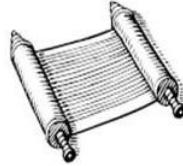


# **2017 CMTL Reader**

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"Taking Responsibility for Torah"

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

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## **A Pre-Modern Joke About Post-Modernism**

November 28, 2017  
Jewish Press

An old yeshiva joke tells of a bachur who is completely paralyzed when he encounters a Talmudic passage that seems to contain unresolvable contradictions. All his learning accomplishments turn to ash; either he has misunderstood everything, or else the Talmud is not worth studying. His rebbe responds by telling him to study a series of apparently random Tosafot. On further investigation, it turns out that each of these Tosafot immediately follows one that ends with an unresolved question. The moral is drawn: If Tosafot went on despite having unresolved questions, so can you!

A comment of Rashi to Genesis 35:13 seems intended to make the same point. “I do not know what (in the place where He had spoken with him) teaches us.” If you have nothing to say, why not remain silent? The point must be that incomplete understanding of one verse does not preclude you from making valuable contributions to the understanding of other verses.

All very well and good. Yet almost every subsequent traditional commentator, from medieval through modern, feels compelled to resolve Rashi’s difficulty rather than joining his confession of ignorance. (Many of their solutions miss the heart of Rashi’s question, which is that the phrase “the place where He has spoken with him” shows up in three consecutive verses, and appears essential in none of them.) They seem to feel that acknowledging failure in one case would undermine their entire interpretive enterprise.

Talmud Pesachim 22b records the following narrative beraita:

Shim’on haAmsuni – Some say: Nechemya haAmsuni – would derive meaning from each incidence of “et” in the Torah.

When he reached the verse “et Hashem your G-d you must revere”, his students asked: “Rebbe, all the “et”s that you previously derived meaning from, what will occur to them?”

He said to them: “Just as I received reward for derishah (=interpretation), so too I will receive reward for perishah (=separating from interpretation)”.

Until Rabbi Akiva came along and interpreted: “Et Hashem Your G-d you must revere” – this comes to include Torah scholars.

Shimon haAmsuni contended that the direct object marker “et” should always be understood as meaning “with”. In one verse, his approach seemed to yield a theological monstrosity; whom should one fear “with G-d”? Rabbi Akiva’s solution was that people must revere Torah scholars as part of their reverence of G-d, or as Yerushalmi Berakhot 9:5 puts it, they must revere “Him and His Torah”.

What did Shim’on haAmsuni teach before Rabbi Akiva came along? Did “I will receive reward for perishah” mean that he avoided saying anything about this specific verse, or rather that he refused to repeat any of his previous interpretations of “et”?

Human interpretation of G-d’s work is always reaching beyond ourselves, and we should be suspicious of any theory that successfully explains everything in Torah – more likely we are imposing our own vision on the text. But what do we do when our own interpretive theory’s inevitable failure is starkly exposed?

Most commentators assume that we withdraw our theory, that we cannot continue teaching until we can plausibly pretend that we can explain everything. They assume that Shim’on Ha’amsuni simply refused to teach until Rabbi Akiva came up with the answer. Thus they rarely if ever include comments pointing out the weaknesses of their approach.

Rashi thought otherwise. He wrote “I do not know what this teaches us,” and went on writing. The humility of this comment lies not only, and not even primarily, in his confession that he does not

understand this verse, but rather in the implicit acknowledgement that this set of verses casts a shadow on his entire project. If he can't explain why this apparently extraneous phrase occurs in three consecutive verses, how can we have confidence in a methodology that requires the assumption that there are no extra words anywhere in the text?

Rashi nonetheless goes on teaching what he thinks is true. But he does so having gift-wrapped for his readers the evidence for overruling or even disregarding him. It is not surprising that very few of his successors were willing to do the same.

