one or both of these premises. However, he argues that because Chatam Sofer's authority is so much greater than R. Uziel's, ruling like the latter over the former requires a much higher standard of evidence, even to free an *agunah*:

הן אמנם דבס' משפ"ע שם כותב לסתור דברי הח"ס,  
אבל לסתור דברי רב רבנן כזה צריכים להוכחות נגדיות חזקות  
ונוסף לכך גם למצוא דברים מסייעים מדברי גדולי פוסקים אחרים.

*Granted that in the book Mishpetei Uziel he writes to contradict the words of Chatam Sofer, but contradicting the words of such a great among the rabbis requires strong disproofs, and in addition finding supporting words among the words of other great decisors.*

Note that Tzitz Eliezer is probably not casting any aspersion on R. Uziel's ruling. He might agree that R. Uziel had the right to overrule Chatam Sofer, and yet contend that lesser decisors such as himself could not follow R. Uziel against Chatam Sofer when their arguments are equally persuasive. Furthermore, Tzitz Eliezer contends that he **has** found a compelling disproof of Chatam Sofer in Responsum 7 of the great 15th-century German decisor Rabbi Yehudah Weil. Mahari Weil rules explicitly that in a case where the designated witnesses were ineligible, the wedding can be invalidated to free an *agunah*. Tzitz Eliezer believes either that R. Weil by himself outranks Chatam Sofer, or else that R. Weil and R. Uziel together suffice to overrule Chatam Sofer in an *agunah* case.

But we are not done. The 16<sup>th</sup>-century Greek decisor R. Yosef Ibn Lev (Maharival) states that one may not rely on R. Weil's position in *agunah* cases, and the 18<sup>th</sup>-century Polish compendium Baer Heiteiv seems to endorse his position. Tzitz Eliezer indicates that Maharival, Baer Heiteiv and Chatam Sofer together outrank R. Weil and R. Uziel, and so at this point he cannot free the *agunah*.

But he is not done, either – he is just beginning. He notes that Baer Heiteiv quotes only R. Weil's ruling, not his reasoning (and perhaps had did not have access to the full responsum). There are two ways to rationalize R. Weil's ruling: (a) he denies Chatam Sofer's claim that testimony-from-inference is sufficient to validate a marriage; or, (b) he believes that designating specific witnesses to a wedding has the legal effect of rendering all other witnesses ineligible with regard to that marriage.

Tzitz Eliezer contends that the second possible rationale contradicts the position of R. Moshe Isserles (RAMO: author of the late 16<sup>th</sup> century *Mapah*, or *Tablecloth*, which is the set of Ashkenazi glosses to R. Yosef Caro's *Shulchan Arukh*, or *Set Table*, and have been absorbed into that work, and are generally authoritative for Ashkenazi Jews) that if **eligible** witnesses were designated, other undesignated witnesses remain eligible as well.

Tzitz Eliezer then argues as follows: (a) Perhaps Baer Heiteiv rejected R. Weil in favor of Maharival because he believed that R. Weill contradicted the position later adopted by R. Isserles, and he correctly held that R. Isserles holds greater authority for subsequent decisors. However, (b) when one looks at R. Weil's full responsum, it becomes clear that R. Weill accepts R. Isserles' position, and therefore rejects (only) Chatam Sofer. Finally, (c) R. Weil is more authoritative for us than Chatam Sofer. (Indeed, if Chatam Sofer was unaware of R. Weill's position, we can argue that he would have ruled differently had he been aware, and so deprive his ruling of most or all authority.) On this basis (and others), Tzitz Eliezer agrees to free the *agunah*.

I have one point to add. It seems to me that the legal force of a position is affected by the context in which it is articulated. For example: A position that is articulated to free an *agunah* cannot necessarily be relied on in other circumstances, and a position articulated by a decisor in other circumstances should not be applied automatically to *agunah*-cases, especially when it would prevent subsequent decisors from freeing the *agunah*.

In this case, R. Weil's position was not articulated in an *agunah* context. He addressed a case in which, so far as we can tell, both parties still wished to be married to each other. The impact of his ruling was to require them to go through a second marriage ceremony. If Chatam Sofer **had** addressed an *agunah* situation, perhaps we would give his position authority equal to or greater than R. Weil's. However, Chatam Sofer's position was also articulated in a non-*agunah* context. In his case, the question was whether the second ceremony could be waived in order not to embarrass the officiating rabbi at the initial ceremony by exposing his failure to notice the ineligibility of a designated witness. Chatam Sofer



makes clear that at the outset that this is not a serious concern, as the second ceremony can be done without publicity, and that in practice the second ceremony should be held.

Chatam Sofer then obliquely references a Talmudic statement which suggests that one must give a substantive answer to even a fool's Torah questions. It is in the context of that statement that he offers his novel ground for validating the initial marriage. In other words, he did not intend for this ruling to be followed even in its original context. Moreover, he wrote this ruling while implicitly calling its recipient a fool, which suggests that he did not hold it to the highest standards of rigor. Tzitz Eliezer mentions none of this, but I suggest that it is in the background of his ruling. Regardless, it would give a contemporary decisor a basis for following his ruling, and that of R. Uziel, despite the position of Chatam Sofer.

## **The Market for Halakhic Authority: Some Reflections on Gadolnomics**

Originally published in *The Lehrhaus*  
October 19, 2016

It is my great pleasure to respond to Prof. Chaim Saiman's characteristically erudite, well-reasoned, and provocative essay about Liberal Orthodoxy and "gedolim." [1] I agree entirely with his fundamental thesis that halakhic authority requires both supply and demand. Nonetheless, there remain differences of emphasis, evaluation, and prediction that are worth exploring.

It is vital to distinguish at the outset between gedolim as leaders and gedolim as figureheads. Prof. Saiman writes that, in Orthodox discourse:

*invoking the gedolim serves as a powerful rhetorical tool. A viewpoint approved by a recognized gadol is automatically deemed in the bounds of acceptability, even if a majority find it wrong, novel, or idiosyncratic. By contrast, positions that fail to garner support of gedolim live under a perpetual cloud of suspicion, no matter how widespread amongst the laity.*

But this puts the cart before the horse. In much of contemporary Orthodoxy, the positions of gedolim (past and present) are in the hands of Procrustean censors who strive to ensure that nothing genuinely novel or idiosyncratic escapes, let alone anything "suspicious." [2] When such a position nonetheless escapes, the result is generally loss of gadol status rather than legitimization of the position. [3]

Moreover, none of the great posekim of the twentieth century had (or sought, or would have accepted) anywhere near the authority that the Orthodox Right attributes to its current figureheads (many of whom in fact have no authority at all, and cannot even control the release of documents bearing their signatures). [4] As opposed to the current façade of absolute consensus, those posekim regularly disagreed with one another in no uncertain terms and in full view of the laity. So I do not believe that the 'cult of the gadol' is a necessary constituent of halakhic authority, which both flourished before it and God willing will survive it.

Prof. Saiman claims that "positions that fail to garner support of gedolim live under a perpetual cloud of suspicion, no matter how widespread amongst the laity." This formulation draws a stark dichotomy between gedolim and laity; ordinary posekim play no role. This is contrasted with Liberal Orthodoxy, with regard to which Prof. Saiman quotes the founding statement of the International Rabbinic Fellowship as follows:

*The alternative and preferred model of rabbinic authority is one in which that authority is not consolidated into the hands of a few, but proliferated into as wide a circle of responsible rabbis as possible. In this model, the role of the rosh yeshiva is not to control his students, but to empower them to think for themselves, to assume responsibility, and to act on their own.*

This vision of the rosh yeshiva and the rabbinate is familiar in Modern Orthodoxy as that plausibly attributed by many students of the Rav to their teacher. [5] It also has deep roots in Slabodka and its many descendant yeshivot.

I contend, however, that this description matches only Liberal Orthodoxy's self-perception, not its reality. For example, the IRF speaks of rabbinic autonomy, and to some extent was founded to oppose the RCA's centralization of conversion via the GPS system. But it rapidly set up its own conversion system asserting its own halakhic standards, with YCT Rosh Yeshiva Rabbi Dov Linzer at the head of its halakhah committee. Rabbi Avi Weiss used similar rhetoric when beginning YCT, but in fact Chovevei musmakhim send their serious she'eilot back to their yeshiva teachers, as those teachers regularly assure me. When Liberal Orthodox powerhouse (and RIETS musmakh) Rabbi Shmuel Herzfeld and Maharat Ruth Balinsky wanted to allow female converts to immerse without a beit din present, they sent the she'eilah to Yeshivat Maharat Rosh Yeshiva Rabbi Jeffrey Fox.

It should also be much more acknowledged by the "Centrists" that no YCT musmakh has instituted radical changes in a previously "mainstream" Orthodox shul, nor has any YCT grad officially accepted a position

at a partnership minyan. That will likely change soon, but because of policy changes at the home institution, not because of satellite autonomy.

Prescriptively, this is not necessarily a bad thing. Critics often suggest that YU roshei yeshiva produce “out of touch” pesak, whereas shul rabbis better understand the laity’s needs. I think this is simply false. Roshei yeshiva receive she’eilot because people like their answers, and in any case many YU roshei yeshiva are successful shul rabbis as well. They are also in constant conversation with their shul rabbi students. The eclipse of shul rabbis occurred because they were less capable than the roshei yeshiva of serving a more educated and more observant generation of Orthodox men and women, and the balance is shifting back as a remarkable new generation of rabbis takes the field.

Centrist pesak may be New York-centric, and the she’eilah-asking audience for roshei yeshiva likely skews young. But Liberal Orthodoxy skews young and metropolitan as well. In other words, Liberal Orthodox halakhists currently use roughly the same structural model of authority as Centrists.

This fundamental structural agreement is often obscured by a key conceptual error. Expanding the range of acceptable pesak in the direction of “leniency” does not increase autonomy unless local rabbis can reject the results of their colleagues’ lenient decisions just as they can with regard to stringencies. For example: Demanding that I validate the Jewishness of anyone any colleague has ever converted may be a very good thing, but it limits my halakhic autonomy. This is why Liberal Orthodox activists regularly protest against the autonomy of marriage registrars in Israel. Enforced pluralism constricts autonomy. This may be good or bad, but either way it must be understood.

We must therefore look elsewhere than rabbinic autonomy for the cause of what is—here I agree fully with Prof. Saiman—the lack of a sufficient “sense of halakhic authority” on the left, as opposed to in the center and on the right.[6]

One possibility is that, in this regard, the right and center are living on borrowed time. The cult of the gadol springs up in the absence of true halakhic leaders, as a (an often successful) stopgap attempt to maintain halakhic authority. But sooner or later people notice the lack of genuine halakhic responsiveness to changed circumstances, the fundamentally totalitarian mindset necessary to maintain the façade of consensus, and the inevitable corruption surrounding figureheads. They become cynical or rebel.

In my view, this is currently much more of an issue on the right than in the center, where various YU roshei yeshiva such as Rabbi Hershel Schachter and my teacher, Rabbi Mordechai Willig, have emerged as genuine leaders. Some of the distortions of “gadolatry” remain all too present, but I think it would be dishonest and churlish not to acknowledge that they regularly take, publicize, and sustain novel, idiosyncratic, controversial, and courageous positions on issues ranging from the prenup and anti-me’agen demonstrations to kashrut to niddah to Zionism. One need not wish to follow them everywhere to acknowledge their genuine leadership, and to contend that the Haredi world has no one to match them.

That kind of true leadership, I contend, is the vital source of halakhic authority. It does not require the belief that these leaders are superhuman talmidei hakhamim with incomparable mastery of kol ha-Torah kulah; even those who think that Rabbi Schachter is unequalled in the area of halakhah recognize that he is not an incomparable lamdan or baal mahshavah.

This revival of centrist authority has made serious inroads to the right, and I think better accounts for Haredi acceptance of Centrism than a delayed acknowledgement of Rabbi Soloveitchik and Rabbi Lichtenstein’s respective gadolness. However, it has not spread to the left. Rather, it has alienated many on the left. This is partially a function of Rabbi Schachter’s very direct and sometimes caustic or derisive opposition to positions and personalities dear to the left.

The question is why the Orthodox Left has not produced comparable leadership, or alternatively, why its comparable leadership has not produced a comparable revival of halakhic authority. Prof. Saiman suggests that “[i]n a radically autonomous culture, it is very difficult to promote voluntary obedience to a demanding system of law whose norms are out of sync with contemporary mores.” This applies as well to

ordinary posekim as to artificially hyped gedolim. On this account, halakhic authority cannot exist without hierarchy, and the Orthodox Left objects in principle to hierarchy, even intellectually meritocratic hierarchy. The new democratization of halakhic knowledge facilitated by widespread higher Jewish learning, disruptive technologies, and ArtScroll means that there is no basis for some individuals having more authority than others.

I do not believe that this description of the left is accurate, at least not entirely. Even the most anticlerical of partnership minyanim eschew full egalitarianism because they are willing to grant halakhah some authority even when it conflicts with a fundamental norm of the rest of their lives.

At the same time, I think it is clear that Orthodox Left communities include many fellow travelers who want the benefits of halakhah—authenticity, discipline, etc.—without paying any price in autonomy. It also remains to be seen whether halakhic authority can be sustained, even in a community that deeply yearns for it, without belief in literal Torah mi-Sinai. Yet requiring that is certainly a deal-breaker for some on the Orthodox Left.

It may be that the Orthodox Left will yet fracture many times, along many axes, before we have any sense of which, if any, elements will succeed in revitalizing halakhic authority.

This brings us to the predictive element of Prof. Saiman’s essay:

*If liberal Orthodox communities can create a structure of commandedness that feels consonant, even if not identical, with classical forms, then eventually other Orthodox subgroups will come to recognize it—much as centrist Orthodoxy eventually gained the begrudging acknowledgment of haredim. But if it fails to do so, then claims that liberal Orthodoxy is engaged in a qualitatively different project than Orthodoxy will ring true, and comparisons to the trajectory of Conservative and Reform Judaism may yet prove accurate. So while I am rooting for liberal Orthodoxy’s success, it bears the burden of proving its vitality. From where I sit, the jury is still out.*

I think it is worthwhile to compare this thesis to one advanced by Rabbi Dr. Zev Eleff a year ago:

*In the post-World War II era, Conservative Judaism routinely looked to the Committee on Jewish Law and Standards to justify and prescribe normative Sabbath behavior (riding in automobiles), oblige a widely accepted solution to the agunah crisis (the “Lieberman Takkana”) and to defend dietary practices (Rabbi Isaac Klein’s swordfish responsum). Accordingly, it was the institutionalization of a particular brand of Halakhah that finally separated the Conservative Movement from its Orthodox coreligionists.*

Where Prof. Saiman argues for halakhah as the ultimate unifier of Orthodoxy, Dr. Eleff argues for it as a primary cause of sectarianism. The historical example of the Pharisees and Sadducees supports Dr. Eleff; Prof. Saiman can cite Hasidim and Mitnagdim as counterpoint.

I agree with Prof. Saiman that developing in the lay community “a structure of commandedness that feels consonant, even if not identical, with classical forms” is necessary for halakhah to function as a unifier. I don’t agree that it is sufficient. Rather, I suggest that unity requires each side to feel at least somewhat accountable to the other (recognizing that the degree of accountability will vary inversely with relative sociological power). This means inter alia that

1. each side makes halakhic arguments in a manner that is generally recognizable to the other, while eschewing arguments that the other sees as out of bounds.
2. each side respects and takes into account the other’s objective evaluations of its arguments.
3. each side restrains itself from acting on conclusions that the other sees as inconceivable.

In short, each side seeks to avoid “making the Torah into two Torahs.”

This brings us back, finally, to the subject of gedolim. One development relevant to both the Saiman and Eleff theses is the recent move of YCT to establish the Lindenbaum Center for Halakhic Studies, with

Rabbi Ysoscher Katz as Director. The Center has published responsa on a variety of subjects, and can be seen as an effort to establish its authors as “gedolim” in the sense intended by Prof. Saiman, namely as figures whose imprimatur suffices to legitimate an otherwise marginal-at-best community or otherwise out-of-bounds behavior. The risk is that it will instead instantiate Dr. Eleff’s thesis and lead to out-and-out sectarianism.

Part of the mythos of American Orthodoxy is that the aspirationally halakhic elements of the Conservative rabbinate erred fatally by issuing new permissions to a community that did not feel itself bound to obey the old prohibitions. The jury is certainly out as to whether Rabbi Katz’s teshuvah endorsing partnership minyanim repeats this error.

But there is a deeper issue. For “gedolim” to legitimate, their Torah must resonate not only in their community, but in the other community. Put differently, the gadol of one community must plausibly appear as a gadol to the other, not just sociologically but substantively. This requires that their Torah products reflect real accountability to at least some of the other community’s standards.[7] Rabbi Katz currently rejects such accountability, in ways that are evident in his teshuvot.[8]

I tentatively suggest an alternative to Prof. Saiman’s explanation for the grudging acceptance of YU Orthodoxy by the right; it just got better at their own game. Similarly, I believe that if Liberal Orthodoxy produces a deep cadre of halakhically committed scholars and laypeople who are equal to or better than their Centrist counterparts at halakhah and Talmud etc., with different sensibilities but with accountability, it will invigorate its own “structure of commandedness” while gaining the (perhaps grudging) acceptance of Centrism, and at least benign neglect from those further to the right.

With Prof. Saiman, I am rooting for that end, and doing my best to help bring it about.

---

Notes:

[1] Some of the ideas in this response were first presented orally at the Hartman conference on “Orthodoxy and Boundary Anxiety.” I will attempt to use Prof. Saiman’s term in this essay to cover the same groups that he intends, without venturing my own opinion as to the boundaries of “Orthodoxy”. On partnership minyanim specifically, please see <https://moderntoraleadership.wordpress.com/are-partnership-minyanim-orthodox-a-cmtl-symposium/>.

[2] See, for example, the chapter on Rabbi Samson Raphael Hirsch in Marc Shapiro, *Changing the Immutable: How Orthodox Judaism Rewrites Its History* (Oxford: Littman, 2015).

[3] See in this regard the responses to a recent hetter nisuin issued by Rabbi Shmuel Kamenetsky and Rabbi Nota Greenblatt.

[4] Consider Rabbis Moshe Feinstein, Yosef Eliyahu Henkin, Eliezer Waldenburg, Shlomo Zalman Auerbach, Rav Ovadiah Yosef, to begin with. This statement is possibly not true of Rav Yosef in his later years.

[5] Many of these students have not chosen to identify with the Liberal Orthodox wing.

[6] The term “sense of halakhic authority” is left undefined both in Prof. Saiman’s essay and here, and deserves extensive separate discussion. For now, either you share the intuition that something along those lines is lacking, or else much of what both Prof. Saiman and I write is nugatory.

[7] It is certainly also the case that leading figures on the right exhibit no accountability to the left. The acceptance-as-legitimate within other segments of Orthodoxy of positions that are deeply offensive to the left, such as bans on women driving, or tolerance of racist language, also hasten and exacerbate the split, as does the dismissal of otherwise valid critiques or positions simply because they are advanced by the left.

[8] For my critique of one recent teshuvah, see <http://library.yctarah.org/lindenbaum/women-and-kriyat-hatorah-a-response-from-rabbi-aryeh-klapper/>. For a similar critique by Rabbi Linzer of the most recent teshuvah, see <http://library.yctarah.org/lindenbaum/women-leading-selichot-a-response-to-rabbi-ysoscher-katz/>.

## **Intro to Halakhah**

December 27, 2016

*Hello Rabbi Klapper,*

*I am currently learning with some beginners to Judaism and people interested in conversion, and I want to help them conceptualize the idea and process of traditional Halakha. I feel like very often 'beginners' classes tell people what certain halakhot are (i.e., we don't do this on Shabbat) without giving them the tools, historical context and skills to be able to understand why something is part of halakha and how much legal weight it holds (from understanding biblical vs. rabbinic origins, to the evolution of the oral law, to understanding the 'weight' of post-talmudic halakhic writings, thinking about machloket in halakha, etc).*

*In other words - do you know of a good article or work that helps present a sophisticated overview of halakha that's appropriate to help teach beginners? I'm especially looking for a traditional approach since my learners will be operating within Orthodox communities.*

*Thanks!*

*Yana Tzviyah*

Dear Yana:

I have many times felt the lack of an adequate article for these purposes. Your letter inspired me to make the following attempt at filling that gap.

### **INTRODUCTION**

Halakhah is a spiritual language of the Jewish people. It is both a set of rules-for-action and a mode of thought. It tells Jews how to behave in situations that have already been thought through, and how to make decisions in new situations.

### **A. ABSTRACT CATEGORIES OF HALAKHAH**

All of Halakhah is under the authority of the Torah. Within that basic framework, there are many different levels and sources. The two most important categories are deoraita and derabbanan. Other significant categories include halakhah l'Mosheh miSinai and minhag.

Deoraita (literally: "of the Torah") laws are derived by Biblical interpretation. Some laws are explicit in the text, such as the prohibition against cursing the deaf. But even seemingly explicit statements become law only via the decisions of interpreters. For example, halakhah takes the Biblical prohibition "Do not place a stumbling block before the blind" metaphorically, as a prohibition against giving self-serving advice or enticing others into sin. (All authorities agree that it is forbidden to place a physical stumbling block in front of a person who can't see. But there is a possibility that it is not forbidden by this particular verse!)

Derabbanan (literally: of the rabbis) laws are legislated by rabbis. It is important to recognize that the assignment of a law to one category or the other is itself a decision made by rabbis.

Derabbanan laws divide into the categories gezeirot and takkanot.

Gezeirot are laws that are framed as direct extensions of deoraita laws, either because the cases are similar or to avoid slippery slopes.

Takkanot are laws that inculcate Torah values in society but are not necessarily connected to any specific deoraita law. For example, the phrase “tikkun olam”, which you may have heard in its modern usage (making the world a better place), enters Halakhah as a justification for a set of takkanot intended to encourage community and protect wives from unscrupulous husbands.

When deoraita and derabbanan obligations conflict, one generally (but not always!) follows the deoraita. When one is in doubt about a deoraita obligation, one must act stringently; when in doubt about a derabbanan obligation, one may act leniently. “Doubt”, “stringent” and “lenient” are themselves halakhic terms of art.

Halakhah l’Mosheh miSinai (literally: law given to Moses at Sinai) is a term used either to describe laws that G-d told Moses about at Sinai but nonetheless – for reasons unknown to human beings – told him not to write in the Torah, or else laws that have been part of the halakhic corpus for all of Jewish memory but no one knows when and where they entered. An example of the first category is that *tefillin* must be black.