I suggest that Rashi's attitude is desperately needed specifically in our time and place. Anyone in intellectual contact with "postmodernity" realizes that every interpretive system will generate unresolvable contradictions, and that the more perfectly a theory fits the evidence, the more suspicious we should be that the evidence is artificial. We all know at some level that there are things in Torah which our religious theories cannot explain well.

This realization can yield four negative responses.

We can become paralyzed, unable to make choices;

We can become relativists, unable to believe that our choices matter;

We can come to believe that our choices have value simply because we made them, and are therefore not subject to moral critique; and

We can choose to believe that our choices are demonstrably correct, and therefore aggressively reject rational critique.

Or, following Rashi and perhaps Shimon haAmsuni, we can be both humble and firm. We can simultaneously affirm our *derishah* and our *perishah*, continuing to teach our best understanding of Torah while acknowledging the inevitable limits and weaknesses of our understanding and welcoming both moral and rational critiques.

## **The Rabbi and the Gabbai: A Horsetorical Bromance**

May 19, 2017

The gaon Rav Chasdai, who was known for his outgoing and generous nature, once came across a group of children looking crossly at one another. He asked them what was the matter, and their reply was: We all want to play horsey, but no one is willing to be the horse. So he volunteered to be the horse. The children tied a rope around him and rode him or led him around for awhile. When they got tired and hungry, they tied the rope very securely to a tree and told him to wait like a good horsey while they went home and returned.

Of course, they forgot about him entirely. The gabbai of the shul found him half an hour later, and said he would come back with a knife to cut the ropes. But Rav Chasdai insisted that he instead go bring the children back to untie him, saying that he did not wish to disappoint them.

Thus I heard the story from Rav Chasdai's grandson, whose credibility is beyond question.

To my mind, however, his grandfather gave the gabbai an implausible rationale. The children would not have been disappointed. They had forgotten all about the game, and would never have expected their "horse" to still be there when they remembered.

I suggest instead that Rav Chasdai thought it was important for the children to understand and take responsibility for their actions. What if the gabbai hadn't come by for hours? Plainly the knots were so tight that he was unable to free himself. Children have to learn that games can also have real consequences.

But why didn't Rav Chasdai tell the gabbai his true motivation? First of all, the gabbai was prepared to destroy the children's rope, and Rav Chasdai was gently calling to his attention that the children had legitimate interests here. Second, perhaps the gabbai had no sympathy for children, and would otherwise have punished them severely.

That was my speculation. But it happens that I shared it with a colleague who turned out to be the grandson of the gabbai, and he assured me that his grandfather was legendary for his rapport with children.

Why then did Rav Chasdai pretend to be concerned about the children's disappointment? My colleague had a very different perspective. His family tradition was that Rav Chasdai loved to play with children, and would be sad when they grew bored of him. So he suggested that perhaps Rav Chasdai really just wanted the gabbai to bring his playmates back.

I was rather taken aback by the suggestion. Would the gaon Rav Chasdai have used the gabbai's time dishonestly? Would he want to play with children, any children, so much that he would simply waste time waiting around for them?

Perhaps there was no wasted time, and Rav Chasdai spend his wait-time reviewing Shas in his head. Indeed, I wonder whether Rav Chasdai loved playing with children because their games, unlike the social play of adults, let him have human contact and relationships without distracting his intellect from Torah. Chasidic rebbeim are often described as functioning on both levels simultaneously, but Litvaks may not have the same capacity.

Perhaps Rav Chasdai spent his days looking for excuses to get away from adults, and the errand he gave the gabbai was the best he could think of in the moment. He viewed it as a white lie, as the alternatives were either insulting the gabbai or else wasting time better spent studying Torah.

With all humility, though, I'm not sure he was right. The Talmud famously declares that even Hashem tells white lies in order to preserve marital harmony, but hopefully everyone understands that this isn't a

license to tell your spouse that you've gone to daf yomi when you really went in to work. And this isn't obvious, but I think it also means that you can't tell your spouse that you're going in to work when you're really going to daf yomi. Preserving marital harmony doesn't mean deceiving your spouse so that s/he won't stop you from doing what you want to do, even if you think you'll be happier doing it. I also suspect that preserving rabbi-gabbai harmony is not at the same level of priority as preserving marital harmony.