Maimonides uses the term *kabbalah l’Mosheh miSinai* to refer to laws derived by a Biblical interpretation that is and always has been universally accepted by Jews.

Minhag (literally: what is practiced) refers to local or family/ancestral custom. The weight given to such customs varies greatly in different times and places, and depends on many factors. The weight given to any particular custom depends on many factors, not least whether halakhic authorities see it as constructive.

In our day, localities rarely have defined customs, and people often come from a quite varied set of ancestors. This attenuation of shared experience is still being worked out in many areas of halakhah.

You may see people using siddurim with different texts in the same synagogue, and members of a single community may have different practices on basic issues such as how to check vegetables for bugs and how to prepare tea on Shabbat. It is important to clarify when an issue is purely one of custom, when different “customs” actually reflect different underlying legal positions, and when a “custom” may result from unjustified halakhic laxity.

Halakhah in all these areas generally functions on the assumption that precedent is binding. However, as circumstances change, there is always a valid question as to how precedents apply to new circumstances. For example, should the rules about kashering metals apply to modern alloys with unprecedented physical properties?

There is also important and valid conversation about how halakhah should respond to historical events or modern sensibilities. For example, should we change the liturgy for 9<sup>t</sup> Av in light of the establishment of Israel and the liberation of the Temple Mount?

## **B. SOURCES OF HALAKHAH**

Deoraita law is derived by interpretation of the Pentateuch. Interpretation of the other books of Tanakh can yield only a special category of derabannan called *divrei kabbalah* (literally “words of tradition”; the term *kabbalah* here has no mystical subtext).

For almost all practical purposes, all halakhically relevant Biblical interpretation can be found in the Babylonian Talmud (henceforth Bavli). Post-Talmudic halakhists will rarely if ever derive law directly from the Biblical text, but rather will work with a Talmudic interpretation. Occasionally they will cite interpretations from other works that preceded the completed Babylonian Talmud (anywhere between



500 and 900 CE) such as the Jerusalem Talmud or the various compilations of Biblical legal interpretations known as *midrashei halakhah*.

Similarly, almost all relevant legislation can be found in the Bavli. Post-Talmudic rabbis almost never seek to legislate beyond the confines of their own community. Some rabbis had expansive understandings of their own community, however. For example, Rabbeinu Gershom of Mainz banned polygamy, opening other people's mail, and divorcing women against their will for all those who considered themselves Ashkenazim. The decree against polygamy was not universally accepted as binding by all Jews until the State of Israel enforced it on a forward-looking basis on the Yemenite Jewish community when they immigrated.

The key source of contemporary halakhah is therefore the Bavli.

The Bavli is organized around the Mishnah, a summary of the Oral Law composed by Rabbi Yehudah the Nasi around 220 CE. The Mishnah is somewhere between a code and a textbook, and contained just about all legal topics but not all legal texts. It rarely cites the Biblical source for even deoraita laws. It records many disagreements, including the names of the relevant rabbis, but also many anonymous positions that may or not reflect consensus or conclusion.

The Bavli cites sources for the Mishnah, undoes the Mishnah's summary by citing parallel and conflicting texts and treating them as equally authoritative, and seeks to formulate the boundaries and reasoning of the positions in the Mishnah. The Bavli is in dialogic form, framed by an anonymous narrator (according to Maimonides and much of the subsequent tradition, the overall editors were the 5th century Rav Ashi and the 6th century Ravina), but cites the comments and positions of Babylonian and Palestinian Rabbis from the post-Mishnaic era through the fifth century. Only some of its discussions end in formal halakhic conclusions, and those conclusions often vary in manuscript, and therefore may reflect rather than generate practice. Nonetheless, a complex set of rules has evolved as to how to derive halakhah from the Bavli.

In the millennium-plus since the Bavli's completion, halakhah has developed via three different types of literature.

The first is direct interpretation of the Talmud, in works often called *peirushim* (commentaries) or *chiddushim* (novellae). The most famous *peirush* is that of Rabbi Shlomo Yitzchaki, known as Rashi.

Perhaps the best-known *chiddushim* are those of Nachmanides, Rabbi Moshe ben Nachman. A famous contemporary *peirush* is that of Rabbi Adin Steinsaltz; famous contemporary *chiddushim* are those of Rabbi Yisroel Meir Karelitz, known as Chazon Ish. However, contemporary halakhic scholars rarely offer interpretations that cannot be found, at least implicitly, in medieval predecessors.

The second is through essays that address specific cases or topics. These are known as *sh'eilot u' teshuvot*, or *responsa*. The most influential *responsa* produced in America thus far are those of Rabbi Moshe Feinstein, in volumes known as *Igrot Mosheh*.

The third is through codes that synthesize the practical outcomes of the commentaries, novellae, and *responsa*. The most comprehensive code remains Maimonides' *Mishneh Torah*, which uniquely includes the laws that will be practiced only when the Temple is rebuilt, and laws that can be practiced only in Israel or with regard to Israeli produce. The most influential code, however, is the 16th century *Shulchan Arukh*, which in current usage refers to the original work of that title by Rabbi Yosef Caro together with the glosses added by Rabbi Moshe Isserles. That work contains only laws that can be practiced outside Israel.

One reason for the *Shulchan Arukh's* enduring influence is that Rabbi Caro was a Sefardi, whereas Rabbi Isserles was Ashkenazi. The combined book therefore brought together the two mainstreams of halakhah and became a universal basis for conversation.

The *Shulchan Arukh* generated its own set of commentaries. The most influential in popular Ashkenazic practice today is the early 20th century *Mishnah Berurah*, edited by the saintly Rabbi Yisroel Meir Kagan

of Radin, Poland. It deals only with ritual. The enormously influential 20<sup>th</sup> century Sefardic giant Rabbi Ovadiah Yosef treated Rabbi Caro's rulings as completely authoritative. Summary presentations of his positions are still popular.

### **C. IS THERE ONE HALAKHAH, OR ARE THERE MANY HALAKHOT?**

Several times we've already referred to differences in the halakhah followed by contemporary Sefardim and Ashkenazim. Those categories have a complex and illustrious history, and unpacking it will help us understand several broader issues about the nature and process of halakhah.

Sometime before the 10<sup>th</sup> century, Jews spread out across much or all of Europe. Whether because of different origins, or because of their new contexts, many communities developed distinct halakhic traditions. Each of these communities followed both the consensus and the idiosyncratic rulings of their past and present great halakhists.

The influence of particular traditions waxed and waned, in response to intellectual, economic, and political circumstances. By the time of the Spanish Expulsion in 1492, the two dominant European cultures were those of Spain and Portugal on the one hand, and of France and Germany on the other.

The Jews of Sefarad, unlike those of most previous European expulsions, did not assimilate into the halakhic cultures of their exile. They set up independent communities wherever they went, even where there was an established Ashkenazic culture. This seems like a violation of the deoraita prohibition "lo titgodedu", which bans halakhic factionalism, but for various reasons, the Sefardim were convinced that it did not apply to their situation. Perhaps they thought of themselves as a dominant culture, and all others as outliers.

For perhaps the first time, there were now two different halakhic cultures in the same location. The emergence of the Shulkhan Arukh as a composite work embodied and legitimized that phenomenon. Over time, both Ashkenaz and Sefarad have repeatedly fractured and recombined, but until the emergence of the modern State of Israel, there was no sense that they should recombine with each other, and such efforts in the State have failed almost completely.

The modern era saw another new phenomenon – denominational splits, and then ideological splits within denominations. In North American Orthodoxy today, Modern Orthodox, Yeshivishe, and Chassidic groups each see themselves as somewhat self-sufficient halakhic cultures, although they join in rejecting Conservative Judaism's version of halakhah. In Israel, Religious Zionists play somewhat the same role as Modern Orthodoxy in America, although the communities' ideologies are not quite parallel.

Denominational/ideological splits differ from geographic splits in that they foster much greater personal religious mobility. The ubiquity of multiple halakhic cultures today, coupled with the general modern tendency to value autonomy and individualism, raises the question of whether people should be bound to adopt a halakhic culture in its entirety, rather than treating themselves from a smorgasbord of legitimate religious options. This question is especially pertinent for converts and baalei teshuvah, who cannot be told to continue the traditions of their parents.

Another axis which at times seems to create multiple halakhot is the lekhatchilah/bediavad axis,

Lekhtchilah (literally "what one should do from the beginning") is the pristine halakhah, the way one should behave in the absence of external pressures.

Bediavad (literally "once it has already been done; often pronounced "bedieved") is the baseline halakhah, the minimum one has to do to avoid having to do it over, or to avoid negative consequences.

For example, one should lekhatchilah hear the Scroll of Esther on Purim in the presence of a minyan. However, one who heard it privately has fulfilled their obligation and need not hear it again, even

if a minyan becomes available. Similarly, many laws of kashrut set up lekhatchilah standards for separating milk and meat whose violation does not render the food or the utensils nonkosher.

What makes this confusing is that

- a. External economic or moral pressures (called *sh'at had'chak*) can enable and even compel one to choose the bediavad option. For example, one should eat food that is kosher only to bediavad standards if the alternative is humiliating a well-intentioned host. Another example: In otherwise identical situations, a wealthy family may be told that they cannot eat the product of a “kashrut disaster” in their kitchen, whereas a poor family may be told to go ahead and eat it.
- b. Often the lekhatchilah and bediavad options track the sides of an underlying dispute, or reflect attempts to accommodate as many sides as possible of an underlying dispute
- c. Sometimes a bediavad choice is sufficient post facto *only* if one did not consider and reject the lekhatchilah option.

Halakhah actually has many other levels on this axis, such as mitzvah min hamuvchar (an elite fulfillment of a mitzvah), and *sh'at had'chak gadol* (great necessity).

#### **D. HOW HALAKHIC DECISIONS ARE AND SHOULD BE MADE**

Some of Halakhah is settled law in all traditions. Some of the rest is settled law within specific traditions. Answering questions about usual cases that are covered by settled law is simply a matter of finding a sufficiently knowledgeable person, or a clear enough book.

On many issues, however, one can find controversy among authorities across traditions and through the ages, including the present day. If a layperson knows this, how is he or she to make a decision? Which is the right question -- what to do, or whom to ask?

Other issues are new or newish. On such issues, how should decisions be made, both by halakhists and by laypersons?

There are no easy answers. What is most important is to avoid both arrogance and excessive humility.

Arrogance leads to making decisions one is unqualified to make, and to being afraid to ask questions lest they expose one's failings of knowledge or judgment. Excessive humility leads to surrendering one's moral judgment to others, or surrendering one's practical judgment when no one else really knows the facts of the case.

Every Jew has the obligation to learn all the Torah they can, not least so they know when they don't know enough, and need to ask. But whom to ask is a crucial decision.

One reason that the broad halakhic tradition has always preserved so many voices is to give halakhists the discretion to find the answers that work in specific circumstances, or that resonate with specific souls.

Halakhah has a built-in set of objective factors that allow decisors to rule in accordance with usually non-normative positions in isolated cases, such as risk of great financial loss, or damage to human dignity. These rules apply differently in deoraita and derabbanan issues, etc.

Even more importantly, the Torah contains so many distinct mitzvot because each soul properly has its own hierarchy and balance of values. Every life lived with Torah integrity is a unique and valid interpretation of Torah. Some may prioritize study, others action; some may focus more on their relationship with G-d, others on their relationships with people. The job of a Jew is to live out his or her soul's Torah to the fullest.

To that end, you should look to ask your questions to halakhists who genuinely understand you, and who have the depth and breadth of Torah and worldly knowledge to know as many of the relevant halakhic

options as possible. This requires forming a genuine relationship with the halakhist, and naturally creates a bias toward asking most questions to the same person. But it is appropriate and reasonable to ask questions in specific areas to specialists, or to recognize that one resonates with the values of a halakhist in some areas but not in others.

It is also important to realize that one can ask questions to someone without being bound by their answer. **So long as you are upfront about your intent**, a halakhist will often be willing to talk through the options with you and give you the knowledge and parameters you need to make your own decision. Some great halakhists will do this in a way that helps you internalize their process and make you more autonomous in the future. Sometimes the halakhist will tell you frankly that you should not ask for a binding psak.

What is not okay is to ask multiple authorities until one gets the answer one wants, without caring whether it fits precedent or is intellectually or morally convincing. This is generally an abuse of the system and the people, and lacks all integrity. For this reason, competent halakhists will often refuse to tell you their opinion – especially if it differs from the conventional wisdom - unless and until you agree to be bound by their decision.

It is also important to understand that even great halakhists can make mistakes, especially about who you are and your specific circumstances, especially if your case is presented to them through a third party such as your synagogue rabbi. If you receive a psak that causes you or someone else significant emotional, economic, or spiritual hardship, please ask another halakhist for help after disclosing that you received the previous psak.

## **E. THE SCOPE OF HALAKHAH**

Halakhah covers the entire range of embodied human experience. It has rules about sex and speech, business and bathrooms, ritual and recreation, and everything else you can imagine. There is, however, disagreement about whether it ever directly regulates emotions, or only actions that usually express emotions. Are Jews actually obligated to love their fellow as they love themselves, or only to act as if they do?

One reason for Halakhah's comprehensiveness is that it enables every decision in life to be meaningful.

Moreover, every halakhic decision one makes for oneself, or receives from another, should be a moment of growth. Every decision should leave you better prepared to make future decisions, and under more pressure or when the stakes are greater.

But while halakhah applies to everything, halakhah should not be the entirety of one's religious experience or study of Torah. It is important to learn Tanakh and commentaries, Jewish philosophy, Talmudic narratives, or other authentic Torah genres – each person focusing on what resonates with their individual soul - and the principles and values derived from them should complement your halakhic reasoning and challenge your halakhic assumptions.

There are also decisions – often the biggest decisions in life - that only you can make, and for which halakhah prepares you without telling you what to do. Halakhah does not tell you whom to marry, or when to become a conscientious objector in wartime, or which political party to support. Halakhah often provides only vague guidelines as to how to choose when obligations *bein adam lachaveiro* (interpersonal) conflict with obligations *bein adam lamakom* (between man and G-d). Making these decisions requires a broad Torah perspective.

## **F. CONCLUSION**

This article has in a sense tried to teach you all about halakhah while you stand on one foot. All the rest is up to you – go learn!

## Is There a Modern Orthodox Way to Decide Halakhah?

December 27, 2016

Any viable Orthodox ideology must at some point find expression through Halakhah. But it would be unwise to create a hermetically sealed off Modern Orthodox Halakhic space. When your community no longer communicates with other Halakhic communities, you have sectarianism rather than healthy diversity. So while some aspects of Halachic decision-making are properly distinctive to Modern Orthodoxy, this doesn't mean that *every* aspect of Halachic decision-making should be distinctive to Modern Orthodoxy.

I see the primary Halakhic conversation partner of Modern Orthodoxy being to its right, rather than to its left, meaning that I'm more interested in the distinction from what we'll "Charedi Halakhic decision-making" than from what we'll call "Conservative Halakhic decision-making". But since in conversations with the right we are constantly asked to explain how we're different than the left, there's always a need to distinguish ourselves at both ends.

Here's how Wikipedia formulates these differences:

*Charedi Orthodoxy, Modern Orthodoxy, Conservative Judaism.*

*Orthodox Judaism has a range of opinions on the circumstances and extent to which change is permissible.*

*Chareidi Jews generally hold that even minhagim, customs, must be retained, and that existing precedents cannot be reconsidered.*

*Modern Orthodox authorities are generally more inclined to permit limited changes in customs and some reconsideration of precedents.*

*Conservative Judaism holds that its rabbinical body's powers are not limited to reconsidering precedents based on earlier sources, but that the Committee on Jewish Laws and Standards is empowered to override Biblical and Tannaitic prohibitions by takanah when perceived to be inconsistent with modern requirements and our views of ethics.*

The Wikipedian distinction between Chareidi and Modern Orthodoxy makes everything a matter of degree, which is unsatisfying. Furthermore, I think it's not very true. Let me explain why via a joke:

*There are two complaints that people always make about the way Halakhah (not Modern Orthodox Halakhah) exists in the world today.*

*The first is that it's absolutely frozen, and nobody's willing to introduce any changes. Even minhagim, customs, must be retained. Existing precedents cannot be reconsidered.*

*The second thing we can't stand are all the new chumrot. Where do all these stringencies come from?*

But you realize, of course, that these complaints contradict one another! You can't be upset both about the freezing of Halakhah and about all the new chumrot, **because all the new chumrot are changes**. Both in reality and perception, the Charedi community is not unchanging; rather, the Charedi community makes many changes, and I don't think that we want to characterize the unique Modern Orthodox approach to Halakhah as "we're willing to make a few more changes, as long as they're l'kula (towards leniency), but we're not willing to consider anything that creates a stringency." That doesn't seem to me to be a viable, self-respecting approach. And if Chareidi Halakhah has changed dramatically, then change per se cannot be the basis of a uniquely Modern Orthodox approach.

Furthermore, the whole notion of a Halakhah which is an inflexible continuation of the past is a fiction. There are two simple ways of demonstrating that.

1) The Halakhah which is a direct continuation of the past regarding electricity. It can't be! There wasn't any such Halakhah.

2) Customs - how many of the people supposedly following "inflexible customs" are following the customs their parents did? Customs/*minhagim* are local and geographic, and relate to specific people and communities. But geographic *minhagim* were already breaking down in the aftermath of World War I, and by the aftermath of World War II everyone had moved. Furthermore, many if not most currently observant American Jews grew up in homes that were not fully observant, and therefore are properly unwilling to treat their parents' behavior as precedent. Rather, these *baalei teshuvah* belong to constructed communities of practice that often adopt practices en masse that were previously limited to books or pietists, or combine practices in unprecedented ways.

Here is one more illustration. The Artscroll Talmud is often depicted as if it were a bastion of traditionalism. Specifically, what purportedly made the Artscroll Talmud the bastion of traditionalism, as opposed to the Steinsaltz Talmud, is that Artscroll maintains the sacred *tzurat hadaf* (form of the page) of the Vilna Talmud, the classic traditional Yeshiva page of the Talmud. Indeed, the new Koren edition of Steinsaltz reverts to the Vilna *tzurat hadaf*.

But ArtScroll in fact represents radical change. The popularization of Talmud, to the point where people with no Yeshiva education, no access, no direct tradition from teachers - where, let's say, a very bright 12-year-old girl can start learning Talmud on her own, and can become highly competent learning Talmud - that is a direct result of Artscroll. That could not have happened before, and it revolutionizes the community.

Furthermore, Artscroll doesn't actually maintain the Vilna Shas. It actually uses a very fine contemporary reprinting of the Talmud called "Oz v'Hadar" that graphically is very much like the Vilna Shas, but includes all sort of commentaries that were never there in the Vilna, and actually emends the Vilna text to correct obvious scribal errors. It's a wonderful, beautiful modern update. This makes it an excellent symbolic refutation of the notion that the distinction between Modern Orthodoxy and Charedi Judaism is one of change as opposed to non-change. It might be about different kinds of change, it might be about the way in which change is presented, but it's not about change, per se.

We also should not limit the differences between Modern Orthodoxy and Conservative Judaism to extreme cases of *takkanot*. (*Takkanot* are rabbinic decrees that explicitly make law, as opposed to interpreting law.) First of all, it's not clear that Modern Orthodoxy should be opposed in principle to contemporary *takkanot*. Rav Yitchak Herzog, the first chief Rabbi of Israel, wrote a hypothetical Halachic constitution for the state of Israel, and it began with a list of the *takkanot* you would have to make about inheritance and testimony and minority rights and all sorts of similar things. Modern Orthodox should follow the commonsense halakhic rule that one cannot legislate for communities that have not accepted one's authority to do so, But It is both untrue and unwise to say that Modern Orthodoxy should be opposed in principle to *takkanot*, let alone that we should define ourselves on the basis of that opposition.

More broadly, I don't want willingness to overrule precedent to be the primary axis that differentiates us from Conservative Judaism. Explicit change is always radical and rare, and the heart of halakhah is how it continues and grows naturally. We should be able to define ourselves in ways that relate to ordinary halakhic process, and not just to extreme cases where some people feel that halakhah is in crisis and must be changed. Ideally, in the extreme cases you're just continuing a standard process, as opposed to abrogating your normal procedures and using emergency methods. My sense is that emergency methods rarely work.

Another possible approach is to define a halachic process by who gets quoted how often. So you might say that what defines Modern Orthodox halakhah is that it quotes the Rav a lot, and to not be Modern

Orthodox is to never quote the Rav, and there's an in-between status, like the Artscroll chumash, which involves quoting the Rav once, and for something completely conventional. I don't know of psak emerging from the Chareidi community that makes any reference to the Rav's halachic positions (which largely survived only through oral transmission, although a variety of posthumous compilations have appeared. My sense is that these works are read exclusively in the Modern Orthodox community).

On the converse side, perhaps the primary distinction between Modern Orthodox and Conservative halakhah is whether once cites the positions of past Conservative halakhists as precedent. There are occasional citations of Professor Shaul Lieberman, but on the whole, it's fair to say that a responsum citing a position of the Committee of Jewish Law and Standards as meaningful precedent would per se be excluded from Orthodoxy.

But this doesn't seem to me a sufficient or desirable description, even though it is often accurate. When you have a clear vision, and you're identified with something, over time you tend to become much more attached to the accidental positions of the poskim who support that vision. You develop a tradition which favors the poskim who believe x or work in the following way, and it happens that all those poskim for some entirely incidental reason take one side of a technical dispute regarding Shabbat – perhaps they believe that you can't brush your teeth with toothpaste on Shabbat. So you stop using toothpaste on Shabbat.

That's how I understand Beit Hillel and Beit Shammai. There are many expansive explanations that account for every detail of every disputes between Beit Hillel and Beit Shammai, because how else to explain why all the people in Beit Hillel always agree, and all the people in Beit Shammai always agree? I suggest there was at some point an ideological dispute which we can't recover, and over time they started quoting only members of their own school. Positions gradually hardened on accidental issues; Beit Hillel and Beit Shammai started arguing about toothpaste, which had nothing whatsoever to do with their ideologies.

I don't want to define Modern Orthodoxy as a post-ideological community, which no longer has ideas, but just follows precedent. So there must be a better and deeper defining feature of our halakhah than who we quote.

Another possible approach is result-based. Only a posek within Modern Orthodoxy would reach conclusions TYPE A, and only a posek within the Charedi or Conservative community would reach conclusion TYPE B, and/or no posek who reaches conclusion TYPE X is Modern Orthodox, and no posek who reaches conclusion TYPE Y is Charedi or Conservative. For example, perhaps Modern Orthodox psak is consistently more liberal than Chareidi psak about issues such as what amount of their hair married women must cover, and on the other hand, in contrast to Conservative psak, a Modern Orthodox teshuvah works on the presumption that all forms of homosexual contact are forbidden.

This approach also fails to satisfy me. Leaving aside the question of whether there are enough specific grounds of this sort to generate a useful definition, it describes the past but doesn't provide guidance for the future. Modern Orthodox psak is anything which accepts these past outcomes, and Chareidi or Conservative psak is one which accepts those past outcomes. Without underlying ideas, this leads nowhere.

What underlying ideas might distinguish Modern Orthodox psak?

Many people think that Modern Orthodox psak should be more inclined to be "science-friendly". But I think that Modern Orthodox psak should be more skeptical than Chareidi psak of whatever the "official" scientific consensus is right now.

Why? Charedi psak generally (Rav Shlomo Zalman Auerbach zt"l of course was a shining exception) approaches science as a foreign body of knowledge which must be accepted when it impinges on halakhah. Scientists get to determine what the truths of science are. Science may be rejected if specific



Jewish traditions seem inconsistent with those truths (which occurs much more often in the realm of theology than in the realm of halakhah), but otherwise, experts from the world of religion should not presume to evaluate science.

Modern Orthodox psak should not accept this approach. Rather, our poskim should relate to the physical sciences as part and parcel of the knowledge they need to decide halakhah, and to achieve love and fear of G-d. They should either be at home in both worlds, or preferably believe that there is only one intellectual world. As a result, they will be less likely to take scientific claims on faith, and more inclined to do their own research. (This will also make them less susceptible to relying on a single, perhaps mistakenly, trusted scientist's reports, an issue which has dogged even great poskim.)

Another possible underlying framework is attitude towards manuscript, historical, or archeological evidence. One might reasonably expect Modern Orthodoxy to be much open than Charedism to reconstructing texts, or to understanding legal texts in historical context, or to archeological evidence.

Here the personality of Rabbi Soloveitchik was a confounding factor. At least in his ideological statements about Halakhah (possibly as opposed to in his actual psak), the Rav strongly rejected such methods and evidence, because they suggested that halakhah was historically contingent. A number of poskim in the Modern Orthodox community have begun changing that, including Rav Nachum Rabinovitch, Rav Yehudah Herzl Henkin, and in principle Rav Herschel Schachter. But certainly that's not how poskim are trained in YU.

Rather, because of the legacy of the Rav, Modern Orthodox halakhists in the late 20<sup>th</sup> century were Briskers, which is to say that they adopted a conceptual model of Halakhah which was otherwise associated with a fairly extreme form of Lithuanian Chareidi Judaism. This conceptual method had no necessary connection to Modern Orthodoxy; it was a historical accident generated by the Rav's intellectual charisma. So methodology of learning is not currently a useful definition or description of Modern Orthodox halakhah.

This raises a critical issue. Are we trying to describe what Modern Orthodox psak is, or rather to prescribe what Modern Orthodox psak should be?

A descriptive definition is problematic because there is no clear picture of what Modern Orthodoxy is. For example: Sociological Modern Orthodoxy can be defined by its lesser and weaker commitment to halakhah, particularly on issues of sexuality, whereas ideological Modern Orthodoxy may be defined by visions of women's rights, treatment of non-Jews, and similar issues.

Meanwhile, who are the Modern Orthodox poskim in America? Descriptively, I think the obvious candidates are YU roshei yeshiva such as my teacher Rav Mordechai Willig, Rav Herschel Schachter and Rav Tzvi Sobolovsky. They cannot be considered Chareidi. First of all, they quote the Rav all the time! And on many other issues their sensibilities are clearly not Chareidi: they presume that their students will pursue degrees, for instance. Yet, I would be very hesitant to view them as methodological models.

On the other hand, choosing Rabbi Daniel Sperber or Rabbi Mendel Shapiro as models seems to be disingenuous. People know only the teshuvot that implement changes or allow practices they very much want permitted; no one knows what they think about using preset dishwashers on Shabbat or other less fraught issues. One cannot extrapolate a method from a small set of extraordinary cases.

Here is another example of the fine boundary between prescriptive and descriptive, from my own work:

*Let me emphasize again in closing that the halakhic arguments above show that torture can be forbidden halakhically, not that it must be. Technical counterclaims can easily be made; for example, one might suggest that the blanket prohibition I describe could only be rabbinic, and that there is no capacity to legislate rabbinically in our day. Halakhic decisors and halakhic communities must take responsibility for the way Torah responds to moral challenges. I describe halakhah as I believe it ought*

*to be, and as it can be if we acknowledge that ethical principles have a critical role to play in both physical war and in milhamtah shel Torah.*

This is a clear statement of prescriptive Modern Orthodox halakhah, which believes that ethical principles have a critical role to play in both the physical world and milhamtah shel Torah. What's interesting about it for our purposes is that I wrote it in response to an article by Rabbi Michael Broyde, who by that time was unquestionably a substantively and sociologically important Modern Orthodox posek. For several years thereafter, the admissions interview for Yeshivat Chovevei Torah required applicants to read our two articles and explain which of us appealed to them **methodologically**. So I identified as a Modern Orthodox posek, and everyone identified Rabbi Broyde as a Modern Orthodox posek, and yet it seems on critical methodological issues we differed quite dramatically. Similarly, Rabbi Chaim Jachter is certainly an important Modern Orthodox posek, whom I bring in each year to speak to the Summer Beit Midrash, and yet we disagree on some central methodological issues.

It may be that the attempt to define a whole set of unifying characteristics and expect everyone to agree with all of them is excessive. Possibly we should instead identify a cluster of methods and attitudes, and say that to be Modern Orthodox, psak must adopt some but not all of them.

But I think that at some level the issue will boil down to the values that are implemented in halakhic decisionmaking. This is true even though some Modern Orthodox poskim have denied that values legitimately play a role in psak. At the same time, we cannot say that poskim must **always** confirm the values of their communities. Halakhah has no dignity if it cannot critique as well as support, and poskim must be allowed to lead and even be countercultural.

What values must play major roles in a body of halakhic work for it to be Modern Orthodox? We can probably find consensus on religious Zionism, the right of women to full religious experience, and the obligation to treat all human beings Jewish or non-Jewish as *tzalmei Elokim* as values that define halakhic outcomes as Modern Orthodox.

But it isn't sufficient to define values that are reflected in *outcomes* of the halakhic process. It is at least as important for the *nature* of the process to reflect Modern Orthodox commitments. I contend that the fundamental value that should distinguish Modern Orthodox halakhah process is autonomy.

Autonomy means the ability to live by rules of one's own choice, and ideally of one's own devising. It is often framed as a right. But in the context of halakhah, rights always come linked to responsibilities.

We live in a post-Nuremburg culture, in which the excuse "I was just following orders" carries the worst possible connotations. Modern Orthodox Jews can't want people to excuse or justify immoral actions on the ground that they were obeying the command of a religious authority.

Nonetheless, there are several obvious objections to incorporating the value of autonomy into halakhic process.

- 1) Rav Aharon Lichtenstein said that "The essence of Judaism is the *metzaveh/metzuveh* (commander/commanded) relationship. Even if one does not go so far as "essence", there is no denying the centrality of "tzivui" which seems antonymic to autonomy.
- 2) Halakhah is (partially) a system of law, and law by definition requires authority. Legal authority is also socially necessary, because the alternative is anarchy, and in anarchy the weak always suffer.
- 3) If having a better Torah education doesn't privilege you in the values discourse of Judaism, what's the point of learning Torah?

Each of these objections is overdrawn. Autonomy can be *balanced* with authority; it's not a zero-sum game.

A Modern Orthodox halachic process will not presume that the person with the highest level of Torah scholarship automatically gets all values-decisions correct. Psak Halakhah is not like playing Stratego. Moreover, it will recognize that elite Talmudists and halakhic scholars, even those with earned reputations for righteousness, are susceptible to moral error. But it will endorse significant deference to such scholars, and mandate accountability – not unquestioning submission, but accountability – to one's peers and superiors in Torah knowledge.

At the same time, Torah scholars who value autonomy will seek to avoid imposing their authority on others, and within the limits of halakhah will try to leave maximal space for people to live by their own conceptions of the right, the good, and the holy.

This vision emerges from the dispute between Moshe and Yehoshua about Eldad and Meidad. Should the presence of multiple prophets be seen as a threat to central authority, or rather “וַיִּתֵּן כָּל-עַם ה', נְבִיאִים”, “May it be that all the nation of G-d are prophets”? Modern Orthodoxy adopts Moshe's position, and ideally wants every Jew to have reliable independent religious intuition. But we recognize the fallibility of even the most educated intuition, and the danger of overestimating our education.

The goal of empowering people to make autonomous decisions obligates us to understand what constitutes a sufficient education on what kind of halakhic issues. Even the most autonomy-affirming halakhist must sometimes say: “You raised this question, let's look at the sources together and read the following articles, But – after all that, this is an issue that requires trained intuition and experience. and therefore ultimately I think you should formally ask a shaylah”. It will take a lot of work to figure out the boundaries of autonomy, and the nature and boundaries of authority, particularly as we have unprecedented forms of knowledgeability. We have laypeople who never studied formally but know Shas by heart because they've been to daf yomi shiur and read through the Artscroll Talmud, and people with good web-searching skills can know more than most of their rabbis on any subject within 10 minutes, because they read 3 articles which clearly explain in English what all the sources say.

One possible approach would be to separate the jobs of moral and halakhic analysis. When technical and authority grounds lead to halakhic stalemate, but one side is morally preferable, non-poskim can make their own decision on other grounds, such as morality. At the extreme version of this model, any time you have a dispute amongst poskim which makes it legitimate to adopt either position, private individuals can choose on moral grounds.

The problem with this model is that it reduces halakhah to expert knowledge, and sees Torah knowledge as conferring no authority in nontechnical discourse. In a world where anyone with internet skills can find a formal halakhic argument for almost any practice, this would turn halakhic discourse and Torah knowledge into trivialities.

I contend that halakhic Jews who see autonomy as conferring responsibility will reject this model because they seek accountability to Torah. Seeking accountability means deference without total submission, and a bias toward learning more and toward becoming more and more able to make more and more decisions, without ever desiring to achieve a state in which there are no heteronomous constraints on one's will or intuition. It means that we seek out teachers and poskim with whom we share our deepest Torah convictions but who are willing to say things to us that we really don't want to hear.

In short: Modern Orthodoxy halakhic process should be distinguished by the moral responsibility assigned to the laity. The challenge is - can we build a morally responsible laity which nonetheless genuinely accepts halachic authority? I like to think we can.

## **Women and Kriyat HaTorah: A Response to Rabbi Ysoscher Katz**

Originally published on *The Lindenbaum Center*

September 29, 2016

Rabbi Ysoscher Katz recently released in Hebrew, and then in English translation, a responsum on the subject of aliyot for women. I believe that many of the arguments in this responsum are incorrect, and sufficiently implausible that they cannot be given any halakhic weight, meaning that they cannot be relied on even in extreme circumstances.

My purpose here is to place the grounds for this admittedly strong contention before the broad Modern Orthodox public and scholarly community. Perhaps it will be shown that I have erred, or at the least, serious halakhic scholars will declare that they support his readings. Perhaps Rabbi Katz will reconsider, or explain how I have misread him. Regardless, I trust that he and I will engage in this Torah battle with all our faculties and intensity, and depart from it friends as when we started. ואת והב בסופה.

My firm conviction is that the correctness of halakhic arguments on this issue should concern everyone, whether they have already been convinced on other grounds that “Partnership Minyanim” are acceptable, or that they are unacceptable. More on this below. Readers who must know my own opinion in advance are referred [here](#).

Here are my summaries of Rabbi Katz’s essential claims, substantiated by italicized quotations from the English version of his responsum. After setting them out here, I will respond to each in the next section.

1) When a beraita on Megillah 23a writes:

הכל עולין למנין שבעה ואפילו קטן ואפילו אשה  
אבל אמרו חכמים אשה לא תקרא בתורה מפני כבוד צבור

it does not mean that having a woman be קורא בתורה is forbidden, but merely that it is advised against.

*“In other words, even though there is no halachic problem with women being called up to the Torah and reading from it, the Sages advised against it to avoid offending the community.”*

*“They did not forbid women from reading or being called up; they just recommended that we avoid it: it is better not to do it, but from a purely halachic perspective, it is permitted.”*

2). When Tosefta Megillah 3:11 writes:

והכל עולין למנין שבעה אפי' אשה אפי' קטן  
אין מביאין את האשה לקרות לרבים

it does not mean to forbid having women who are already in shul read for the public.

*“According to the Tosefta, the law is that women “are not brought to read in public”. That is, if they are outside of the synagogue, they are not called up. It would seem that we can learn from this that it is permissible to call up women who are already inside the precincts of the synagogue.”*

3) When R. Yoel Sirkes (BaCH) writes that there is a formal rabbinic decree (takanah) against giving women aliyot, he is simply mistaken.

*“First, in the Ba”h’s opinion, prohibitions intended to preserve the dignity of the community carry the weight of a takanah, and for that reason, it is impossible to disregard them even if the rationale behind them is no longer relevant. This argument, however, is not clear at all. What is his source for saying that things that were stated in the form of advice are in fact prohibited? From the simple language of the text, it would seem that they are not prohibited at all. The Sages only “advised” that we avoid these practices when they constitute an offense to the dignity of the community; they did not issue a takanah.*

*There is therefore no takanah here that would remain in force even when its rationale no longer applies.”*

4) There is no problem of religious factionalization – lo titgodedu - when one engages in a practice that everyone else should agree with, even if they don't.

*“Since congregational Torah reading for women is no longer deemed offensive in any context, because the status of women is now equal to that of men, a community that allows such a practice to take place simply realizes something that is potentially acceptable for all other communities. Hence the fear of balkanization does not apply to this situation.”*

5) The prohibition of lo titgodedu does not apply at all in our day because our community is already so fragmented.

*“Many contemporary poskim hold that it is no longer appropriate to forbid something for the purpose of preventing balkanization.”*

6) Rabbeinu Tam dispositively rejects all those who suggest that the original permission in the beraita applied only to the intermediate aliyot, which did not then require making berakhot.

*“But Rabbeinu Tam already overruled these opinions (in Tosafot, Rosh Hashanah, ibid.) and wrote, “Because the language of the Gemara is ‘We call up the seven’ [emphasis added], it means even at the end of the seven aliyot”, meaning that the Gemara permits calling up women even for the last aliyah, which always had a blessing associated with it.”*

7) Rabbis Aryeh and Dov Frimer in their article take the position that psak is simply a matter of choosing the side more authorities favor; that for this purpose, all recognized authorities count equally; and individual poskim may not follow minority positions even if they find them more intellectually convincing or socially necessary.

*“In short, they treat pesak halachah according to the method of “Sinai”, basing their ruling on quantitative adjudication rather than conceptual argumentation.*

*Their attempt to prove that their approach is correct is built on a quantitative method of halachic ruling. They effectively claim to have studied everything that has ever been written by poskim on the subject of women's aliyot. Having done so, they classified the opinions, counted them, and reached their conclusion on the basis of the opinion of the majority.*

*The Frimer brothers (shlita) approached the subject with exaggerated egalitarianism. They gave equal halachic weight and validity to anyone who expressed an opinion on the matter of congregational Torah reading for women.”*

I will now address these issues in the order they are presented. [1]

### **Claim # 1**

**When a beraita on Megillah 23a writes:**

הכל עולין למנין שבעה ואפילו קטן ואפילו אשה

אבל אמרו חכמים אשה לא תקרא בתורה מפני כבוד צבור

**it does not mean that having a woman be קורא בתורה is forbidden, but merely that it is advised against.**

My response:

There is no absolute way to distinguish in Hebrew between prohibitions and cautionary advice. Grammatically, one can claim that לא תרצח and לא תנאף are merely advice rather than prohibitions.

For example, on Ketubot 81b the Talmud claims that

לא יאמר אדם לאשתו 'הרי כתובתיך מונחת לך על השלחן'

is mere עצה טובה rather than a prohibition.

This cannot mean that any scholar can arbitrarily declare any negative formulation to be mere advice. Rather, such a claim requires a tradition that such is the case and/or a strong argument from context.

Does Rabbi Katz have such a tradition or argument? Here is what I wrote in an earlier dialogue with Rabbi Katz on his Facebook wall:

*Let's grant that אבל אמרו חכמים (just about) always means that there is some action that is permitted under a particular legal rubric, but the Sages say that it is nonetheless objectionable under another rubric.*

*The question is whether that second rubric is always nonlegal (=advice), or rather can be either legal or nonlegal.*

*R. Ysoscher cited examples which are probably nonlegal. This doesn't help unless there are **no** examples that are definitely legal.*

*But there are such examples:*

תלמוד בבלי מסכת יומא דף סט עמוד א  
והתניא לא יעלה עליך אבל אתה מותר להציעו תחתך אבל אמרו חכמים אסור לעשות כן שמא תיכרך נימא אחת על בשר

תלמוד בבלי מסכת נדה דף ל עמוד א  
ר"ש היא דאמר אבל אמרו חכמים אסור לעשות כן שמא תבא לידי ספק

*So אבל אמרו חכמי can be legal, even when contrasted with a previous legal position.*

*The fallback position is that it is not legal unless the term אסור is specifically used. This works only if there are no examples which are clearly legal even though they don't use the word אסור.*

*But there are such examples:*

משנה מסכת חולין פרק ג  
סימני בהמה וחיה נאמרו מן התורה וסימני העוף לא נאמרו אבל אמרו חכמים כל עוף הדורס טמא

משנה מסכת כריתות פרק ו  
איש אמו ואביו תיראו מלמד ששניהם שקולים אבל אמרו חכמים האב קודם לאם בכל מקום מפני שהוא ואמו חייבין בכבוד אביו

תוספתא מסכת יבמות (ליברמן) פרק ו  
יפת תאר התורה נתנה לה שלשים יום אבל אמרו חכמים צריכה להמתין שלשה חדשים מפני תיקון הולד

*The next fallback position is that the formulation לא אשה is not legal. This works even prima facie only if there are no examples which are clearly legal.*

*But there are examples:*

תלמוד בבלי מסכת שבת דף צה עמוד א  
וכן היה רבי שמעון בן אלעזר אומר משום רבי אליעזר אשה לא תעביר סרק על פניה מפני שצובעת

תלמוד בבלי מסכת מועד קטן דף ט עמוד ב  
תניא רבי יהודה אומר אשה לא תסוד מפני שניווול הוא לה תלמוד

*Here is a really fun example, where it is used in contrast to אסור but I think still means אסור*

בבלי מסכת ביצה דף לג עמוד א

דרש רבא אשה לא תכנס לדיר העצים ליטול מהן אוד ואוד שנשבר אסור להסיקו ביום טוב לפי שמסיקין בכלים ואין מסיקין בשברי כלים

*The last fall back is that אמרו לחכמים אבל the grammatical form doesn't mean אסור. But if it is conceded that this is the only case of that combination, and it is clear that the components separately can mean אסור, what is the basis for the argument?*

Rabbi Katz responded as follows:

*R. Aryeh, I briefly address all of the above in my teshuva.*

The only relevant element of the teshuvah I can find is this section:

*Some people have highlighted the fact that, in some sources, the phrase “But they said” implies a prohibition (Avodah Zarah 29b, Hulin 59a, and others). There, even though the word “forbidden” is not used explicitly, the prohibition is clear from the context. Yet in this case, it is obvious that this is a good, sound advice and not an actual prohibition. And even though the expression is the same in both places, the Rishonim have already written that the terms used by the Sages do not always mean the same things in every place (see Bava Metzia 2b; Tosafot, s.v. velihazei; Bava Kama 70a; Rashi, s.v. demihazei; and other places).*

In my humble opinion, this argument does not address the issue at all, and we are left with Rabbi Katz's arbitrary claim, which he asserts is “obvious”, that this text should not be read as a prohibition. Note as well that Rabbi Katz makes no attempt to argue that any prior interpreter has read the text this way, and implicitly concedes that many have explicitly read the text as a prohibition.

### **Claim #2**

**When Tosefta Megillah 3:11 writes:**

והכל עולין למנין שבעה אפי' אשה אפי' קטן  
אין מביאין את האשה לקרות לרבים

**it does not mean to forbid having women who are already in shul read for the public.**

Here again, Rabbi Katz provides no evidence or precedent for his reading, which I think is based on an excessively literal reading of מביאין.

Rabbi Katz then assumes that this Tosefta is offering the same rationale for excluding women as the beraita, and that therefore the kevod tzibbur of the beraita also applies only to women who are not present in shul. But even if he were correct with regard to the Tosefta, the language of the beraita cited in the Bavli leaves no room for this distinction. If so, on a halakhic level his reading is either incorrect or else irrelevant to practical decisionmaking.

Furthermore: Rabbi Katz never contends that the Tosefta expresses advice rather than prohibition. Why not read the Bavli in light of the Tosefta on that issue?

Furthermore: Rabbi Katz cites no evidence for his assumption that women were never present for Torah reading in Talmudic times. [2] Megillah 22b, as explained by Rashi, seems to assume that women **were** present in shul for Torah reading. Yalkut Shim'oni Proverbs 943 discusses an elderly woman who receives long life for attending synagogue daily no matter what; there is no indication that she is unusual because of her gender, rather than for her diligence.

### **Claim #3**

**When R. Yoel Sirkes (BaCH) writes that there is a formal rabbinic decree (takkanah) against giving women aliyot, he is simply mistaken.**

In a conventional responsum this paragraph would be rewritten as follows:

*Bach clearly held that the beraita contained a prohibition, and not mere advice.*

*In the absence of any contravening view (and in any case BaCH is far from alone), the halakhic issue is settled.*

Note that the only ground Rabbi Katz provides for disagreeing with BaCH is his claim that the beraita does not contain a prohibition.

**Claim #4**

***There is no problem of religious factionalization – lo titgodedu - when one engages in a practice that everyone else should agree with, even if they don't.***

To the best of my knowledge, this is simply wrong. Lo titgodedu is *always* about practices that one community thinks everyone else should agree with – it is, the Talmud on Yebamot 13b-14a tells us, about following conflicting legal positions, not about customs (although it may also be forbidden to institute a new custom when this will lead to controversy.) Rabbi Katz provides no evidence for his position.

(In the superb JOFA blogcast discussing this responsum, Miriam Gedwiser made this point directly, and Rabbi Katz said he would provide sources for his position at a later date.)

Perhaps he means that there is no issue of lo titgodedu when one believes that the opposing position is indefensible.