But what if it wasn't about their roles, but about their very human selves? Both Rav Chasdai's grandson and my colleague describe their grandfathers as deeply intimate, almost inseparable friends. Sometimes inseparability can become overwhelming, and one person's unwillingness to enforce boundaries, added to the other's inability to recognize them, can put a profound relationship into crisis. Aggada recognizes that same-sex friendship can be as powerful as heterosexual love; perhaps halakhah does as well, or at least should. Surely Rav Yochanan would have been right to dissemble rather than shatter his relationship with Resh Lakish.

Moreover, the Talmud reports that Hashem once did lie in order to preserve a beit midrash society. When Rabban Gamliel was removed from office for abusing Rabbi Yehoshua, his successor Rabbi Elazar ben Azariah opened the Academy to hordes of previously excluded students, and Torah flourished. Rabbi Gamliel grew depressed, so G-d sent him a dream in which the new students were shown to be worthless hypocrites. The Talmudic narrator makes sure we know that the dream was false; but believing that it was true gave Rabban Gamliel the emotional strength to return to the scene of his humiliation, and eventually to (mostly) regain his office. (Perhaps he also eventually gained the strength to realize that the dream was false.)

So if Rav Chasdai really needed the space, and he dissembled to the gabbai, I think I might be fine with it.

Except that there's a difference between a one-time falsehood in a crisis, and an ongoing habit. At some point Avraham would have caught on that Sarah thought of **him** as too old to have children; at some point Rabban Gamliel would have recognized that his dreams were a little too convenient.

So maybe this story became so worth retelling because it in fact records a crisis passed, and a relationship saved.

But I need to emphasize that it's very possible that neither the rabbi nor the gabbai ever really understood what had happened between them. Maybe in the moment the rabbi projected his desire to play onto the children; surely the gabbai really thought the rabbi needed amusement rather than privacy. Real people do real things for complex and ambivalent motivations, so maybe nothing wholly false was thought or said, and a friendship was saved.

One difference between halakhah and aggada is just that allowance for unclarity. The Talmud states that one who learns Torah lishmoh has fulfilled the purpose of creation, whereas one who learns Torah not lishmoh would have been better off uncreated. It isn't until chassidut that we really consider the question of whether anyone learns purely one way or the other. Assuming that we will always be somewhat but not fully lishmoh, are we better off learning, or not?

Another way of putting it is that halakhah teaches us how to act, but aggada teaches us how to be.

*Note: This dvar Torah is a fictional riff on versions of a story sometimes told about a specific past rabbi. Any resemblance to him, or to any other specific historical figure, is wholly coincidental.*

## **The Integrated Religious Life**

April 27, 2017  
Jewish Press

Few texts seem less philosophically promising at first glance than “anything that a zav lies on becomes tamei” (Vayikra 15:4). By contrast, “The world stands on three things: Torah, Avodah, and Gemilut Chassadim” (Avot 1:2) seems wholly removed from the nitty-gritty of halakhah. Yet on closer analysis the conceptual relationship between these texts illustrates and validates Rav Aharon Lichtenstein zt”l’s insistence on the integration of halakhah and hashkafah.

Let’s start from Vayikra. Mishnah Zavim 4:7 cites a disagreement regarding the case of a zav who is lying on a four-legged bed, with each leg of the bed resting on a garment. The tanna kamma (anonymous initial position) holds that all four garments become tamei. Rabbi Shimon holds that none of the garments becomes tamei.