**Claim #5**

***The prohibition of lo titgodedu does not apply at all in our day, because our community is already so fragmented.***

Here Rabbi Katz cites precedents, but I believe he misunderstands them. Rav Moshe Feinstein wrote that there is no issue of lo titgodedu in America today *on issues such as tefillin on chol hamoed, where everyone acknowledges the legitimacy of multiple preexisting practices*, and there is no basis for claiming that one custom is more established in a given American location. Rav Moshe never suggested that this would be true of new practices whose legitimacy is controversial, and I do not believe that anyone else in the halakhic tradition ever suggested it before Rabbi Katz did.

(in the JOFA blogcast, Rabbi David Brofsky correctly noted that Rambam and Rashi have opposing rationales for the prohibition of lo titgodedu. For Rambam, the issue is communal strife; for Rashi, the issue is the fear that there will no longer be a common Torah holding the halakhic community together. Rabbi Katz does not explain which of these positions he is following, or whether his argument should work according to both.)

**Claim #6**

**Rabbeinu Tam dispositively rejects all those who suggest that the original permission in the beraita applied only to the intermediate aliyot, which did not then require making berakhot.**

***“But Rabbeinu Tam already overruled these opinions (in Tosafot, Rosh Hashanah, ibid.) and wrote, “Because the language of the Gemara is ‘We call up the seven’ [emphasis added], it means even at the end of the seven aliyot”, meaning that the Gemara permits calling up women even for the last aliyah, which always had a blessing associated with it.”***

This is a minor point, but for the record, rishonim such as Rashba continued to hold this position after Rabbeinu Tam. Furthermore, from an academic perspective, it is likely not Rabbeinu Tam who rejects this reading, rather Rabbeinu Tam who suggests it and an anonymous Tosafist who rejects it. This is clearly indicated by Abudarham, for instance.

**Claim #7**

***Rabbis Aryeh and Dov Frimer in their article take the position that psak is simply a matter of choosing the side more authorities favor; that for this purpose, all recognized***



***authorities count equally; and individual poskim may not follow minority positions even if they find them more intellectually convincing or socially necessary.***

This is of course a caricature, but also a lesson in the dangers of allowing polemic to infect halakhic discourse. Rabbis Aryeh and Dov Frimer are well aware that different poskim have different weight, and that poskim do not always follow the majority of precedent. Confronted by articles on this issue which they thought went too far in following idiosyncratic extrapolations of minority positions, they tried to demonstrate that on this issue there is such an overwhelming consensus that no responsible posek could rule against it.

Rabbi Katz reacts by setting up a false choice among extremes, and apparently contending that in fact any posek can make any decision he or she wants on any issue without any regard for textual or legal precedent and without any accountability to contemporary halakhic consensus whatsoever. I presume that this is a caricature of Rabbi Katz's true position, but his language does not exclude it.

For the record, Rabbis Aryeh and Dov Frimer actually offer what seem to me highly original arguments and readings. For example, they contend that the original halakhah excluded women from aliyot, but that the Sages then included them out of concern for the possibility that there might be circumstances where excluding them would mean that no keriah would happen, and then withdrew the new license. On those grounds, they argue that even the original Mishnah would not have permitted women to receive aliyot when, as in our day, the oleh does not actually read the Torah.

In summary – Rabbi Katz defends partnership minyanim on the basis of a series of original textual readings and halakhic arguments. Some of these readings and arguments are merely arbitrary and unprecedented; I contend that most of them are demonstrably false.

For those interested only in technical questions, and for whom the relevant standard is the existence of a plausible technical justification, Rabbi Katz's arguments are unnecessary. Not that I accept this as the proper standard; rather, I contend that an essential role of psak and poskim is to choose among technically plausible positions, legitimating some but not others. Otherwise everything will be permitted, as a sufficiently clever advocate can justify anything.

Furthermore, the essential value claim Rabbi Katz makes, that a growing number of halakhic communities nowadays would not consider women's aliyot to be a violation of the kavod of their tzibbur, is correct. In the future, it may well be possible to construct a halakhic defense of partnership minyanim on that basis.

There are also plausible grounds for disagreeing with BaCH, and for doing so on grounds that would be shared by many other authorities past and present.

But the existence of some plausible grounds does not mean that we should be intellectually indifferent to the plausibility of these grounds.

I mentioned above that this response grew out of a dialogue on Rabbi Ysoscher Katz's Facebook wall. That conversation ended, to my mind, disturbingly. I and several other scholars suggested to Rabbi Katz that this reading of the beraita was an arbitrary rejection of all past readings of a crucial text, and that absent any evidence for his reading, it could play no role in practical halakhic decisionmaking. He responded by accusing us of bias.

In response I wrote the following:

*A halakhic decisor has to be accountable to a community of Torah scholars, or s/he is just playing G-d. If s/he cannot convince anyone in such a community – not of the abstract correctness of a position, but even of its plausibility as a basis for practice – and still maintains the position as a basis for practice, s/he is just playing G-d. If there is no overlap between what convinces one group of scholars and what convinces another, they are clearly no longer part of the same community.*

*I fully agree that FB is not the whole community, nor is FB the community I wish to be accountable to. But I do believe that at least several of the people in this discussion would have been more than happy to be convinced by the reading, and to some extent this discussion is very likely to include the people most inclined to be sympathetic, as well of course as some who incline the other way. So if no one here is at all convinced, and the discussion is intellectually exhausted, R. Ysoscher, to what community of talmidot chakhamot are you accountable?*

Rabbi Katz to my mind did not give an adequate response, and the subsequent English release of his responsum took no account of our arguments. For that reason I have taken the step of publishing this response. I thank Rabbi Katz for his courage in starting this conversation, and look forward to seeing the truth of Torah emerge from the contention of scholars, whether or not my arguments prevail.

Notes:

[1] Rabbi Katz contends that the essence of his teshuvah is point 4, and that point 1 is insignificant to the overall teshuvah. I disagree, for reasons that I hope will become evident.

[2] Rabbi Katz writes: “*Women were not used to praying in synagogue (they would sometimes visit the synagogue area (see Avodah Zarah 38a; Yerushalmi, Sotah, ch. 1, halachah 4) but not take part in congregational prayer).*” The two citations are cases where women **were** present in a synagogue, and nothing about the texts indicates that this was unusual.

## **Bully for Sodom**

November 17, 2016

Sodom was a halakhically sophisticated culture. Everyone knew the law, and the difference between a violation of the law and what you could be sued for. On Sanhedrin 109b, the Rabbis illustrate the evils of Sodom via the halakhic principle that one cannot be sued for stealing property worth less than a *perutah*:

*If someone had a row of bricks – they would come and each steal one.  
If somebody had put out garlies or olives to dry – each person would take one.*

Rashi explains:

*They would say to the victim: “What loss have I caused you? All I took from you was one clove!”  
It is as if each person pulled one hair out of his head – the victim ends up bald.*

Let’s think for a moment about this case. Who were the perpetrators, and who were the victims?

I suggest that the rabbis are describing something all-too-familiar – malicious bullying. Groups would get together and impoverish whomever they didn’t like, while making sure not to do anything that could provoke reaction from those with formal authority and official power. [1]

The analogy to the schoolyard is clear. These are the clique of kids who pick on a classmate to torment. No individual kid says or does anything particularly unforgivable, and anyway there are no witnesses outside the group – perhaps they even physically surround the victim so no one else can see. The victim eventually overreacts to one seemingly minor offense, and then gets in trouble, since the attacker at whom he or she lashes out has not individually caused significant damage.

Sodomean bullies consciously manipulate society so that the victim’s acts of self-defense become punishable while their aggression creates no liability. They take advantage of a morally intuitive “doctrine of proportionality”.

But is it possible that “each person stealing less than a perutah” is terrible not only when it consciously manipulates the system, but even, or perhaps especially, when it enables people to avoid realizing that they are causing harm? Can we identify systems and environments in which this happens? I suggest that conversation is one such realm. Please allow me to explain.

Liberal cultures have a deep, understandable, and to some extent laudable reluctance to acknowledge that a conversation can be zero-sum, meaning that whatever one participant gains, another loses.

Talmudists, by contrast, understand this instinctively. This is because Talmudic *sugyot* (=literary units) are often structured as disputational dialogues. In disputational dialogue, a *raayah* (attempted proof) for one side of the *machloket* (dispute) is always a *kushya* (attempted disproof) against the other, and a *kushya* on one side is usually a *raayah* for the other.

It is important to recognize that a Talmudic dialogue is zero-sum on only one axis – which position wins, meaning emerges as more likely true. Anything that makes one side more likely true, makes the other less likely true. A *raayah* for one side (+1) is a *kushya* on the other (-1) – that’s zero-sum. But both sides benefit in the sense that they have come closer to the truth. So the way to avoid zero-sumness is to change the goal of conversation from victory to truth.

But – what if the other person has not made that change? For them, it still *feels* zero-sum, no matter how much you tell them that they have been enriched. If you “defeat” them in argument, they will likely disengage and decide that the modality doesn’t suit them.

Sometimes the zero-sum axis is not about persuading each other, but rather about the public authority of your respective positions. In such contexts, total victory is achieved when the opposing position becomes untenable in your community’s discourse. This can happen through pure logical or empirical

demonstration, as when looking through a microscope proved that microbes exist. But much more often, it results from effective rhetoric which makes use of or disguises itself as logical or empirical demonstration.

Disputational dialogue using formal arguments and verifiable evidence are rare in the public square. What is much more common is what might be termed “affective debate”, in which a conversation is “won” when one side has made it more emotionally or politically difficult to disagree with it than the other.

It is often assumed that even thinking about affective conversations as zero-sum games is inappropriate. Surely the goal is for each side to express itself fully to the other! No one loses just because the other side got to express itself.

But this is true only when there is a shared goal of emotional transparency. With regard to public affairs, affective conversations are often properly understood as (conscious or unconscious) battles for emotional dominance, with each side trying to make it difficult for anyone to express the other position.

Let’s imagine a conversation set on the midrashic planet EinMakom.

Some people on this planet find emotional fulfillment only by eating roast lamb in public. Deprived of that outlet, they become terribly sad and lonely. Many believe that their god cuts off all relationship with them if they fail to eat lamb in public at least once a year.

Other people on this planet worship sheep, and believe that killing them for food is sacrilege and a perversion of the natural order. Watching people eat lamb makes them physically and psychologically ill. [2]

Now let’s imagine a group conversation space – say, a WhatsApp group for EinMakom’s communal leaders. Nachshon, one such leader, opens a conversation by sharing the intense inadequacy and despondency he felt when work recently compelled him to spend months in a vegetarian community, where it was socially impossible to eat lamb in public.

Following Nachshon, another community leader offers profound gratitude to him for sharing the experience. Another admires Nachshon’s bravery and courage, and considers them inspirational. A third expresses astonishment that such intolerant communities still exist. A fourth declares with happy confidence that no one in **this** group would consider acting so intolerantly. And so on.

Each of these follow-up notes seems positive and innocent – what could be wrong about supporting someone who has taken an emotional risk? But their collective effect is to silence anyone on the listserv who worships sheep and wishes to protect themselves against the psychological and physical damage they experience when watching lamb-consumption. Each individual note has minimal effect. But the camel’s back is nonetheless fractured.

In another space, the roles might be reversed. An initial posting about the psychological damage caused by watching lamb-consumption is followed by similar supportive postings, so that the notion of expressing one’s pain at being deprived of public lamb-consumption – let alone of demanding the right to consume lamb in public – becomes inconceivable.

As opposed to Talmudic discourse at its best, in which one argument generates the necessity for another, and stimulates its development and formulation, Sodomean conversations silence people and end genuine discussion. The result is that people lock themselves into homogeneous communities, or bubbles. (Homogeneity of opinion may be coincident with apparent ethnic or religious diversity. This will tend to aggravate the difficulty of recognizing the problem of silencing.)

Too many conversations in too many spaces in the Jewish world today are conducted in Sodomean fashion. Too many conversations in too many spaces in America today are conducted in this fashion.

Thus we keep locking ourselves into self-affirming bubbles, and are shocked to discover that our opinions are not universally held.

It would be an important step forward if we acknowledged – at least to ourselves – that in public conversations about controversial issues, affirmations and expressions of support are often powerful zero-sum moves, and when utilized en masse, can easily become instantiations of middat Sodom.

Acting on this recognition, we can take care that our conversations make space for genuinely different and surprising opinions. Surprised often enough, we may rediscover how to argue ideas for the sake of truth rather than victory, and share experiences for the sake of mutual understanding. As Jews, we can recreate the art of disagreeing for the sake of Heaven, and as Americans, the art of deliberative democracy.

Notes:

[1] Deborah Klapper and Davida Kollmar both asked, with Avraham Avinu: If there were victims in Sodom, didn't G-d destroy the victims and perpetrators together? I suggest that in a deeply corrupted culture, the victims are just wannabe bullies, and there is no essential difference between them. Bad people can be bad to each other.

[2] One Rabbinic interpretation holds that the first Paschal sacrifice was instituted as a public defiance of Egyptian lamb-worship.

## Korach and the Failure of Meritocracy

by Rabbi Avraham Bronstein

July 6, 2016

Imagine a nation run as a meritocracy in which leaders rise to the top as they prove that they are brighter, more motivated, and possess a greater sense for achieving the common good. Things start well – there is a period of rapid growth and development, as everyone seems to be sharing the rewards of the superior decisions and leadership coming from what is, by now, a trusted elite. Then, seemingly from out of the blue, something goes very wrong. The entire leadership makes an epic misjudgment so out of line with their reputation as the best and the brightest that the people assume they were collectively guilty of criminal negligence, if not outright corruption. As the grim, full reality of the disaster sets in, it becomes clear that all of the previous gains have essentially been erased, that an entire generation may well be wasted.

Now imagine that, through it all, the same leaders remain in charge, demanding the same levels of trust and of faith as though nothing had happened. We might naturally expect the rise of popular movements to voice the people's loss of confidence in the status quo. This scenario actually happens quite often. In 2010, their motto was, "Don't tread on me." In 2011, they chanted, "We are the 99%," In 2016 they rally behind "Make America great again," and in our *parashah* Korach boldly asserts "The entire community is holy, and God rests among them."

The Midrash describes a Korach who is not so much making a principled political or spiritual argument, but instead cynically manipulating the masses to further his own personal ambition. In one interpretation, Korach was slighted by the appointment of his cousin Elizaphan as chief of the Levite division of Kohathites. "Therefore will I now stir up rebellion against Moses, and overthrow all institutions founded by him." We do not have to look far to find contemporary parallels.

However, according to Rabbi Mordechai Yosef Leiner, the Ishbitzer Rebbe, Korach was actually correct, and perhaps even made his argument in good faith. His downfall was not objecting sooner, when his own tribe of Levi was itself given rights and responsibilities beyond those of the typical Israelite.

Citing Proverbs 20:26: "The wise King scatters ('mezareh') the wicked, and turns the wheel ('ofen') over them," the Ishbitzer explains that God had already placed the wreath ('zer') upon Korah and his followers, and thus had already elevated their status. As a result, God turns their own traits ('ofen') against them. In the end, Korach's position of privilege undermined his egalitarian message.

Looking at the Biblical narrative, the meritocracy had indeed failed. The Israelites had encountered one setback after another on their short journey from Egypt. Most recently, the leadership fell right into the sin of the spies, which Moses and Aaron never saw coming, dooming an entire generation to death in the wilderness.

Most concerning, perhaps, the only person who could force Moses to confront the enormity of the breakdown that had occurred and articulate the loss of confidence that the people had in their leaders and institutions was himself a leading member of the Levite tribe, a part of the ruling elite. The problem was not necessarily Korach's ambition, his jealousy, or his ideology. Korach's followers are described as "princes of the community," reinforcing the idea that the only people who had the ability to really say something about the failure of leadership were themselves part of the problem. Korach had the right idea, yet at the same time he totally missed the point.

In *Twilight of the Elites: America After Meritocracy*, Chris Hayes makes the point that an ongoing, competitive meritocracy almost automatically creates a chasm between the elite and the masses, the rulers and the ruled. From within what was once called an ivory tower, but is now called an echo chamber, interacting only with others who are very much like them share their interests and concerns, the elite, over time, become less elite. Their judgments are less reliable and their grasp on reality is shakier – even as they consolidate ever more power and influence. Moses lived alone, near the Tabernacle and far from

mainstream Israelite society, where he most regularly interacted with God and his appointed elders. It is perhaps not coincidental that the sin of the spies almost directly follows the appointment of an additional layer of bureaucracy explicitly designed to cushion Moses from the people and their concerns.

In the end, of course, Moses is re-validated and the status quo is preserved, but something significant does happen in the aftermath of the episode. According to most interpretations, Korach's insurrection took place immediately following the sin of the spies, in the second year following the Exodus. From here, we pick up the story again in the 40th year of the Israelites' journey through the wilderness. Rashi explains that God did not directly speak to Moses even once in the 38 intervening years.

I would suggest that God had a constructive purpose in His silence. As a new generation of Israelites matured, God wanted leaders who would turn not to a Moses who speaks directly to God, but towards the people and their concerns. As Hayes documents, the authority that we place in meritocracy is only viable if there is also accountability, communication, and perspective.

Korach did not understand that, as a Levite, his challenge to Moses was actually also an argument against himself, a point that, in the heat of an election year, bears profound reflection. Sometimes we're like Moses, spending so much time in the clouds talking to God that we forget that the things we do and say impact real people. Sometimes we are like Korach, not realizing that the principled arguments we make against our leaders can all too easily be turned against us as well. The resolution of the episode teaches us, perhaps, that there is a value in institutional establishments and hierarchical leadership so long as it doesn't take a Korach to get their attention.

*Rabbi Avraham Bronstein (SBM 2002) coordinates institutional outreach and sales for Koren Publishers. He has served in rabbinic positions at The Hampton Synagogue and Great Neck Synagogue.*

## **Charisma Revisited, or: The Difference between Winning It All and Total Victory**

June 24, 2016

Maybe – just maybe – this time is different. In the wake of yet another dispiriting scandal involving a brilliant and charismatic Orthodox educator, I have been encouraged by a series of thoughtful, serious, and practical public responses. Noteworthy among these was SBM alum Rabbi Elli Fischer's "On 'Hard' and 'Soft' Charisma in Jewish Education: Toward a Taxonomy of Risk". Rabbi Menachem Schrader then wrote this extremely valuable comment:

*Rav Amital, the great rabbi Rabbi Fischer referred to, was crucially aware of his own charismatic potential. He diffused its dangerous side in 2 ways:*

- 1. by insisting on his students' obligation to think things out themselves, and come to their own conclusion, even if it contradicted his own.*
- 2. by bringing Rav Lichtenstein in to be Rosh Yeshiva together with him, knowing full well they would frequently disagree on many matters. This created an intrinsic counterpoint to the charisma of his persona, requiring the talmidim of the yeshiva to weigh the conflicting views of their religious mentors, and deciding which if any approach should be adopted.*

Now Monty Python fans are aware that approach number 1 does not work on its own – telling people that they “are all individuals” does not disaggregate the herd of independent minds. So I want to focus on the remarkable second approach.

Rav Amital's invitation to Rav Lichtenstein was humanly remarkable for the willingness to share power and influence (and let us not forget Rav Sabato's similar invitation to Rav Rabinovich). It was pedagogically remarkable because it seemingly squared a circle by emphasizing the value of intellectual and ideological diversity in the context of a highly ideological institution with a fundamentally intellectual agenda.

Could this model be transferred to day schools and high schools?

Let's first point out the obvious objections.

*Yeshivat Har Etzion was the rare pushmi-pullyu that could make up its mind which head to follow when, rather than freezing in place, or painfully splitting, or suffering from severe autoimmune diseases.*

*Day schools can't possibly afford the salaries of two heads of school, or two teachers in each classroom. This kind of complexity is appropriate for high school students, but sixth graders need clarity and direction above all else.*

*This kind of complexity is appropriate for the intellectual elite, but not for the masses.*

And so on and so forth. In many contexts many of these objections are well-taken.

So here is a radical suggestion. What if we tried to transfer this approach to a larger rather than a smaller scale? What if we tried to run the entire Orthodox community, or at least the Modern Orthodox community, with that value in mind?

Let me propose the following metaphor. In some contests, the goal is to win as thoroughly and resoundingly as you can. But in professional sports, this is rarely the case on the macro-level. Sports require competitive balance, so richer teams accept self-imposed limits to allow poorer teams to compete. This doesn't diminish the intensity of any particular game, or season, or playoff series. Each team tries to win every game. But it means that everyone understands that total victory is self-defeating.

Many years ago, I asked a young woman just graduated from seminary whether her institution encouraged independent thinking. She assured me that it did. I responded by asking her to tell me about a time when her teachers had clearly disagreed about a matter of hashkafah. After a few minutes, she said that she had the impression during a session on shiddukhim that one teacher had strongly favored looking



for Torah scholarship as a first priority, while another favored looking first for excellent middot. That is certainly a vital issue, but I think there should have been more. So: What hashkafic topics do teachers openly and passionately disagree about in your local school?

For example, I am very glad that there are Orthodox clergy who respond passionately and unselfconsciously to human suffering of any kind, even if their responses are not what I would have said or done. I am glad that there are Jews who think Rashbam is the rishon closest to peshat. I am glad that some Jews think the Rav's philosophic framework is far too wedded to a past academic moment. Now I generally prize deliberation and rational self-consciousness; I see Rashbam's overall approach as a step back from the likeliest meaning of Torah; and my hashkafic positions live in constant productive dialogue with the Rav's works. But my world would be poorer, and Torah-interpretation would be less capable of approximating Divine will, if I convinced everyone to agree with me.

Of course boundaries are important, and obviously Rav Amital and Rav Lichtenstein had much in common. But the purpose of boundaries is not only to wall out, but also to wall in, and for our own sakes we need to keep people in whom we strongly disagree with.

When Eldad and Meidad prophesy in the camp – in other words, when they show signs of being able to prophesy outside of the presence of Mosheh – Yehoshua asks Mosheh to punish them. Mosheh responds with an idealistic vision in which every Jew is a prophet. It seems that Mosheh is right, but is he completely right? A midrash tells us, after all, that the content of their prophecy was that Mosheh would be transferring his position to Yehoshua.

I suggest that Mosheh was more right than Yehoshua. In a binary game, spiritual anarchy is better than spiritual totalitarianism.

But Yehoshua had a point. Constitutional democracy is better than either. G-d chose not to make us all prophets, because G-d wanted us to be thinking about and through Torah.

Mosheh Rabbeinu was the sun; Yehoshua the moon. To shed any light in the presence of Mosheh one had to be a supernova; Yehoshua could be the foreground for an entire galaxy.

The Torah tells us clearly that Mosheh's model was non-repeatable. Perhaps it also means that we should not try to repeat it, but rather celebrate the responsibility imposed by the permanent absence of legislative prophecy, and the extended absence of any prophecy.

We should be patient in judgment – which means that we need to make sure to hear and encourage passionate disagreement;

We should raise up many students – even or especially if they will fight for positions we think are wrong (but we should tell them clearly when they are wrong, badly wrong, or culpably wrong);

We should build a fence around the Torah, so that we can have the freedom to err without fearing that every error will uproot our Tree of Life.

Here is a final thought exercise: What are the people, positions, ideas, practices, that you oppose with might and main, and still recognize are sometimes more right than you are? Or if not more right, at least sometimes capture aspects of the holy or the good that your own positions cannot?

In a community which has genuine answers to those questions, I suspect that conventionally run institutions will nonetheless be more open, and I hope that teachers with natural charisma will be less likely to fall into negative habits.

## **The Way of the World is for a Man To Sacrifice Himself**

by Tobie Harris

November 17, 2016

The story of Lot offers interesting parallels to the Avraham-centric stories directly before and after it.

Lot rushes to meet his guests, offers them food and rest, even bakes them matzot just as Avraham did. When the bloodthirsty mob storms his house, he goes a step further by risking his life for the sake of his hospitality. Lot leaves the safety of his house and pleads with the mob:

ויצא אליהם לוט הפתחה, והדלת סגר אחריו.  
ויאמר:

אל נא אחי, תרעו.

הנה נא לי שתי בנות, אשר לא ידעו איש – אוציאה נא אתהן אליכם ועשו להן כטוב בעיניכם.  
רק לאנשים האל אל תעשו דבר, כי על כן באו בצל קורת.

*Lot went out to them by the doorway and closed the door behind him.*

*He said:*

*Please my brothers, do not do evil.*

*See, I have two virgin daughters – I will bring them out to you and you can do with them as you like.*

*Just don't do anything to these men, as they have come under my roof."*

The text offers no direct indication whether Lot's offering his daughters to the mob should be seen as an indication of the extent of his hospitality, or rather as a sign of unthinkable brutality and callousness.

Midrash Tanchuma, on the other hand, takes an unequivocal stance:

בנוהג שבעולם אדם – מוסר עצמו ליהרג על בנותיו ועל אשתו והורג או נהרג,

וזה – מוסר בנותיו להתעולל בהם.

א"ל הקדוש ברוך הוא:

חייר, לעצמך את משמרן,

ולבסוף תינוקות של בית רבן משחקין וקורין "ותהרין שתי בנות לוט מאביהן".

אמר רבי נחמן:

מנין שכל מי שהוא להוט אחר בולמוס של עבירה סוף מאכילין אותו מבשרו?

מלוט.

*The way of the world – a man sacrifices himself for his daughters and for his wife, to kill or be killed – but this one – he sacrifices his daughters to be tormented.*

*God said to him:*

*By your life, you save them for yourself,*

*and in the end schoolchildren will laugh and read "Lot's two daughters got pregnant from their father.*

*Rabbi Nachman said:*

*From where do we learn that if one has a craving for sin, in the end he is fed his own flesh?*

*From Lot.*

This midrash not only condemns Lot, but also directly links this heartlessness to the end of his story, suggesting that his own rape by his two daughters is divine retribution for having offered them up for gang rape by the residents of Sodom.

While the idea of attempted rape being punished by actual rape is obviously horrific, Ilan Sandovski (<http://www.hidush.co.il/hidush.asp?id=16392>) suggests a causal link between the two stories. He suggests that when Lot's daughters said "ואיש אין בארץ לבוא עלינו כדרך כל הארץ" "There is no man to come upon us in the way of all the land," they did not believe that the entire world had been destroyed. Rather, they realized that they were no longer in a position to be made a decent marriage offer (for someone to take them "in the way of the world"). This left them alone and vulnerable, at the mercy of a father who had already proved that their virginity was an asset he would trade away for his own protection. They needed a

way of securing steadier protection, particularly in the long term, while also ridding themselves of their dangerous virginity. They needed this to happen in a way that their father could neither deny nor use to punish them for licentiousness (as Yehudah almost did to Tamar). In their eyes, raping their father and thus upgrading their status from “virgin daughters” to “mothers of his sons”, was their only path to safety.

Immediately after the end of their story, we return to the narrative of Sarah being taken by Avimelech, which suggests another parallel: is the midrash’s scathing criticism of one who does not sacrifice himself to save his daughters **or his wife** any less applicable to Avraham, who (for a second time) surrenders his wife to ensure his own safety? Isn’t he, too, sacrificing her “to be tormented” rather than insisting on killing or being killed?

If so, the parallel to Lot’s story might suggest that we need to look for Avraham’s punishment, his own metaphorical “being forced to eat his own flesh”. I would suggest that we can find it in the next chapter, when Sarah forces him to send Yishmael away. While this demand is endorsed by God, there is no sign that it would have been commanded had Sarah not seen the need for it.

Avraham’s actions in Gerar made Sarah believe that her position in the household was precarious. (The prior story of her tormenting Hagar also directly follows her being sacrificed to propitiate Pharaoh). She realizes that safety in Avraham’s household is not absolute for a less-favored wife. Sarah, like Lot’s daughters, must shore up her defenses by securing her status as “mother of the [primary] sons”. In a household where a wife can be traded away for safety, Sarah is right to believe that she must play power games to ensure her and her son’s safety.

But because these parallel stories of sacrificing others are both capped by the Akeidah, the lesson that the parallel is trying to teach is as murky as the lesson of the Akeidah itself (a problem I originally thought I would get around by focusing on the Lot part of the story). One can read the Akeidah as saying that sacrificing others for yourself is wrong, but sacrificing others for God is right. One can read the fact that the sacrifice was called off as saying that sacrificing others is always wrong.

But in whichever reading, I think there is one point that is significant: the Akeidah is the only one of these stories that begins with an affirmation of the value of the person sacrificed. Lot’s daughters are described only as virgins; Sarah isn’t described at all in this story and in the earlier story is described only as “beautiful”. Yitzchak, in contrast, is described as “your son, your only one, whom you love” and the narrative takes time to establish the closeness between him and Avraham. This point might suggest that the greatest evil – the evil that breeds reciprocal selfishness – more than the sacrifice itself, is to take away the humanity of the one being sacrificed, to reduce them to an object whose value lies only in its utility.

*Tobie Harris (SBM 2005) currently lives in the Baka neighborhood of Jerusalem and is working as an attorney for the Israeli Antitrust Authority.*

## **What if Avraham Had Lived in America? Thoughts on the Political Implications of Human and Jewish Being**

November 25, 2016

Kabbalah teaches that all difference is illusion, because everything is G-d, in Whom inheres no difference. But illusion is necessary, as human beings cannot understand G-d as pure simplicity. Human comprehension emerges out of analysis, or breaking things down into distinguishable components.

One can therefore argue: The difference between Jews and other human beings is a necessary illusion. But just as the illusion of the world must be a means to comprehending the undifferentiated G-d, the illusion of Jewish difference must be a means to comprehending the image of G-d in all humanity.

This suggests that consciousness of being “different” is an essential aspect of Jewish identity, as in “They are a nation that dwells alone.” Jean Paul Sartre in AntiSemite and Jew challenges this idea by distinguishing between “authentic” and “inauthentic” Jews. Authentic Jews define themselves by who they are, without reference to others. Inauthentic Jews define themselves by what differentiates them from non-Jews. Anti-Semites by definition live inauthentically, since they define themselves in contrast to Jews. Jews should strive to be authentic.

My question is whether Sartre’s authenticity is possible, or rather impossible because distinction is necessary for human understanding. Could one be a self-conscious Jew if all human beings were Jewish? Is it possible to be meaningfully Jewish without self-consciousness?

Rabbi Soloveitchik in his essay “Confrontation” opens up what can perhaps be described as a kabbalistic corrective to Sartre. Self-consciousness is essential, and difference **is** necessary for self-consciousness, but difference does not require the presence of an external “other.”

According to the Rav, Jewish human beings properly perceive themselves as both fully human and Jewish. It follows (my extension of the Rav’s argument) that one can define one’s Jewishness by distinguishing it from one’s own generic humanity, without having resort to an external “other,” and without denying that one remains a generic human.

This dual nature as both human and Jew is embodied in Avraham Avinu’s paradoxical self-description “ger v’toshav anokhi imakhem,” “I am (simultaneously) an alien and a citizen among you.” The Rav understands these as discrete conditions. A Jew qua human is a citizen of the world, and qua Jew is an alien. Jews are both different from and the same as all other human beings.

Jews throughout history have lived this dichotomy as fiddlers on the roof, with varying degrees of success. Sometimes we fell off on one side, losing track of our Jewishness; sometimes on the other, losing track of our humanity. But there was never doubt that the roof was slanted on both sides.

Until 20<sup>th</sup> century America.

Here’s why.

In previous Diaspora cultures, Jews could participate as equals (when and where they could) only by giving up their particularism. The “generic” cultural or political space might allow them to maintain their particularism in segregated areas of life, such as worship, but as citizens, they were required to be undifferentiatedly human.

Most often, this undifferentiatedness was an illusion, and the “generic” space actually reflected a dominant non-Jewish culture. More sharply: Judaism was always posterior to the generic culture, whereas some other religion(s), philosophic system(s), ways of life etc. were anterior to that culture. To enter that space as a Jew meant stripping off part of one’s prior being.

By contrast, for a post-enlightenment Christian, or a Golden Age Muslim, being a part of generic or universal human culture might mean living in a space where only part of one’s Christian or Muslim being

could be **expressed**. But this limit on expression was not a limit on one's being. One could be political as a Christian, or artistic as a Muslim, without in any way becoming "other." Generic humanity essentially meant the parts of Christianity or Islam that could be lived even by those who were not Christians or Muslims.

I contend that 20<sup>th</sup> century America was different in that Judaism was anterior to the generic culture.

But that claim needs clarification before being applied to the 21<sup>st</sup> century, as follows:

Judaism is anterior to generic Israeli culture in the same way as Christianity is anterior in Europe. What makes America different is that Judaism is anterior to the culture in the same way as Christianity is *within the same generic culture*.

Here my claim can be understood in two very different ways.

(1). America is a Judeo-Christian culture (or, if one wishes to be more inclusive, an Abrahamic culture).

(2). America is a genuinely pluralistic culture, in which **all** religions and ethnicities are understood to be anterior to the generic culture.

The difference between these claims roughly maps onto the difference between conservatives (1) and liberals (2).

For conservatives, Jews participate in generic American culture **as Jews** because it is fundamentally a Jewish (and Christian, and possibly Islamic) culture. So that others can participate, we restrain ourselves from fully expressing our Jewishness in the political sphere. But we recognize and acknowledge that for some others, full participation in that sphere requires a contraction of being and not just of expression.

(For example: We might contend that democracy is a fundamental value of our religion, and that (cue Mendelssohn) Judaism has no need or desire for power, whereas other religions see the enforcement of G-d's Will as mission-central.)

For liberals, Jews participate in generic American culture **as Jews** because it is a culture which is continually recreated in the image of all its participants. No one should ever have to contract their religious being to participate fully, and everyone should have to contract their religious expression equally in the political sphere.

For conservatives, therefore, being a Jew and an American still allows the Jew to define him or herself against an internal human other. The generic American is not a generic human.

For liberals, by contrast, there is no difference between the generic American and the generic human – there are no prior religious commitments or non-commitments that can constrict one's relationship to generic American culture, and limits on political expression never constitute limits on being. Therefore, the Jew and American has no internal other to define Jewishness against. The Jew in America is by definition a *toshav* and not a *ger*, not because Jews specifically are *toshavim*, but rather because the category *ger* is not relevant to anyone with American citizenship.

One consequence of this analysis is that the project of liberal Jewish identity in America may be impossible to sustain. But I am leery of making strong concrete claims on the basis of abstract philosophy, let alone kabbalah. Perhaps absolutely authentic being is possible, and can be the basis of a viable mass program. Perhaps differences in religious expression are sufficient to create the necessary illusion of difference.

I am more interested in exploring the consequences of this analysis for the generic American public space. Here's what I want to say:

The liberal position rests on the assumption that religious expression and religious being are wholly separable. There is no restriction on religious expression that in any way impacts on religious being. Or

most sharply: There is no circumstance in which I can argue that a restriction on my religious expression in a public space is also a restriction on my being.

This yields a variety of easily recognizable results. For example, banning prayer in public contexts, on the grounds that theistic prayer excludes atheists, or monotheistic prayer excludes polytheists, etc. Or requiring Catholic photographers to work the weddings of divorcees without expressing their opposition in either word or deed.

The conservative position rests on the assumption that there are no generic humans, and every restriction of religious expression **is** presumptively a restriction of religious being. Conservatives therefore are suspicious of attempts to extend the generic sphere beyond the political (thus the opposition to “political correctness”), and leery of expanding diversity in the political arena when that risks constricting their religious expression within it (as they think has happened too often already).

Now the “liberal conservative” recognizes that there is great value in building a polity that includes difference, lest we fall off the other side of the roof and forget our common humanity. Liberal conservatives are therefore willing to sacrifice some of their religious expression, and consequently their religious being, for the sake of creating a generic political culture. They may for example be willing to settle for generically monotheistic rather than explicitly Jewish or Christian or Judeo-Christian public prayer, or agree to decriminalize adultery.

But where liberals see diversity as a cost-free value, liberal conservatives contend that substantive diversity (meaning a diversity of values, as opposed to superficial diversity such as skin color or dress) always has a cost, for all members of the generic culture, and that a responsible society engages in ongoing cost-benefit analysis. There is an at least theoretical point at which diversity-accommodation become a Procrustean bed, and multiculturalism eliminates all the substantive differences that made its constituting cultures valuable in the first place.

My own sense is that Jewish conversation about America should take place within the liberal conservative framework of *ger vetoshav*. We should acknowledge the great value of building a diverse polity, but also the costs of diversity, and then argue passionately about how best to maximize the former and minimize the latter, and about how to balance them when there is no choice but to choose.

## **Instinctive Liberalism and Halakhic Conservatism: Netziv's Radical and Creative Approach and Its Implications for American Denominational Relationships**

Originally published in *The Jewish Press*  
September 29, 2016

Liberal Judaism in North America is almost perfectly correlated with political liberalism, while Orthodoxy is more diverse politically. The correlation between religion and politics reasonably suggests to many that the tail of liberal politics is wagging the dog of liberal religion. An unfortunate result is that liberal political aims are becoming suspect in Orthodoxy as stalking horses for liberal religious aims.

Is there a way out of this trap? The early 20<sup>th</sup> century great Rabbi Naftali Tzvi Yehudah Berlin (Netziv) suggests a way forward in his approbation to the R. Yisroel Meir Kagan (Chofetz Chaim)'s book Ahavat Chesed.

Ahavat Chesed sought to demonstrate that engaging in gemilut chassadim (acts of lovingkindness) is not a vague and fuzzy "soft" obligation, but rather the fulfillment of clearly definable commandments and hardcore halakhic obligations. For example, it argues that there is a specific positive commandment to lend money to the poor. R. Kagan thought this work would inspire his community to do more chesed, in the way that his famous halakhification of lashon hora was intended to alter his community's speech habits.

Netziv applauds the effort but is aware of a tension here. Why should such a book be necessary? Shouldn't observant Jews engage in lovingkindness by nature, regardless of whether obligations are spelled out in exhaustive detail? His answer sets out far-reaching theories of human and Jewish nature, and an original understanding of the relationship between halakhah and ethical intuition.

Netziv begins by positing that human beings are by nature creatures of "gemilut chassadim" (perhaps because of our Divine Image, *tzelem Elokim*). He then contends that human beings are naturally commanded to fulfill this aspect of their nature. This generates a category of obligations he calls *chovot ho'adam*, the obligations of human beings qua their humanity, which likely includes all categories of proper interpersonal behavior. These are in addition to the 7 Noachide commandments.

Jews, as descendants of Avraham, Yitzchak, and Yaakov, are attuned to this imperative, and correspondingly are even more commanded by their nature to engage in gemilut chassadim.

Why then should laws of gemillut chassadim be necessary?

Here Netziv presents an astonishing Biblical interpretation. Exodus 19:3-5 reads:

"Thus you must say (*tomar*) to the House of Jacob, and tell (*tagid*) to the House of Israel . . . Now, if you heed My voice, and observe My covenant, then you will be for me a treasure out of all the nations . . ."

Netziv argues that House of Jacob refers to the masses (*hamon am*), whereas House of Israel refers to the Torah intellectuals. He further argues that "if you heed My voice and observe My covenant" is an *Amirah* directed at the House of Jacob. How does it differ from a statement intended for the elite? Netziv suggests that it refers to only two legs of the tripod on which the world stands – it refers to Torah and Divine Service, but not to Gemillut Chassadim.

Why would G-d leave out gemillut chassadim when talking to the masses? Netziv explains that the Jewish masses are obligated by their nature to do *chesed* anyway. Only the elite needed to be made aware that Jews should engage in *chesed* not only to fulfill human nature and sustain the world, but also to fulfill G-d's command, or *leshem Shomayim*.

This additional dimension of Jewish obligation is formalized within Halakhah, and therefore carries with it practical differences. As an example: Halakhah prohibits charging interest to Jews. If Jewish person X

needs a loan, and Jewish person Y can afford to make the loan only if they charge a low but nonzero rate of interest, Y may not extend the loan even though doing so would be an act of *chesed*.

This means that halakhah is not always a deepening and ultimate fulfilment of *chesed*, but rather can stand in tension with it. Netziv does not explain *why* G-d established halakhah to be in tension with *chesed*, but multiple explanations are ready to hand. For our purposes, the simplest is that the world requires *din* (law, justice) as well as *chesed*; or put in American political terms, that pure liberalism is not sustainable. In American Jewish religious terms, those whose political perspective is pure *chesed* need to have a deep respect for traditional wisdom (Torah) and ritual (Avodah).

Netziv contends that the different sensibilities G-d acknowledged at Sinai continued afterward. The tribes descended from Yosef continue the House of Jacob; the tribe of Yehudah continues the House of Israel. Yosef, says Netziv, represents an effusion of *chesed* without great Torah knowledge, whereas Yehudah represents Torah greatness. The Tabernacle dwelled in Shiloh, in the tribe of Joseph's son Ephraim, for many years because of their great natural *chesed* and despite their relative lack of Torah scholarship. It was only when Torah greatness was achieved in David and Solomon that G-d's place on earth was transferred to Yerushalayim, in Yehudah's sphere of influence.

Perhaps we should acknowledge that we have regressed, and therefore open space to again appreciate Mishkan Shiloh, and the strengths of Yosef, and the differing religious needs and virtues of the Houses of Jacob and Israel.

This would allow Orthodoxy to celebrate the instinctive liberalism of non-Orthodox Jews as a profound religious fulfillment of their human and Jewish nature, without being committed to or endorsing the specific policies associated with American liberalism. Orthodoxy would therefore be at much lower risk of being driven and deformed by reactionary impulses against non-Orthodox liberalism.

We would of course maintain that all Jews should strive for a culture of maximum Torah awareness, and that halakhah is the binding way for Jews in all areas of life. But even if our halakhic sensibility led us to prefer conservative policies in some or many areas, the liberal impulse in politics would be seen as genuinely Jewish.



## Are Day Schools Worth the Money?

December 27, 2016

Many Orthodox Jews assume that socially isolating schoolchildren is an absolute cultural necessity, and some further believe the same about intellectual isolation. The cost of setting up and running a school that meets governmental standards, and that enables graduates to earn a decent living, is therefore a given. Day schools only have to justify expenses above and beyond that minimum, and they are competing only with each other.

Many Modern Orthodox and just about all non-Orthodox Jews, however, have additional (or conflicting) educational values and priorities for their children. Some require a school to meet minimal standards such as having enough AP classes to enable competitive application to elite universities, or a genuine team sports program. Others go further and will choose a school for their children based primarily on whether it will enable their children to thrive emotionally, socially, or academically, with Jewish content and influence just one among a constellation of competing values.

For these families, Jewish day schools are competing with public and private schools. We seem to be winning the competition less often than in the past. This is a crisis both because we need the students generally, and because we particularly need the parents who can afford other private schools.

How can we win the competition more often? Dr. Harry Bloom recently argued that we need to showcase the objective secular academic achievements of students, such as SAT scores. I think that is very likely true, but that doesn't necessarily mean that we should put a greater percentage of our resources into such education.

Premise 1: Jewish day schools have no innate economic advantages over either private or public schools. The only special workplace benefit we offer is adaptation to the Jewish calendar and – perhaps owing to the cost of day school tuition – there is no deep pool of highly talented Jewishly observant science or literature teachers who might take less money in exchange for this benefit. Furthermore, because we appeal to a wealthy community, we tend to compete with well-funded public schools.

Premise 2: Jewish day schools have an innate academic disadvantage with regard to public or private schools, namely that we need to spend time on Jewish stuff. Time matters - all other things being equal, students will learn more math etc. in a school that spends more time on math, and there will be more time for office hours, professional development, and the like in a school with fewer classtime needs.

Premise 3: There is no reason to believe that Jews, or members of the Jewish community, are better at running schools than other people with similar educational backgrounds and experience.

Conclusion: Therefore, it is unreasonable and unrealistic to expect day schools to be better academically on average than their secular peer schools, public or private. Every school should strive for excellence, but in the end, we do not live in Lake Wobegon. If the claim of academic superiority is our only hope for sustainability, we have no hope, **unless the Jewish education we provide makes the overall academic product superior.**

Here is the same argument in a historical key.

Once upon a time, Jewish day schools were academically superior to non-Jewish competitors because

a. they drew students from a community that was on average more academically motivated and intellectually developed than its economic peer communities.

This is no longer true, not because Jews are less motivated than we were, but because we have become much wealthier, and so are now competing with more motivated peers.

b. Jewish studies, owing to the amount of time spent on them with high academic expectations, gave many students – especially very talented students – a more challenging and rigorous academic experience

than they could receive at the same grade level in other subjects. Thus the standard claim that studying Talmud improved math SAT scores, and in general fostered logical clarity and evidence-based argumentation.

It was true, however, that successful Talmudic rigor did not consistently translate into Jewish inspiration or identification, and worse, that mediocrity or failure in Jewish studies sometimes led to serious alienation from religion or broad self-image issues. The result of this was that Jewish Studies curricula and pedagogy became less focused on the immediately cognitive, and much more focused on broad life-relevance than on Jewish cultural density. The result of this is that students and parents now look for ways that students' Jewish Studies performance can be improved by other disciplines, rather than vice versa. We now learn Tanakh and Talmud (sometimes) "just like literature", and Talmud (sometimes) just like geometry.