The tanna kamma’s argument is that since the bed would fall if any of its four legs were removed, the zav is lying on each of them. All that matters is that each leg supports any of the zav’s weight. Rabbi Shimon’s argument can be understood in two ways. According to Rambam, he holds that only something which supports most of a zav’s weight becomes tamei. According to Rashi, he holds that only something which supports all of a zav’s weight becomes tamei.

Rav Lichtenstein suggested that Rashi and Rambam’s positions reflect a fundamental conceptual disagreement. Rashi holds that the action of supporting a zav makes something tamei. Rambam, however, holds that the key factor is the status of being a zav’s support.

Imagine that “Frank” occupies most of a chair, but “Joe” squeezes himself onto the edge. Frank and Joe are both sitting in the chair, but Joe is sitting in Frank’s chair. In other words, an object is defined as “the seat of a zav” only if most of a zav sat on it, but it was “sat on by a zav” if any part of a zav sat on it.

The halakhot of zav have not been practical for millennia. But the disagreements in and about this Mishnah have important and very present consequences in the realm of hashkafah.

Shimon HaTzaddik teaches in Avot 1:2 that for the world to stand, it must be supported by three pillars: Torah, Avodah, and Gemilut Chassadim. What defines “supported by”? The first time I had the privilege to learn Torah from Rav Lichtenstein, he asked in his endlessly imitable style:

- a) Does the world fall if any of Torah, Avodah, and Gemilut Chassadim is lacking, or only if all are lacking?
- b) If all three pillars are necessary, is this because each sustains a separate aspect of the world, or rather because their synergy sustains every aspect of the world?

I suggest that the philosophic question of what supports the word’s weight is fundamentally the same as the legal question of what supports a zav’s weight. Here’s how each legal position plays out in the context of Avot.

According to the tanna kamma, so long as each individual pillar makes even a token contribution, the world can yet stand. A culture of piety and learning can survive interpersonal failures; a culture of serious scholarship and good character can compensate for a lack of religious passion; and a culture of genuine spirituality and profound kindness can endure despite ignorance.

According to Rashi’s Rabbi Shimon, each pillar must support its own third of the world. The world can withstand the schismatic separation of piety, learning, and character, so long as each survives in its own bastion.

But I find Rambam's Rabbi Shimon to be the most compelling position. A cultural world must be defined as "resting on Torah, avodah, and gemilut chassadim" in order to stand. Each pillar must be strong enough to support most of its world.

There are growing socio-religious gaps in Orthodoxy between the realms of profoundly rigorous study of Torah, spirituality as service of G-d (Avodah), and the aspiration for social justice (Gemilut Chassadim). Perhaps our world can survive this trifurcation, as it certainly cannot if any of the three completely disappears.

But I submit that authentic Judaism needs at least the possibility of such unity to survive. A healthy Torah culture cannot believe that Torah is disinterested in social justice; a healthy culture of yir'at shomayim cannot see learning as irrelevant; and the past century bears eloquent witness to the dangers and ephemerality of avowedly secular utopias.

Rav Aharon Lichtenstein modelled the gold, the vision, and the dream of a fully integrated religious life, in which Torah, avodah, and gemilut chasadim could never be pried apart. If our world yet stands, it is and will be in his merit. Zekher tzaddik livrakhah.

## **Is Halakhah Always Law? Thoughts on Aggadic Aging, Morality, and Mortality**

January 5, 2017

Does Jewish tradition recognize an ethic independent of Halakhah? In his article by that title, Rav Aharon Lichtenstein zt”l argued that the question is semantic. If one defines Halakhah expansively as the totality of Jewish religious obligations, ethics are included; if one limits Halakhah to the realm of religious law, then some ethical obligations are external to the system.

רואים דברים למי שאמרם – This answer was a fitting formulation for R. Lichtenstein, who for me and countless others embodied Awe of Heaven (יראת שמי). But there are many ways in which it can fail to satisfy others. The most obvious is that it ignores (other than in Footnote 5) the question of whether ethics can ever legitimately **conflict** with religious law, and if yes, how a religious person should behave when legitimate sources of religious obligation conflict.