**I am agnostic for the purposes of this post as to whether these changes overall improve the effectiveness of Jewish Studies. I do want to suggest, however, that they have significantly diminished our only sustainable competitive academic advantage. Restoring that advantage may therefore be an economic and sociological necessity even if in a perfect world, i.e one in which Jewish day schools had no external competitors, we might not put cognitive achievement quite so high on our list of goals.**

## **Are Adam and Eve Modern Orthodox Role Models?**

October 27, 2016

A healthy religious culture teaches its foundational stories to its children with confidence and without embarrassment. This is a problem for Modern Orthodoxy, which has discomfort teaching the story of Creation. The most immediate and important reason for this is gender. We do not have a shared communal interpretation of the story that squares with how we want our boys and girls to think of themselves, to relate to each other, and to grow up as men and women.

To put this in perspective, think for a moment about the first Rashi on Chumash. He explains that the Torah tells us that G-d created the world in order to secure our right to Eretz Yisroel. For all the moral challenges of Israeli-Palestinian relationships, this remains a powerful and important touchstone for Religious Zionism – G-d gave us this land, and He had a right to do so, because He created it. I myself am very fond of Ramban's caveat that He gave it to us on condition that we deserve it, but the point stands.

Can we find a reading of human creation that plays the same role for our community?

An enormous contribution to that end was made by Rabbi Yehuda Herzl Henkin in the title essay of his book Equality Lost.

Rabbi Henkin begins from my favorite example of bitingly humble Chazalic wit. Mishnah Avot 1:1 reports that

*The Men of the Great Assembly said three things: One should be patient in judgment, stand many students up (as independent thinkers), and build a hedge around the Torah.*

“Building a hedge around the Torah” is the justification for most of Rabbinic law, and lesser men would have felt it necessary to guard the source of their authority against mockery. Instead, Chazal (Avot of Rabbi Natan 1:1) engage in preemptive self-deprecation. Which human being made the first hedge?

Adam. What was it? He told Eve that G-d had capitally prohibited not just consumption of the Tree of Knowledge of Good and Evil, but even contact with it. What happened as a result? The Snake proved to Eve that contact did not result in death, and she therefore decided that Adam must have lied about consumption as well.

In other words: The first attempt to build a hedge around the Torah led to original sin. But we rabbis go on building them anyway, hopefully having learned from experience how to build them better. What should we have learned?

Rav Henkin notes that this story assumes that Eve had no direct access to G-d's command, which was given to Adam before she came into being. Adam did not legislate together with Eve. He did not discuss with her whether it would be better to avoid all contact with the tree, even though G-d had prohibited only eating its fruit. Instead, he legislated for her. His lack of trust made her vulnerable to the (male) snake. This lack of trust was the true original sin.

In other words: The story of Eden teaches us that men must never seek to impose themselves as necessary intermediaries between G-d and women. The Torah is not in Heaven, nor over the sea, such that women must ask men to go fetch it for them.

The original temptation was that Adam saw knowledge, and especially knowledge of Torah, as a source of power rather than as a gift to be shared. This is a yetzer hora that remains profoundly human, and rabbinic.

Yet in this version of the story, why did Adam eat the fruit? He knew that G-d had not forbidden contact, and should have corrected Eve – perhaps with a supercilious smile – when she came to him with her story.

A romantic answer is that Adam had no interest in immortality without Eve.

A tragic answer is that Adam took responsibility for his error by deliberately sharing her fate.

But neither of these answers fits well with another element of the text. When G-d confronts Adam, he does not express love or atonement. Instead, he blames Eve.

וַיֹּאמֶר הָאָדָם  
הָאִשָּׁה אֲשֶׁר נָתַתָּה עִמָּדִי –  
הִוא נָתַתָּה לִּי מִן־הָעֵץ וְאָכַל:  
*The man said:*

*The woman whom You gave to be with me –  
she gave me from the tree, and I ate.*

How can this reaction fit with Rav Henkin's reading?

Or HaChayyim provides what I think is a very productive approach.

ונראה שכוונת האדם היא שלא ידע דבר  
כי אם האשה הביאה לפניו המזומן ואכל  
ואינו חייב לשאול על המוגש לפניו – דבר זה מניין?  
כי הלא כל הארץ לפניו היא מלאה מעדנים אשר נטע ה'  
ודקדק לומר "אשר נתת עמדי" –  
שלא לחייבו לחפש ולדקדק אחריה לדעת המובא לפניו  
כיון שהאשה הלז נתנה ה' עמו לעזר ולהועיל  
ואין רע יורד מהשמים

ואין לו לבדוק אחריה, כי מן הסתם מעשיה נאים.

*It seems correct that the intent of the man is that he knew nothing of the matter  
other than that the woman brought before him something ready to eat, and he ate.  
He was not obligated to ask about what was set before him – where did this come from?  
All the land is before him filled with the delights which Hashem had planted!  
He was precise in saying "whom You gave to be with me" –  
not to obligate him to search and be precise after her to know what was brought before him.  
Since this woman was given by Hashem to be with him to help and be effective,  
and no evil descends from Heaven,  
and he should not have investigated her deeds, since the default was that her deeds were fitting.*

The fruit, Or HaChayyim suggests, was not visually distinguishable. Adam had no idea what he was eating! When G-d confronts him, he responds that Eve was vouched for by G-d, and thus surely there was no reason to mistrust her testimony.

So what should Adam have done? One witness is sufficient with regard to prohibitions, such as kashrut. This is true regardless of gender. Indeed, many rishonim say that the basis for the principle that one witness is believed in such matters is that people should be able to trust the kashrut of their spouses and hosts without resorting to halakhic detective agencies.

I suggest that the proper frame for this story is poetic justice. Adam was correct to trust Eve's kashrut; he was wrong to mistrust her maturity and judgment. By refusing to treat her as an equal when conveying the law, he taught her to mistrust him. Once she no longer trusted him, she saw no reason to live up to his trust in her. He was punished not because he trusted her, but because he had mistrusted her.

We should think long and hard about whether that narrative is playing out again today in communal conversations about women and halakhah.

I submit that young men and women who internalize this reading of human creation will seek to build a society in which Torah is always a shared resource, and in which Torah decisions are made collaboratively and transparently to the extent possible. If you agree, and think that this describes the Torah society that

you want your children to live in, please share, print, and otherwise disseminate this essay as widely as you can.

## **Feminism, Anti-Feminism and the Halakhic Process: Parashat Zakhor as a Case Study**

March 16, 2016

The discipline of legal interpretation has political value only so long as it can surprise. When judges are merely lawyers for client ideologies or classes, their predictable rulings have power but no influence, and courts lose the capacity to bridge over troubled waters. Witness our embarrassing inability to even consider a replacement for Antonin Scalia on the Supreme Court.

This often generates a vicious paradox. Critics will argue that the existing legal structures embody the values of the powerful, e.g. males, rather than of the full community. But since their arguments are framed as advocacy for a particular subgroup, they often kill the golden goose they are attempting to capture. Law's authority depends on the perception it has legitimacy beyond power; why else would the powerful submit to its authority?

The Torah acknowledges this paradox when it bans judges from favoring the poor over the wealthy. Such favoritism is shortsighted, and leads to the wealthy buying the courts or else evading them. Courts that apply law evenhandedly are the best hope of the poor, unless the law is so corrupt that anarchy or revolution seem justified.

All the above applies to the discipline of halakhic interpretation and its role in the Orthodox community. To the extent that asking a *sh'eilah* is an assertion of power—I get to choose who decides for you—rather than a submission to the authority of Torah, *psak* becomes a tool of oppression. But *Halakhah* can enable a divided community to creatively address religious challenges. Relating to halakhic decisionmaking as nothing more than an assertion of power is a self-fulfilling prophecy that undermines the best hope of the marginalized to live as full members of a society governed by religious law.

Feminist halakhists understand themselves as advocating for a marginalized subgroup within Orthodoxy. My contention is that to be constructive and effective they need to sustain rather than undermine the authority of the legal system. They need to appeal to Torah rather than making claims on Torah; they need to retain the capacity to surprise with their Torah interpretations, and to be surprised by Torah.

The same is true of anti-feminist halakhists, who generate despair, and ultimately revolution or anarchy, when their *psakim* become ideological recitations rather than live engagements with Torah.

Let me illustrate my point via three skeletal model *teshuvot* about the following *sh'eilah*: May a woman make a *berakhah* on *Parashat Zakhor* when leining it from a *sefer Torah* for a *minyan* composed entirely of women? (Please assume that each skeleton would be halakhically plausible if fleshed out. R. David Brofsky assembles and synthesizes the sources at <http://www.torahmusings.com/2014/03/zakhor/>)

Here is the first model, which aims to justify women's maximal ritual participation:

*Q. Are women obligated in the d'oraita mitzvah of Zekhirat Amalek?*

*A. Sefer HaChinnukh says no, but Minchat Chinnukh says yes, and offers a plausible argument for his position. Since we wish to eliminate distinctions of obligation between men and women where possible, we rule like Minchat Chinnukh.*

*Q. Does women's obligation in the mitzvah of Zekhirat Amalek extend to an obligation, whether d'oraita or d'rabbanan, to hear Parashat Zakhor read from a Torah scroll in public?*

*A. Rabbi Nosson Adler, as cited by Binyan Tziyyon, held that women have such an obligation. Binyan Tziyyon suggests that this follows from the combination of Minchat Chinnukh's position that women are obligated d'oraita with T'rumat HaDeshen's position that the d'oraita obligation entails public reading from a scroll. Minchat Yitzchak attests that contemporary Ashkenazic practice is to have late-afternoon readings just for women, which shows we rule like Minchat Chinnukh.*

*Q. If women are obligated to hear Parashat Zakhor read in public, can they form their own minyan for that purpose, read for themselves, and make birkot haTorah in the process?*

*A. The default setting is that anyone obligated to perform a mitzvah in public can count toward that public. This is addressed regarding women in the contexts of kiddush Hashem, birkat hagomel, and keriat Megillah. Women can therefore make birkot haTorah when leining Parashat Zakhor for a minyan of women. They can certainly lein for other women, as even BHG's odd suggestion regarding Megillah, that women have an obligation to hear but not read, does not apply here. However, this does not necessarily mean that women can say Barkhu before leining Parashat Zakhor, as that is a davar shebikedushah and requires separate analysis.*

Here is the second outline, which seeks to limit what it sees as halakhic boundary-pushing:

*Q. Are women obligated in the d'oraita mitzvah of Zekhirat Amalek?*

*A. Sefer HaChinnukh says no, because women are not obligated to fight the war against Amalek. Minchat Chinnukh objects that Amalek is an obligatory war, and women participate in obligatory wars. However, Sefer haChinnukh would presumably have responded that women's participation does not involve combat, and therefore is unlikely to be improved by the emotion of hatred/revenge. Binyan Tziyyon notes that some historical women, for example Yael, were praised for playing combat-like roles, but these were exceptional horaot sha'ah, not models for ordinary women to emulate in ordinary circumstances. Indeed, the Talmud refers to Yael as engaging in a "Sin for the sake of Heaven"! In any case, as a rishon, Sefer HaChinnukh, has more authority than Minchat Chinnukh, and furthermore, some argue that Rosh and T'rumat HaDeshen clearly agree with Sefer HaChinnukh.*

*Q. Does women's obligation in the mitzvah of Zekhirat Amalek extent to an obligation, whether deoraita or derabbanan, to hear Parashat Zakhor read from a Torah scroll in public?*

*A. The questioner in Responsa Torah Lishmah 187 suggests that even if women are obligated in the d'oraita mitzvah, they are not obligated in the public reading. This is because while the d'oraita mitzvah is constant, the public reading is a d'rabbanan obligation with a specific timeframe – annual or triennial – and thus constitutes a mitzvah aseh shehazman garma, a time-cause commandment, from which women are exempt. This seems compelling, in the following way: The mitzvah d'oraita is a private mitzvah, intended to make sure that children are reared to this hatred/revenge. The d'rabbanan mitzvah is to translate that hatred/revenge into martial spirit, and therefore must take place in public. T'rumat Hadeshen and Rosh demonstrate that Rabbi Adler was incorrect in stating that women are obligate in the public reading, or perhaps misunderstood – see below.*

*Q. If women are obligated to hear Parashat Zakhor read in public, can they form their own minyan for that purpose, read for themselves, and make birkot haTorah in the process?*

*A. We stated above that women are probably not obligated to hear the public reading, in which case the question is moot. However, even if one adopts Rabbi Adler's position, the default setting is that any requirement for a "public" requires the presence of ten adult male Jews. While some suggest that women can form halakhically significant groups of ten for mitzvot in which they are obligated, such as Kiddush Hashem, birkat HaGomel, and keriat Megillah, others disagree, and traditional practice has followed the restrictive position. Even Minchat Yitzchak, while accounting for Rabbi Adler's position, held that men should not make the blessing when leining Parashat Zakhor for women, probably even if a minyan of men were present but had already heard Parashat Zakhor that year. Women may choose to inspire their private sense of hatred/revenge by participating in the public ritual, and in some cases their participation may be necessary to inspire the men, or alternatively, prevent the men from acting on their hatred/revenge inappropriately. For these reasons, in some cultures there may develop an obligatory custom for women to attend the reading, and perhaps this is all that Rabbi Adler meant.*

The problem is that these *teshuvot* are not in genuine dialogue with each other. Just about no one following A would consider following B, or vice versa, in response to a reevaluation of the argument about Rosh's position, or to a demonstration that Rambam disagreed with Sefer HaChinnukh. The hypothetical

authors and followers of these *teshuvot* seem incapable of being genuinely responsive to Torah that surprises them. They have raised shields, and nothing that conflicts with their ideologically preordained *psak* can get through. Here is a tentative fragment of a third response, one that I hope would have a better chance of generating authentic halakhic conversation:

*Both Sefer HaChinnukh and Minchat Chinnukh assume that the purpose of remembering Amalek is to enable war in the moment. But perhaps the purpose of the mitzvah is not immediate inspiration but rather ongoing cultural hatred/vengeance. In that regard, women are certainly vital, as they are vital to generating all the love of mitzvot and mitzvot of love (see the Rav's essay "Two Categories of Tradition," while recognizing that the sharp gender-role dichotomy the Rav sets out there is not descriptive of our social reality). This may be the understanding of the many rishonim who make no explicit distinction between men and women with regard to this mitzvah. Even if this is not the purpose of the mitzvah d'oraita, perhaps it was the purpose of Chazal in mandating a public reading of Parashat Zakhor. Even if the public reading is not a mandate of Chazal, but rather a communally adopted custom, it seems clear that at least Ashkenazi women adopted the custom. Perhaps, as well, the exemption of women from war is culturally bounded, and in a society where women serve in combat, they are obligated in this mitzvah as well. (Note that in both Israel and the US women do not have the same military service obligations as men, and that there are very good pragmatic reasons for even the most egalitarian of cultures to be more physically protective of young women than of young men.)*

*And yet, the notion of a mitzvah to hate and take revenge, to the point of genocide, is properly and deeply challenging and troubling. This is true even though the ethnic category of Amalek is halakhically defunct, and the mitzvah in any case applies only in Messianic times, and even then only when Israel is sovereign and completely at peace with all its neighbors. In contemporary times, the felt absence of G-d's Presence has led to an increased desire for the pressure of His yoke, as Dr. H. Soloveitchik wrote. Two manifestations of this phenomenon are the search for chumra/stringency in the charedi world and the desire for increased obligation among women in the Modern Orthodox world – benot Yisroel hechmiru al atzman.*

*All stringencies inevitably lead to leniencies.*

*Both Rav Aharon Lichtenstein zt"l and the Chofetz Chayim reached the conclusion that the mitzvah of erasing Amalek could be fulfilled only by someone acting for no motive other than obedience to Divine Command; rationalization turns mitzvah into murder. Shaul lost his kingdom not because he was merciful, but because by sparing Agag, he demonstrated he thought genocide could be rationally justified. If a mitzvah related to Amalek can be justified only in the context of commandedness, and all agree that women are fulfilling it, perhaps it is **necessary** to rule they are obligated. Or perhaps with regard to these mitzvot specifically, it is inappropriate or worse to seek obligation where it does not already exist.*

While this third outline is clearly aware of and sympathetic to the concerns of both the first and second, it feels open to being surprised by Torah, and able to react without defensiveness to new sources and ideas that lead in unexpected and previously undesired directions. Unlike the others, it feels genuinely interested in the specific *mitzvah* under discussion. None of this guarantees success, or even influence. In a polarized environment, especially one with an existing power imbalance, there are always authentic and also projection-based reasons for seeing bridges as vulnerabilities rather than as opportunities. But the alternative too often has been mutual pyrrhic victory, so I think the effort is called for.



# Women as Halakhic Decisors: An Analysis from First Principles

April 1, 2016

ולהורות את בני ישראל  
את כל החקים אשר דבר ה' אליהם ביד משה  
*And to provide hora'ah to the Children of Israel*  
*regarding all the principles which Hashem spoke to them via Mosheh*  
ויקרא ויקרא י:יא *Vayikra 10:11*

The question of whether women can be halakhic decisors rarely receives the rigorous halakhic attention it deserves. The reason for this is clear: conversation is generally conducted with a view toward advancing or opposing specific programs and agendas for women's religious leadership in Orthodoxy, and analytic precision becomes less significant than rhetorical effect. What follows is a tentative and rough attempt at analyzing the question from first principles, taking as little as possible for granted. Corrections, refinements, extensions, etc. are very welcome. They will help and encourage me to—very eventually—produce a work that can meet exacting scholarly standards. Please note that my purpose here is to propose and develop lines of analysis, not to take firm positions. It is therefore likely that I will be working with positions that are analytically useful even though in the realm of *psak* I would rule against them without hesitation. And now on to the main course.

It is a halakhic given that each Jewish woman has halakhic obligations, i.e. that in certain times and places she is obligated by religious law to act in certain ways. Actions require halakhic determinations and decisions. No one has ever suggested that every woman must ask a qualified *posek* before engaging in any religiously significant action. Women decide their own priorities, relationships and perhaps even what *berakhah* to make on cornflakes. Or they may decide to ask the *sh'eilah* about cornflakes to someone else, which is in and of itself a halakhic decision. In short: Individual women make halakhic decisions for themselves in exactly the way individual men do, and their capacity to do this is bounded by the same rules that bind men.

On the other hand: The original *Sanhedrin* was formed when Mosheh Rabbeinu laid his hands on (=gave *semikhah* to) seventy men. Service on the *Sanhedrin*, and on its subordinate courts, was thereafter limited to those with direct *semikhah* from those seventy men. For the purposes of this article, I assume only men were eligible for this. On that basis, we can say that the *Sanhedrin* and its court system represent a form of halakhic authority **over others** that women cannot have.

Our question therefore is: How far toward direct *semikhah* does a woman's authority to answer halakhic questions for herself extend?

Most prior analyses have started from the other side, by trying to limit the influence of direct *semikhah*. Proposed limitations include authority over other women as opposed to over a mixed community, elected as opposed to imposed authority, exclusive as opposed to shared authority, capacity to enforce authority, and so on and so forth. These approaches assimilate the issue of *semikhah*-authority to that *serarah*-authority, which is derived from the *derashah* 'king and not a queen.' (The survey of opinions in R. Gershuni's *Mishpat Hamelukhah* is extremely helpful, and I recommend it to you with this note: It is hard to take seriously any limit on authority that endorses Golda Meir as Prime Minister while forbidding her to be President of a Young Israel) We should resist this conflation. Rabbi Moshe Feinstein argued that the ban on women's *serarah* is limited, according to almost everyone but Maimonides, to queenship. Leaving aside the very real question of whether Rabbi Feinstein's analysis is compelling, his argument leaves no way to justify limiting *semikhah* on the basis of *serarah*, as a halakhic decisor is not a queen. Rabbi Feinstein therefore must have understood the issue of halakhic authority as separate from the question of authority generally.

Now direct *semikhah* ceased many centuries ago, and so contemporary men cannot have that form of authority either. Limiting the issue to contemporary halakhic authority, we can differentiate men and women only if: (a) *Semikhah* stands for a broader category of halakhic authority over others that women cannot have; or (b) some forms of contemporary halakhic authority over others are *derived* from the

authority of *semikhah*, and therefore may exclude women; or (c) some forms of contemporary halakhic authority over others are deliberately *modelled* on *semikhah*, and therefore may exclude women.

Category (c) applies to socially-constructed formal authority, not to authority that derives directly from personal achievement and character. It may be central to the question of whether a woman can receive a formal license to *pasken*, or “be ordained as a rabbi,” but it is generally irrelevant to the question of whether a woman can be a halakhic decisor per se. While the categories do intersect, for example when a community decrees that certain types of public halakhic issues can be addressed only by an ordained rabbi, for our purposes category (c) can reasonably be ignored.

What is halakhic authority, and how is it exercised? Is it derived from/modelled on direct *semikhah*? We noted above that an individual woman can make decisions for herself. Let us add there is generally no ban on providing halakhic information to other people, and under many circumstances women are obligated to provide such information to others. For example, women are obligated to rebuke wrongdoers, inform their husbands as to their *niddah* state, and certify that food they are serving is kosher. It seems unchallenged that women may refer questioners to reference books, and therefore they may respond to questions by citing those books from memory. In other words: answering most halakhic questions in most situations—even unasked—does not require *hora’ah*, and women can certainly do this. Halakhic argument comes into play only when we reach the sphere of *hora’ah*.

The category *hora’ah* appears in multiple halakhic contexts, and there is no reason to assume that it is defined identically in each context. Here are four such contexts: (a) a Sanhedrin must bring a sacrifice if its halakhic error caused most of the Jewish people to sin mistakenly—but only if its error constituted a *hora’ah*; (b) a Rebellious Elder is executed for issuing a ruling that defies the Sanhedrin—but only if his ruling constitutes a *hora’ah*; (c) an ordinarily qualified scholar may not issue a *hora’ah* after drinking a *revi’it* of wine; and (d) a student may not issue a *hora’ah* in the environs of his or her primary teacher.

In contexts (a) and (b), a too-obviously wrong ruling is excluded from the category of *hora’ah*. I suggest that by the same token a too-obviously correct ruling is excluded. This yields a possibly useful definition: *A ruling is a hora’ah if and only if a different answer to the same question could also be a hora’ah.* One step further: *A ruling is a hora’ah if and only if a different answer to the same question could be wrong and still be a hora’ah.* And now one step further: *A ruling is a hora’ah only if the person making it was choosing among a variety of answers, at least one of which could be wrong and yet still be a hora’ah.*

The result of this formulation is that it is generally not a *hora’ah* to cite a halakhic handbook, or to refer one to the *ArtScroll Niddah* book rather than Rav Tzvi Sobolofsky’s, with regard to a case that is substantively identical to one that has been ruled on by prior decisors. This is why Rav Herschel Schachter argues that the vast majority of ordained Orthodox rabbis are not qualified *baalei hora’ah*, even though he of course understands and approves of their responding to the vast majority of their congregants’ halakhic questions. Nishmat draws a similar distinction between the job of a *yoetzet halakhah* and someone with a *heter hora’ah*. Obviously the line is blurry, and a sliding scale of competence-to-importance/difficulty might work better than a line, but I think that the border’s general location can be plotted. Rav Schachter and Nishmat seek to prevent incompetents from issuing *hora’ah*, not to make gender distinctions among the competent. This is because Birkei Yosef famously writes that a woman *chakhamah* **can** give *hora’ah*, and his statement is reasonably taken as reflecting halakhic consensus. This probably means that there are no gender distinctions at all as to which halakhic questions can be answered, or which answers given. All that matters is knowledge and training. Birkei Yosef might seem to end the discussion, but I suggest that he does not. Here’s why:

Birkei Yosef’s evidence is the position of Sefer haChinnukh that the prohibition against giving *hora’ah* while drunk applies to women as well as men. But this does not necessarily mean that women can also give the *hora’ah* referred to in other contexts. Note that two of those contexts—the communal sacrifice and the Rebellious Elder—involve the Sanhedrin or those eligible to join it, and therefore presumptively exclude women. We therefore need to explore whether those forms of *hora’ah* have contemporary ramifications. This in turn requires us to introduce another axis: What is

the effect of a *hora'ah*? Here are three options: (a) Essentially nothing. It provides information useful to individuals who seek to live their lives in accordance with *halakhah*; (b) Legitimizing. Without such a ruling, a particular option would be foreclosed, or it would be illegitimate to foreclose a particular option. Because a *hora'ah* said so, other people cannot denounce me for acting in this way, or refusing to act in that way; (c) Binding. Because of a *hora'ah*, I must take this option, or I must not take this option.

It is plausible that women can issue *hora'ah* in the first or second senses, but not in the third, which was originally the province of those with direct *semikhah*. Our question then is whether the third category exists at all nowadays. I think the answer is no. As I understand it, the binding force of a *hora'ah* nowadays is the result of a constructive *neder*. By asking someone a question, you are implicitly swearing to treat their answer as binding. Similarly, although less obviously, a synagogue's acceptance of a rabbi's halakhic authority is a voluntary collective oath to treat the rabbi's answers as binding. The latter may raise general issues of *serarah*, but is not different in kind than an oath to treat a woman's answers on issues of plumbing as binding.

Another possible source of contemporary halakhic authority is the teacher-student relationship. Students may not issue *hora'ah* in the presence of their primary teacher—even in the lifetime of their primary teacher—without permission. It is possible to extrapolate from this that students are bound by the *hora'ah* of their primary teachers. But one can generally choose to cease being the student of any particular teacher, and free oneself from the direct authority of their *hora'ah*. Some argue that a universally acknowledged *gadol hador* has this kind of authority over every Jew. One might then argue that even a woman who was the greatest halakhic scholar of her time could not become *gedolat hador*. That would be a really good *sh'eilah* to have.

The *Center for Modern Torah Leadership* will continue doing all we can to bring this *sh'eilah* into practical being, so that we can ask it to the greatest halakhic scholar of the time. I'm confident that we'll follow her answer voluntarily, even if she tells us we don't have to.

## **Daf Yomi and Advanced Learning, Especially for Women**

June 3, 2016

A literate Jewish laity properly demands and eventually receives an even more learned rabbinate. The Daf Yomi program (founded by my grandfather z”l’s rebbe Rabbi Meir Shapiro) is among the more remarkable lay literacy programs in history. And a rising tide lifts all boats; it takes a rabbinate that knows Shas deeply to genuinely lead a community that has learned through Shas.

The corollary is also true. It is very hard for a broadly ignorant culture to produce genuine talmidot chakhamot. As a passionate advocate of women’s advanced Torah learning, I recognize the urgent need to produce more learned ba’alot bayit, both lishmoh and because they will create the demand for profoundly learned women leaders.

Early last week, I noted on Facebook that YU was celebrating Daf Yomi’s completion of Seder Nashim with an all-male panel of scholars, adding several exclamation points after Nashim. I did not mean to suggest that Seder Nashim is more about women than say Seder Taharot, which in Talmud includes only Tractate Niddah. Nor was I pushing for the affirmative action inclusion of a woman panelist who had not taught the daf throughout that Seder. I hope that everyone possible attended the event, to honor those who maintained this commitment and to inspire others to commit.

Rather, I wanted to focus attention on the extent to which women’s lay learning is still so far behind men’s, with relative attendance at Daf Yomi as a marker. We need women learning the daf to demand women teachers who already know the daf – and *then* insist that those teachers take their earned place on the dais at the next siyyum. We need women to learn through all of Shas if we want to produce women who command Shas. Such women are needed among other things for their insights on issues of Gittin and Kiddushin, and Niddah, and Bava Kamma.

Not that daf yomi suits every learning style. My only extended effort so far was a chavruta with Deborah Klapper that didn’t quite make it through Seder Moed. But to affirm my support for its importance – and also to model some ideas about Talmud education – I will use this week’s dvar Torah to teach the opening of Seder Nezikin. (If you’re inspired to want to learn the masekhta or seder this way – please email me.)

Mishnah Bava Kamma opens with a mnemonic:

### **Four Father-Cases (*avot*) of Damages**

followed by a list of the four:

**Shor** (=ox), **Bor** (=pit), **Mav’eh** (=?), **Mav’ir** (=burning).

Talmud Bava Kamma’s opening focuses on a related statement by the Amora Rav Pappa:

*Some among them are like them;  
Some among them are unlike them.*

This is understood to mean that some *toladot*, or ‘descendant’ cases of damages, have the same consequences as the *av* from which they ‘descend’, but some do not.

Rav Pappa’s claim seems odd; why would a descendant case have different consequences than the father-case? And why would only some of the descendant cases have those different consequences?

The Talmud begins by (re)constructing a *literary* justification for Rav Pappa’s claim. The Mishnah uses the term *avot* in two other areas of halakhah: Shabbat, and Tum’ah.

With regard to Shabbat, there are 39 categories of prohibited labor, and the cases put in those categories entail the same punishment as the principle-cases.

With regard to Tum'ah, the terms *avot* and *toladot* don't refer to categories and cases, but rather to higher and lower categories. When an *av* source-of-tum'ah transmits tum'ah to an object, that object becomes a *toladah* source-of-tum'ah. *However, an av can transmit tum'ah to a broader set of objects than can a toladah.*

The upshot is that in Mishnah *avot* and *toladot* may (Shabbat) or may not (tum'ah) have the same consequences. So Rav Pappa's claim about the *toladot* of the *avot* in our mishnah is literarily plausible.

That brings us to a deeper question: In what sense is a case a *toladah* if it has different consequences than its *av*?

To explore this question, the Talmud lists the *toladot* for each *av*. Not surprisingly, we discover that each *toladah* shares all its abstract qualities with that *av*. We therefore can find no justification for giving it different consequences.

Except in one case— *chatzi nezek tzerorot* (=paying only half-damages for damage caused by pebbles kicked up by an animal). *Chatzi nezek tzerorot* falls under the category *regel* (=foot; commonly occurring damage), which is a subcategory of **Shor**. However, while *regel* usually generates an obligation to pay full damages, there is a Halakhah leMosheh Misinai (tradition received by Moses at Sinai but not recorded in the Written Torah) that one pays only half-damages for *tzerorot*. Nonetheless, according to Rav Pappa, *tzerorot* carries two other features of the category *regel*, and therefore is properly its *toladah*: one is not liable for *tzerorot* kicked up in a public space (= *reshut harabim*), and one has to pay one's liability for *tzerorot* "from the best". (Rava is unsure about "from the best".)

So the Talmud concludes that Some among them are unlike them refers specifically and exclusively to *tzerorot*, and Rav Pappa's statement essentially reduces to a mnemonic for *tzerorot*. Note, however, that Rav Pappa's statement no longer applies directly to the Mishnah. **Shor** includes a subcategory, *keren*, that pays half-damages for first offenses, so *tzerorot* is not unlike **Shor**; it is unlike its *av* only because it is placed in the subcategory *regel* rather than in *keren*.

That covers the overall formal structure of the first two *dafim*. However, the Talmud uses this formal structure as a scaffold on which it hangs as much halakhic information as possible. Or if you prefer: The formal structure is a scaffold built to serve as a mnemonic for as much halakhic information as possible.

So in the course of its discussion of *avot* on Shabbat, the Talmud tells us that

1. There is a Tannaitic dispute as to whether one is liable for multiple sacrifices for violating the same category on Shabbat in multiple ways, and
2. The father-cases on Shabbat are derived from the Mishkan.

In the course of its discussion of *avot* regarding *tum'ah*, the Talmud tells us that

1. an *av* can transmit *tum'ah* to humans, utensils, food, and drink, but a *toladah* cannot transmit *tum'ah* to humans or utensils.

The Talmud then conducts a Benjamin-and-his-brothers-search for the case Rav Pappa was referring to, making sure to bring up the correct case only after it has gone through all the others. In the context of that search, it makes sure to offer a precise definition of each *av*, and also to list its *toladot*.

(Since *regel* appears early in the search, which initially follows the order of a *beraita* listing subcategories of *Shor*, the Talmud leaves *tzerorot* out of its initial presentation of the *toladot* of *regel*, and then revisits the category at the end. So we learn along the way that

1. There can be multiple *av*-cases for a single category, in addition to *toladot*
2. **Shor** includes the *av*-cases
  1. *keren* (=horn), defined as intentional damage, whether or not the horn is "attached";
  2. *shen* (=tooth), defined as damage which benefit the damaging animal; e.g, when it eats, whether or not the plant it eats will regrow;

3. *regel* (=foot) defined as commonly occurring damage by an owned animal
3. **Bor** includes the *av*-cases of pits deep enough to cause death, and pits only deep enough to cause injury. **Bor** is defined as damage by something that was created with the potential to harm. that belongs to you.

(Note that in this case “belongs to you” does not mean actual ownership, as the *av*-case is a pit dug in a public domain, but rather that we treat you as if you own it.)

4. Rav and Shmuel dispute whether **Mav’eh** = **Shen** = tooth, which should therefore be removed from **Shor**, or rather **Mav’eh** = **Adam** = human.
5. If **Mav’eh** = **human**, its *toladot* are damages caused by sneezing and spitting.
6. Goring a human being makes an ox *muad* to gore other animals, but goring an animal does not make an ox *muad* to gore human beings.
7. All humans are always *muad* to cause damage, even when asleep (because they stretch).
8. The *toladot* of **Mav’ir** = Esh (fire) include dangerous objects left on a rooftop which then fall off and injure somebody.
9. **Mav’ir** is defined as damage caused by a human being together with another force, by something that belongs to you, and that you must guard other people’s property against.

Among the Talmud’s brilliant achievements is the narrative voice that weaves all the above into a flowing conversation. I hope many of you will be adding your voices to that conversation.

## Spirituality, Sexuality and the Science of Desire

March 4, 2016

There is as yet no science of desire. Aphrodisiac technology may well have progressed, but we have no biochemical or neurological understanding of the difference between love and lust, and limited if any capacity to demonstrate the objective existence of that difference.

Recognizing the limits of our knowledge, as opposed to our descriptions and commitments, has significant implications for the religious treatment of sexuality.

Many years ago, Rav Moshe Feinstein wrote (*Igrot Mosheh* OC 4:115):

למשכב זכור ליכא שום תאוה מצד הבריאה  
וכל התאוה לזה הוא רק תועה מהטבע לדרך אחר  
אשר גם רשעים בעלי תאוה שלא נמנעין מצד חטא ועון אין הולכין לשם  
שיצר הרע זה אינו אלא מחמת שהוא דבר אסור  
שהוא כמו להכעיס ח"ו

*for gay male sex there is no appetite stemming from Creation,  
and all appetite for this is only straying from nature to another path,  
one avoided even by even wicked 'people of appetite' who do not hold back from any sin or violation,  
because this evil inclination is caused only by it being forbidden,  
and it is as if intended to anger G-d, G-d forbid.*

Rav Moshe believed that he was articulating a psychological truth deeply and broadly rooted in Jewish tradition, but this view is now largely regarded as false even within Orthodoxy. The textual evidence he cited now seems forced or partial.

This shift has occurred in highly significant part because of the deep and powerful exposure of Orthodoxy to the personal narratives of gay family, friends, and patients. Personal narratives are properly the raw material for evaluating current psycho-spiritual reality; we really have little other access to other people's souls.

At the same time, we should also not allow ourselves to become fundamentalists – either way! – about the extent to which these narratives connect to underlying neurological or neurochemical realities, let alone to claims about what is objectively necessary for individual human fulfillment in any and all human societies. Nor should we abandon the notion that our tradition has valuable things to say about the relationship of love and lust, or about the origins of desire.

In that spirit, I offer this brief, preliminary, and tentative treatment of an enduring rabbinic locus of reflection on heterosexual desire. *Shemot* 28:8 tells us that the *Mishkan's* water-reservoir, or *kiyor*, was made of copper:

במראת הצבאת  
אשר צבאו פתח אהל מועד  
*via the mar'ot of the tzov'ot*  
*who tzav'u at the entrance to Ohel Moed.*

Rabbinic tradition generally translates that the copper came from mirrors (*mar'ot*) donated by women-who-gathered-in-hosts (*tzov'ot*, *tzav'u*) at the Tabernacle. There seem to be two very different interpretations behind this common translation, however.

1) The women donated their mirrors to express their *abandonment* of sexuality for spirituality. In Ibn Ezra's words:

נשים באות תמיד להתפלל אל מקום האהל,  
ועזבו כל תאות העולם,  
על כן נתנו מראותן

*Women who continually came to pray toward the place of the Tent,  
and abandoned all worldly desires –  
therefore they gave their mirrors*

Seforno – to my mind compellingly – sees the women as seeking to study rather than to pray, to:

*hear the words of the Living G-d,  
as Scripture writes:*

*'So any seeker after G-d would go out toward Ohel Moed (=Mosheh's tent, not the Mishkan).*

2) The women donate their mirrors, which they had brought out from Egypt, to *commemorate* their persistent sexuality under oppression. By seducing their exhausted husbands, they produced the hosts/*tzva'ot* of the Exodus, and perhaps their efforts were both generated by and generated Divine visions/*mar'ot*. (According to Baal HaTurim, *Ohel Moed* =Tent of Meeting is a *tzanua* allusion to the places where they met their husbands.) These interpretations can be seen as complementary. Their fullest integration is found in the *Derashot* of R. Yehoshua ibn Shuaib (1280-1340; student of Rashba).

אותן הנשים ששלטו ביצרן והיו מתפללות יומם ולילה הביאו מראיהן נדבה,  
שמתחלה היו רואו' בהן והיו מתקשטות  
והיו פרות ורבות ומעמידות צבאות רבות,  
ועתה, כשפרשו מתאוות העולם, הביאום אל משה,  
ומשה היו מואס בהם  
אמר לו הקדוש ברוך הוא למשה: קבל מהם, כי הם סבבו להעמי' צבאו' בישראל,  
אותה שעה קבל משה על פי הדבר  
ועש' מהם הכיור הנכבד שמטיל שלום בין איש לאשתו.

*Those women who ruled over their evil inclinations and prayed and night donated their mirrors.*

*Originally they would look in them and adorn themselves  
and thus be fruitful and multiply and raise up many hosts*

*but now, when they separated from worldly desires, they brought them to Mosheh.*

*But Mosheh was disgusted by them.*

*The Holy Blessed One said to Mosheh:*

*'Receive these from them, since they caused the raising up of hosts in Israel'.*

*At that moment Mosheh accepted them on the basis of the Divine Imperative  
and made of them the honored kiyor, which spreads peace between man and wife.*

There are all sorts of wonderful subtexts here, for example: (a) Mosheh, who separated from Tzipporah, failing to recognize the value of sexuality; and (b) the *sotah*-ritual as a symbol of marital harmony rather than of unhealthy jealousy.

Each of these reverberates down the Tradition, and I hope we'll have occasion to explore them elsewhere. But for now my questions are: What changed? Why was it proper for these women now to give up their mirrors? Why didn't G-d, with deepest appreciation, tell Mosheh to give them back for use in producing the next generation?

One might suggest that the women in question were post-menopausal; that ibn Shuaib saw no value in non-procreative sexuality; and moreover, that he did not believe that post-menopausal women experience sexual desire. But the first of these premises is unfounded; the second contradicts *Halakhah*; and the third contradicts reality. So this would be simplistic rather than simple, and in any case would be a distortion of ibn Shuaib's sources.

Instead, rooted in Akeidat Yitzchak's understanding of the difference between the names *Chavah* and *Ishah* in Genesis, we can say that in Egypt women had no choice but to prioritize procreation over study or prayer, whereas in the desert they were given both the practical and religious option. At the same time, the mirrors were turned into a source of marital harmony and fertility to emphasize that Talmud Torah must always in some real sense be *מעשה* = a cause of virtuous action, and that those who choose to focus on cognitive or meditative paths to spirituality must not denigrate those who choose practical paths.



Now the phrase *tzov'ot petach Ohel Moed* also appears in I Samuel 2:22:

ועלי זקן מאד  
ושמע את כל אשר יעשון בניו לכל ישראל  
ואת אשר ישכבון את הנשים הצבאות פתח אהל מועד  
*Eli was very elderly*  
*and had heard all that his children did to all Israel*  
*and that they lay with the women-who-gathered-in-hosts at the entrance to the Tabernacle.*

Rabbinic tradition suggests that Eli's sons merely delayed bringing the sacrifices that women brought after childbirth, and thus kept these women from their husbands and delayed their next pregnancies. But Meshekh Chokhmah takes "lay with" literally, and Malbim as at least reflecting an underlying sexual intent. I think Malbim is fundamentally correct, and there is no ignoring the implication that women were sexually vulnerable when they came to the Tabernacle in Shiloh. And Shmuel's use of the same phrase as Exodus suggests that this was true at Sinai as well.

Why, if these *tzov'ot* were the ones "who continually came to pray toward the place of the Tent, and abandoned all worldly desires"? Perhaps, very perhaps, noting again the spiritual and epistemological risks of suggesting anything in this area, the argument is that—at least with regard to women—heterosexual desire and spiritual yearning are closely related, and can be deflected toward each other by manipulative men. The Marc Gafni story should not have been surprising, and we need to stop being surprised by its ilk.

Such an understanding can lead to profound suspicion of female spirituality, and/or to a profound sanctification of female sexuality. Mosheh expresses the first when he seeks to refuse the mirrors; the Holy Blessed One expresses the second when He commands Mosheh to accept them. Halakhic tradition does not see the issue as settled. Some *poskim* suggest G-d overruled Mosheh only in this specific case, as a *hora'at sha'ah* (and therefore, perhaps a formerly-mirrored vanity should not become a Torah-reading *bimah*.) We are still searching for a fully mature way to acknowledge both sides of the tension.

Yes, sexuality can be modestly veiled spirituality, and spirituality can be cleverly disguised sexuality. No, we cannot reliably distinguish which is which, or guarantee that one will not become the other. There is no science of desire.

The dispute for the sake of Heaven between Mosheh and G-d endures as the subtext of many contemporary Orthodox conversations. But I suggest the following as a useful metaphor and precedent with regard to women's access to the texts of the *Mesorah* and the physical environs of the Sanctuary. Even Mosheh, who tried to reject the mirrors, never discouraged women from gathering-in-hosts for prayer or study at the entrance to *Ohel Moed*.

## **Halakhic Laboratory #1: Crossdressing**

September 16, 2016

*All halakhic arguments made herein are purely theoretical and may not be relied on for practice even in emergency circumstances without express authorization from a qualified Orthodox halakhic decisor. Any reproduction, retransmission, or other account of this article must include this disclaimer.*

In a genuinely communist society, such as the classic kibbutz, is the mitzvah of *tzedakah* totally fulfilled, or totally eliminated?

I ask this question to yeshiva students often. They quickly realize that it depends on whether the purpose of *tzedakah* (charity) is to inculcate the virtue of generosity – in which case communism is the worst-case scenario – or rather to ameliorate the consequences of income inequality – in which case communism is the ideal.

Thinking more deeply, we can recognize that this question instantiates a broader intellectual strategy. *Tzedakah* is a mitzvah that practically ameliorates a difference – what happens if we instead eliminate that difference? What other mitzvot that have the effect of ameliorating differences?

I first realized the potential breadth of this strategy a few years ago when the Summer Beit Midrash, with the generous support of the Ruderman Foundation, studied halakhah in relation to issues of disability. One guest lecturer, Professor Michael Stein, argued persuasively that the use of wheels rather than legs was a socially constructed disability – in one-level open environments, such as ranch houses, wheels may be faster and more efficient than feet. He suggested that society should where possible seek not to accommodate the disabled, but rather to reconfigure itself so that there was no disability.

Rabbi Benny Lau makes a similar argument in a halakhic context. Mishnah Megillah 24b states that a Kohen with blemishes on his hands may not go up to give the Priestly Blessing. Rabbi Yehudah extends that to kohanim with dyed hands. The rationale for both is that “the people will stare at him”. The Talmud extends the ban to other blemishes such as a blind eye. But it then applies the rationale to create a leniency – physical disqualifications that result from the possibility of distraction don’t apply once the community is “used to them”. Rabbi Lau argues that the community has a moral obligation to **become** used to them. (This argument does not apply to service in the Temple, where the disqualification is not based on the possibility of audience distraction.)

What about mitzvot that depend on difference, but apparently with the opposite intent, to maintain and reinforce that difference? What happens to those mitzvot when we eliminate difference completely? Should we see this as a reason not to eliminate the difference?

For example: Halakhah contains many rules intended to reinforce the difference between Jews and non-Jews. What if all non-Jews convert? Or: Halakhah has laws separating between milk and meat. What if our society becomes wholly vegetarian, or if we develop meat that is not halakhically fleishig and milk that is not halakhically dairy? Or to take a more immediately relevant issue: With regard to gender, R. Yoel bin Nun has reportedly suggested in the halakhic laboratory that contemporary biological women should be considered men for many halakhic purposes, such as obligation in time-bound commandments.