I want to raise a less obvious but perhaps more fundamental issue. To what extent, and in what contexts, is halakhah supposed to **function** as law rather than as ethics? Rav Lichtenstein’s approach distinguishes between formal law (דין) and informal ethics (לפניהם משות הדין), or alternatively between the letter and the spirit of the law. These distinctions may not do justice to the phenomenon of halakhah.

For example: Does law require a human enforcement mechanism external to the person bound by the law? In other words, must law make me accountable to other human beings to be “law? I think the conventional answer is yes. But Halakhah includes many crimes that, in its own terms, are punished by G-d and not by human beings. It includes other categories of wrongdoings which Chazal admit can never be conclusively observed by human beings because they depend on intent in cases where intent cannot be conclusively inferred from actions (לכך כתוב “יראת מלאך”). Are these law, or ethics?

A second, more immediately practical, question is whether halakhah is always supposed to **tell** people what to do, or rather – at least in some cases and contexts – to provide a framework which leaves room for subjective decisionmaking.

This second option may seem oxymoronic – in what sense is something halakhah if it leaves room for subjectivity? But the apparent contradiction stems from the same issue of accountability to others. What if halakhah sometimes has a right answer that absolutely binds you, but that only you can discover and know?

I want to explore that possibility through a fascinating Rabbinic reading of an element of this week’s parshah, when Yosef is told “behold your father is ill”.

Avraham, Chazal tell us, was bothered because people could not tell him and Yitzchak apart. He therefore asked G-d to introduce cosmetic aging. In some versions, Yitzchak asks for aging to involve suffering as well, so that sins can be atoned for. Yaakov then asks for illness to precede death, so that people will know to put their family affairs in order.

This paragraph is best read as the sustained development of a science fiction premise, along the lines of Alan Lightman’s treatment of time in Einstein’s Dreams. What would it be like to live in a world with no physical aging, or with purely cosmetic aging, but without immortality?

It seems to me that in such a world death would be experienced as totally arbitrary. The Master Timekeeper blanks your cardioplate without any notice, and you keel over and die. (In Harlan Ellison’s magnificent “Repent, Harlequin”, said the Ticktockman”, the Master Timekeeper does send advance notice. טען יי'ש.)

Yaakov feels that this condition deprives him of dignity. Mortality per se is undignified, but Yaakov feels that the indignity can be diminished by facing (or perhaps confronting) death. He is willing to sacrifice

his physical quality of life, and experience the physical indignities of old age, in order to face death squarely.

One might object to Yaakov: Shouldn't we face death every day, since it may come at any time? Didn't Rabbi Eliezer tell us to repent the day before our death, and when challenged, acknowledge that this meant we should repent every day?

I think the proper answer is that the mussar mentality also has its limits. Death-consciousness should be in the back of a healthy mind in an apparently healthy body, but not at its front. But there comes a stage – thanks to Yaakov – when it properly moves to the front.

Does this aggada have anything to teach us about modern halakhah?

Contemporary medical technology has created a world which is the opposite of Chazal's prePatriarchal imaginarium. Before Yaakov, we had death without mortal illness; now, we have mortal illness which can go on for years, with progressive mental and physical debilitation. The practical impact of this reality can be that Yaakov's gambit now gives the elderly the worst of both worlds; the indignity of physical (and mental) limitations without the compensation of confronting impending death in full consciousness.

One vision of geriatric halakhah assumes that the prolongation of life is always the supreme value. Observant Jews facing a progressive mortal illness should manage their care accordingly. While there is room at some point for refusing some kinds of care, perhaps rather than endure overwhelming pain, the choices are always made on an either/or basis, and decisions which prioritize anything above life are always concessions to weakness.

A very different vision, informed by our aggada, would relate to mortal illness as an intended Divine gift, requested and bestowed to diminish rather than escalate the indignity of dying. Patients would be empowered and encouraged to make decisions within that framework from the very outset of their illness.