Which brings us to the prohibitions against crossdressing found in this week’s parshah (Devarim 22:5).

לֹא יִהְיֶה כְּלִי-גִבּוֹר עַל-אִשָּׁה  
וְלֹא יִלְבַּשׁ גִּבּוֹר שִׁמְלַת אִשָּׁה  
כִּי תוֹעֵבַת ה' אֶל-הָאֵלֹהִים כָּל-עֹשֵׂה אֵלֶּה:

*The accessory of a man must not be on a woman  
and a man must not wear the garment of a woman  
because anyone who does these is the toeivah of Hashem your G-d.*

Rashi comments that these prohibitions are bounded by their rationale:

– “לא יהיה כלי גבר על אשה”  
שתהא דומה לאיש, כדי שתלך בין האנשים, שאין זו אלא לשם ניאוף:  
– “ולא ילבש גבר שמלת אשה”  
לילך ולישב בין הנשים.

דבר אחר: שלא ישיר שער הערוה ושער של בית השחי:  
“כי תועבת” – לא אסרה תורה אלא לבוש המביא לידי תועבה.  
“The accessory of a man must not be on a woman” –  
*so that she appears like a man, in order to go among the men, as this is only for the sake of adultery;  
“and a man must not wear the garment of a woman” – to go sit among the women;  
Alternatively: That he must not remove his genital hair and his underarm hair;  
“because ... the toeivah” –  
The Torah prohibited only clothing that leads to toeivah.*

RAMO OC 696:8 controversially takes that logic one step further.

ומה שנהגו ללבוש פרצופים בפורים,  
וגבר לובש שמלת אשה ואשה כלי גבר –  
אין איסור בדבר  
מאחר שאין מכווין אלא לשמחה בעלמא;  
וכן בלבישת כלאים דרבנן .  
וי”א דאסור,  
אבל המנהג כסברא הראשונה.

*The custom which has developed of wearing masks on Purim,  
and of a man wearing a woman’s garment, and a woman the accessories of a man –  
there is nothing prohibited in this matter  
since they intend only mere high spirits;  
the same is true regarding the wearing of Rabbinically prohibited Shatnez.  
Some say it is forbidden,  
But the custom accords with the first position.*

RAMO seems to view at least the Biblical prohibition subjectively rather than objectively – crossdressing is only Biblically forbidden when the *intent* is to engage in licentiousness. On this view, perhaps crossdressing would be Biblically permitted when done to satisfy one’s own psychological needs, and then permitted even Rabbinically in extreme circumstances.

Even if that argument goes too far to be sustainable even in emergencies, it suggests an array of supplemental practical strategies. What if the clothing is cross-, but we use other means to ensure that it can’t lead to the sort of promiscuity that motivates the Torah’s ban? For example, what if a biological female cross-dressed as a man but wore a large sign explaining what she was doing? Or: what if crossdressing men adopted a clear symbol to identify themselves, such as a special color of earring? Most contemporary kashrut agencies deem such symbols insufficient to permit the sale of dairy bread, but the Boston tradition is that the Rav thought that labelling the package was sufficient.

Another test case: What should androgynes (people with both male and female genitals) wear? A brief reception history of Mishnah Bikkurim Chapter 4 suggests that the halakhah on this issue has not been fully developed yet. The standard printed edition (also RAMO of Pano) says that an androgyne מתעטף כאנשים = “may/must wrap the head and get a haircut in the manner of men”. Rabbi Shimshon of Sanz, however, has אינו נעטף ומספר כאנשים, which he interprets as meaning that “like men, neither wraps the head nor gets a haircut”. Halakhot Gedolot has ומתעטף באבלות ואינו מספר = “wraps the head during mourning and/but does not get a haircut”. Rambam (Hilkhoh Avodah Zarah 12: 10) has אינו עוטף כאשה ולא = “may/must wrap like a woman but may/must not shave the head like a man”. I leave it to you to figure out where the commas belong in Rambam.

Despite this confusion, I have not yet found anyone suggesting that androgynes should dress, accessorize, and hairstyle in a uniquely identifying fashion. This may seem surprising because the House of Rav states in the name of Rav on Yebamot 83a that the halakhah follows R. Yose’s position that an androgyne is

neither male nor female, but rather its own kind. (The same position is found at the end of the printed Mishnah Bikkurim Chapter 4 in the name of Rabbi Meir). However, the formulations of R. Yose's position bears careful attention. Yebamot 83a has

אנדרוגינוס בריה בפני עצמה הוא,  
ולא הכריעו בו חכמים אם זכר אם נקבה  
*The androgyne is his/her own kind*  
*and the Sages did not determine him/her to be either male or female.*

Mishnah Bikkurim has:

אנדרוגינוס בריה בפני עצמה הוא,  
ולא יכלו חכמים להכריע עליו אם הוא איש או אשה  
*The androgyne is his/her own kind*  
*and the Sages were unable to determine whether s/he was male or female.*

The version in Yebamot leaves open the possibility that the Sages left androgyne as a third category. The version in Bikkurim, however, makes clear that the goal of the Sages was to classify the androgyne legally as either male or female, and any unique status s/he has is an accident of doubt rather than a positive determination. Most likely, then, the version in Yebamot should also be read that way.

If that is the case, the Sages considered and rejected the possibility of breaking the sartorial gender binary in what is perhaps the most likely and obvious case. This would make it much harder for contemporary halakhists to permit breaking it in any case.

We must also consider the apparent absence of any halakhic objection to unisex clothing. This may suggest that the prohibition is not about the need for clothing to mark sex, but rather about the need for clothing not to contradict sex. However, I don't know that halakhah has ever confronted the possibility of a society in which **all** external markers are unisex.

*The purpose of this experimental Halakhic Laboratory Report is to test the possibility of public creative halakhic conversation that does not lead to the practical legitimization of options that lack the backing of significant halakhic authority. Please be a solvent rather than a precipitant.*

## **Partnership Minyanim and Women's Aliyot: A Maturing Conversation**

Originally published in *JOFA's Torch*  
June 21, 2016

Proponents and opponents of Partnership Minyanim have jointly fostered a single narrative. In that narrative, the only relevant technical halakhic question is a pure binary: can women's aliyot be justified technically, or can't they? If the answer is negative, no further conversation is possible; if the answer is positive, the conversation devolves into questions of policy, and no further technical conversation is necessary.

Pure binaries often reflect immaturity, and so it was with this one. Just about anything can be justified technically by a sufficiently clever and bold halakhist; where there's a rabbinic will, there's a halakhic way. The question that matters is when there **ought** to be a rabbinic will, and the mature answer is that it often depends on just **how** clever and bold one has to be to generate the halakhic way. And yes, on which and how many halakhists of what stature are willing to be that clever and bold.

The superb recent JOFA blogcast opened up space for genuinely mature halakhic conversation. [1] But that was only one of its many positive contributions. The contributors also deepened and nuanced many issues of religious experience and communal affiliation, and we are all in their debt for their honesty and seriousness. [2]

I'm sure that I will be reviewing and processing their words for months if not years. But to honor their accomplishment, and hopefully extend its impact, here are some of my thoughts in its immediate aftermath,

All the participants expressed interest in separating the question of women's aliyot from that of Partnership Minyanim. Rabbi Katz's shul, for example, apparently gives women aliyot only on Simchat Torah. The problem, they acknowledged, is that a significant part of these minyanim's attraction is precisely the way they "bundle" issues, especially those around gender and sexuality.

And yet – none of these Minyanim, for all their popularity, has yet turned into a full 22-service a week shul. The reason for this is not, certainly not entirely, that their clientele is simply less committed than that of their local MO shul. Partly it is because, when it comes to MO communities, the frummost common denominator often wins on purely pragmatic grounds: you need a minyan that all ten men are willing to daven in, so the tenth man has a veto. Protest minyanim succeed briefly at conferences and the like, but generally not over the long haul.

But this discussion suggests that many of (at least) the learned elite who attend PMs very much want to stay in social and intellectual communion with the Orthodoxy that rejects women's aliyot. More sharply – it may be precisely the men and women who daven 22 services a week who don't want the PM to meet that often, so that they can attend elsewhere, or so that their children can play and learn Torah with children who attend elsewhere.

I suggest another, somewhat ironic, reason. PMs, to their credit, draw people because the *davening is better*. There is less talking, more communal participation, very little hurrying through (*davening off*) stuff. These are wonderful things, but they are also qualities that exist at very few MO weekday minchah/maariv minyanim; no one goes to shul on a regular Tuesday night for the inspirational singing. Such minyanim are sustained, for better or worse, by people with chiyuvim and people who daven because it's a chiyuv, and many of them want to daven as fast as humanly possible, or faster. So part of the attraction of PMs for many people simply can't be generated 22 times a week in the MO community.

All this means that the halakhic community which excludes PMs has a lot of serious thinking to do about how to relate to PM attendees, and about whether and how to acknowledge and satisfy the genuine religious needs and desires that PMs seem to be meeting more successfully.

In that regard, I want to offer a few reflections on *lo titgodedu*, the halakhic prohibition against factionalizing, as it may apply here.

As Rabbi Brofsky noted briefly, Rambam and Rashi have almost diametrically opposed understandings of this prohibition. Rambam sees it as banning controversy and dispute; Rashi sees it as banning the acceptance of multiple practices **without** controversy and dispute, which creates the impression that we are accountable to completely separate sources of authority – two Torahs.

It should be clear, however, that Rashi also agrees that fomenting controversy is forbidden, even if he doesn't derive that prohibition from *lo titgodedu*, and also thinks that *velo tihyeh k'korach v'kha'adato* is descriptive rather than prescriptive. (I am not sure whether Rambam has a prohibition against factionalization along the lines of Rashi.)

Now the problem with this prohibition is that it is in practice unenforceable. Each side will claim that the other one is in violation, and why should they be the ones to surrender their values? Thus the Talmud suggests that Beit Hillel and Beit Shammai were in simultaneous violation of *lo titgodedu*.

It is also the case that *lo titgodedu* (like *lashon hora*) is *muttar l'toelet* – it is permissible when the ends justify the means.

I concede, for example, that I would not allow *lo titgodedu* to stop me from teaching women Talmud, or from paying sales tax, or from supporting the State of Israel, even if I found myself in communities which saw all of these as deviant.

There is a reasonable argument grounded in halakhic contract law, however, that *kol hameshaneh yado al hatachtonah* – the one who changes has the lower hand. So the standard to justify violations may be higher if one acknowledges that one's action is unprecedented.

On a deeper level, *lo titgodedu* may be a statement about the need for accountability. Everyone should cling obstinately to their truths; and also have the humility to want to check their truths against others'.

We discourage factionalizing because “they” need “us” and our truths, because if we leave (or encourage them to leave us), our ideas will have more influence, but on fewer people. How many aliyot are worth how many marriages without prenups, if that's the tradeoff?

But also because “we” need “them”, and their truths, to keep us from turning Torah-study into nothing but self-reflection at its most subjective. If Torah never tells us things we don't want to hear; if Torah by definition cannot stand against the culture in which we are embedded; is that the Torah we want?

My hope is that mature halakhic and policy discussions conducted with deep moral seriousness on both sides will enable us to muddle through with both our integrity and our community intact.

As a contribution toward that effort, I want to engage critically with the vision of aliyot that Rabbi Katz set out in the blogcast.

Rabbi Katz writes:

**This in turn makes an aliya a moment of empowered religiosity, in contrast to most of our religious encounters where we are predominantly in a religiously dependent state. Most of our encounters with God come from a place of need and inferiority; we need His help, support or approval. Limmud ha'Torah stands out as an exception. That is when we encounter God from a place of strength and perhaps even superiority: He needs and wants us. An aliya is limmud Torah maximized, it is climactic limmud ha'Torah.**

I suggest:

- a) Aliyot are not *limmud* = study of Torah for the *oleh* at all. *Keriat haTorah* is a recreation of Sinai, and the *oleh* represents G-d or Moshe Rabbeinu, *teaching* the Torah. It is the rest of the congregation that listens and learns, men and women alike.

- b) The intent and nature of the ritual is that it involves as little subjective human input as possible – we recite the text, and we aspire to convey the Written Torah as objectively as possible. Unlike ordinary Torah study, it is an act of complete submission.
- c) Prayer is when we talk to G-d – when we get to impose ourselves, and even make demands – and “G-d desires the prayers of the righteous”. Study of Torah is when we **listen**, as attentively as we possibly can, so that we can understand what G-d demands of us. Study is empowering because G-d trusts us, not because G-d needs us.

Of course, access to rituals of religious submission may be as crucial as access to rituals of religious empowerment. One consequence of my analysis, however, is that aliyot became much less symbolically meaningful when the roles of *oleh* and *korei* were split (especially when one recognizes that the middle *olim* don't fundamentally need to recite the blessings).

Aliyot for women may also matter for completely different reasons, among them

- 1) Physical access to the scroll
- 2) Conveying that G-d is not male, and that Mosheh's Rabbeinu's gender was not essential to his role as the Receiver and Transmitter of Torah
- 3) Public religious honor, especially for learned women (That we no longer have literacy standards for men to receive aliyot cuts both ways on this issue.)

It may be that aliyot are the best, or even the only way, of making these points and giving women these religious experiences. An argument in those terms must be met fairly, and if it turns out that we have no way of meeting it, serious cheshbon hanefesh is in order.

Regardless, I am of course writing out of my own (male) experience; perhaps none of these reasons resonate with women's experiences, and perhaps there are others that I have missed entirely.

At the same time, the realization that aliyot can stand for such different things to two (male rabbinic) people such as Rabbi Katz and myself should also generate cheshbon hanefesh in anyone who risks deep communal strife or schism on the assumption that their meaning is clear and inarguable.

Notes:

[1] Which, alas, I will not provide here. Et chata'ai ani mazkir hayom – in previous discussions of women's aliyot, I too assumed that no one was interested in the strength or weakness of the technical heterim, only in the assur/muttar binary. Beli neder I will try to remedy that elsewhere soon.

[2] I anticipate publishing soon a critique of the technical arguments and especially assertions in Rabbi Katz's recent responsum, many of which I thought were incorrect. For that matter, I think many of the additional arguments and assertions Rabbi Katz made in the blogcast were incorrect, and I respond to only a few here. But none of that changes the fact that it generated this wonderful conversation, or diminishes the great credit due Rabbi Katz for willingly opening himself to serious criticism in such a public forum.

## **Coercion in the Delivery of a Jewish Divorce**

Originally created for Boston Agunah Taskforce

December 22, 2016

In Jewish law, a divorce is achieved by the delivery of a bill of divorce, called a get, from husband to wife. A wife cannot deliver a get to her husband. A rabbinical court cannot issue a divorce.

For the most part, a valid Jewish divorce requires the consent of both husband and wife. The husband must deliver the divorce of his own free will and the wife must consent to receive it of her own free will. There are exceptional circumstances where the wife's consent may be dispensed with, but the husband's consent is always formally necessary to create a valid Jewish divorce.

Jewish law is generally very concerned for the autonomy of the husband in choosing to divorce his wife. A Jewish bill of divorce delivered by the husband without his free-willed consent will be invalid.

However, Jewish law is also deeply concerned that wives not be trapped in dead or untenable marriages. To this end, Jewish law defines "free-willed consent" on a sliding scale, thus allowing certain levels and forms of pressure to be applied to the husband in circumstances where divorce is seen as morally desirable or required. The validity of consent-to-divorce obtained via such pressures also depends on who Jewish law construes as having applied the pressure.

For this reason, it is essential that all attempts to pressure a husband to give a Jewish divorce be closely coordinated with a qualified rabbinic court, or follow pellucid guidelines set forth by such a court. Otherwise, there is a severe risk that the husband will "consent", but be unable to act on his consent, as the rabbinic court will consider him "coerced".

### How does Jewish law define "coercion"?

Coercion is any act by any party that is aimed at compelling the husband to grant a divorce. The third party may be the wife, an advocate for the wife, members of the broader Jewish community, the civil court or a rabbinical court.

Jewish law theoretically permits **physical, financial and psychological** coercion under certain circumstances. However, Jewish law also requires that Jews comply with the law of the land. Accordingly, contemporary Jewish law does not countenance physical coercion to grant the get, and American law prosecutes attempts to do so under the criminal law.

### What is permissible vs. impermissible coercion?

Jewish law does envision situations in which coercion upon the husband to grant a divorce may be permitted. The coercion is permitted when:

- a) a duty to grant the get arises under Jewish law,
- b) the husband has been ordered to grant the get by a rabbinical court
- c) the husband refuses to comply.

The coercion aims to bring him into compliance with the principles of Jewish law and the order of the Beit din.

The standard legal theory which renders such compliance "consensual" is that all Jews at core wish to obey the rabbinical court. Therefore, coercion renders a bill of divorce invalid if the coercion is not sanctioned by a rabbinical court which has ruled that it is permissible under Jewish law. This includes coercive action undertaken by civil courts. In practice, this means that civil remedies are best used to compel appearance before the beit din, rather than to directly compel the get, and that secular judges should wait until a beit din has ruled that a duty to divorce exists before using any civil remedies.

The classic case is one in which a husband develops a physical or mental condition that, in the opinion of a competent beit din, would make it impossible for an ordinary woman to live with him. In such a case, if



the wife asks for divorce, and the husband refuses, a beit din will rule that the husband is obligated to divorce her. If he continues to refuse, the beit din may authorize any and all means of coercion to obtain his willingness.

Jewish law distinguishes at least two broad categories of cases in which coercion is justified. A rabbinical court may rule that the husband has a **mitzvah** to deliver the get or that the husband has a **chovah** to deliver the get. *Chovah* implies a more absolute legal obligation to divorce. The level of *chovah* was necessary to justify extreme physical coercion. Rabbinical courts rarely rule *chovah*, especially in the US where they lack the power to enforce such orders. In most cases in the US, therefore, the rabbinical court will rule that the giving of the get is a *mitzvah*.

Some batei din will generally rule *mitzvah* in any case where the marriage is demonstrably over and the husband is using the Jewish divorce as leverage in the civil case. Some batei din will do so only if either the wife initially tried to arbitrate the financial issues in beit din, or at the least if she did not resist an attempt by the husband to do so – otherwise they will wait to rule until the civil case is complete.

The Boston Beit Din does not have a formal position on this issue, and I cannot speak for my colleagues. My expectations are that

- a) we will rule *mitzvah* once the civil divorce is complete regardless of prior circumstances
- b) we will regard any attempt to use the Jewish divorce as leverage as illegitimate and grounds for summoning the husband to beit din.
- c) we will also rule *mitzvah* in any case where the threat or actuality of get-recalcitrance has been used for any purpose other than trying to compel agreement to arbitrate the financial issues in beit din.

If the rabbinical court has ruled *mitzvah*, they may also order communal remedies considered “soft coercion”. The “*harchakot deRabbeinu Tam*”, are shunning methods aimed at imposing communal pressure on the get refuser. They consist of limited social ostracism within the local community, including refusal to do business with the recalcitrant or to allow him participation in synagogue ritual. Contemporary expressions include the publication of formal beit din notices of contempt (*seiruvim*) encouraging such ostracism; organizing demonstrations at recalcitrants’ homes or businesses; social media shaming campaigns, and the like.

On many issues, significant Jewish legal authorities may differ as to whether the method of coercion is proper given the circumstances. In such a case, a beit din would not approve the coercion *in advance*, but would retrospectively validate a divorce given as a result. However, if a third party engaged in the coercive behavior without securing advance permission from the beit din, in full knowledge that it would not be approved by a beit din in advance (*lekhatchilah*), a beit din may be resistant to retrospectively validating the resulting divorce.

There are two key factors that must be considered in determining whether a husband’s participation in the divorce process will be considered by a rabbinical court to be an act of his own free will:

- 1) Threats of deprivation of rights vs. withdrawal of privileges

A divorce may be viewed as coerced if the husband grants it under threat of being deprived of another right he enjoys under civil or Jewish law. Thus threats by a civil court to withhold property that the husband is otherwise entitled to could invalidate a get.

However, a **threat to withhold the issuing of a secular divorce** would not be considered coercive. Under Jewish law, the state is not obligated to grant a married couple the right to divorce. Therefore, if a secular judge refuses to issue a divorce decree until the husband gives the get, this would not be considered coercion. A clause in a separation or divorce agreement that requires the husband to give a Jewish divorce *before* the civil divorce becomes final, *as a precondition* for filing an agreement, or for allowing a decree nisi to become final (in Massachusetts, which has an interlocutory period), is perfectly acceptable.

A clause in a divorce agreement that obligates the husband to give the Jewish divorce *after* the secular divorce becomes final is difficult to enforce civilly, and even if the court seeks to enforce it via contempt, this may lead to a *beit din* refusing to write or validate the divorce because it is being given under coercion. Enforcing such a contempt order would be depriving the husband of a right to freedom or to property, rather than withholding the boon of divorce.

In determining the **equitable distribution** of family assets, a court may not make an award that withholds or reduces a husband's entitlements to property unless and until he delivers the get or as **punishment** for having failed to deliver the get. This is because Jewish law considers the husband to have a vested right to whatever is generally considered his share of the marital property under the law.

However, equitable distribution awards that recognize the **adverse financial impact** that get refusal may have on the wife are permissible. For example, if a judge informs the husband that refusal to give a get will materially affect the wife's chances to remarry, and that one factor in deciding the allocation of marital assets will be her chances of remarriage, this would not be considered coercion.

## 2) Enforcing prenuptial or postnuptial contractual provisions relating to delivery of the get

An agreement under which the husband is liable for **specified reasonable spousal support** so long as the Jewish marriage endures is also enforceable. (This is the mechanism used by the Rabbinical Council of America Prenuptial Agreement).

An agreement under which the husband is liable for **specified damages** if he fails to give a Jewish divorce within a specified time might be enforceable halakhically, but might not be. The difficulty here is that Jewish law generally does not enforce penalty clauses (known as *asmakhta*). For this reason such clauses are not recommended. If they seem the only viable option, the *beit din* must be consulted as to the language of the agreement.

An agreement **to appear in *beit din* to discuss the get** in good faith is enforceable civilly by any means, up to and including contempt, so long as it does not specify that the husband must deliver the get. Indeed, so far as Jewish law is concerned, the secular court may order and enforce an order for the husband to appear in *beit din*, and to pay the reasonable expenses of such meetings, even without an agreement by the parties.

**Any financial award by a *beit din***, such as under the support obligation of the RCA Prenuptial Agreement, is enforceable civilly by any means, including contempt, garnishment of wages, and seizure of assets, without prejudice to the get.