Even suggesting such an approach is risky nowadays. Whereas Yaakov sought to **know** when death was imminent, the contemporary West has often instead sought the autonomy, and the consequent dignity, of **determining** the time of one's own death. This has generated the push to legalize physician-assisted suicide in many states, and euthanasia in several European countries. From a halakhic perspective I believe such laws are fundamentally licenses to murder, and I believe that the same argument can easily be made in a secular key.

Here is where it should make a difference to have halakhah, rather than unrooted ethics. Halakhic rules can prevent one from imagining – or at the least from acting on the imagination – that suicide is a defeat of mortality, rather than a rejection of the value of life. They can force the concession that one is not always entitled to dignity when that conflicts with acknowledgement of G-d's sovereignty.

At the same time, I am suggesting, halakhah might leave space for individuals to determine whether to adopt a course of treatment that will prolong life but diminish conscious life, or the mental acuity with which one lives, or one's capacity to live with some modicum of independence.

These must not be free-for-all, but rather real halakhic decisions with absolute right and wrong answers for each individual, and yet, decisions that should be left in the realm of *מַלְכִיּוֹת* rather than externally imposed. They must be made in the religious arena and not with halakhically unjustified deference to the regnant practices of the medical profession. What we need is a model of G-d-fearing that eagerly seeks intellectual and moral accountability to the tradition **and its past and present human interpreters** without surrendering responsibility.

In other words, I am suggesting that halakhah here should be a hybrid or new construction at the intersection of ethics and law, and furthermore, that perhaps there is space for such an approach in many other halakhic contexts.

## **Do True Lovers Have Free Will? A Philosophic Pilpul**

January 26, 2017

*In honor of the marriage of Tzipporah Machlah and Yehuda*

Principle #6 of the Thirteen Principles of Belief reads: “I believe with perfect belief that all the words of the prophets are true”. It is therefore astonishing that Meshek Chokhmah asserts in his Introduction to Sefer Shemot that such belief is impossible.

Here is his argument:

*The prophecy of Mosheh is above the prophecy of all the prophets, because the prophecy of the others is (certified) on the basis of signs and wonders, and anyone who believes in signs, has in his heart an imperfection = יש בלבו דופ', or else is certified via a prophet who is (already) presumed to be a prophet (on the basis of signs and wonders), such as Elisha via Eliyahu, just that the Torah said to believe a prophet who displays signs and wonders, just as it commands that we believe witnesses, even though it is not necessarily inevitable that they will always testify truth.*

*Chananiah ben Azor demonstrates this, as he was a true prophet but in the end became a false prophet,*

*as they say in (the chapter titled) “Those Who are Strangled”.*

*Not so Mosheh Rabbeinu, because all Israel heard the Holy Blessed One speaking to Mosheh face to face, and all of them reached the level of prophecy and saw how the Holy Blessed One spoke to him, therefore Shemot 19:9 says: “Behold I am coming to you in the thickness of cloud, so that the nation will hear when I speak with you, and they will believe also in you forever”,*

*because so long as they believed on account of the signs, as they did in Mitzrayim – it would have been easy to nullify (whatever Mosheh commanded) via another prophet who displayed signs and wonders; not so now – even if a thousand myriads of prophets came with signs and wonders to say in the name of Hashem that the point of a yud of Mosheh’s Torah should be altered, we will not heed him, and we have a mitzvah to execute him in accordance with the law of a false prophet,*

*since regarding the prophecy of Mosheh we ourselves are witnesses, and so Scripture says: and they will believe also in you forever”.*

Meshek Chokhmah contends that belief in prophets other than Mosheh is a legal rather than religious category, and reflects obligation rather than conviction. Belief in Mosheh is different because it originates in direct experience.

Meshek Chokhmah’s argument echoes Mishnah Avot 5:16’s reflection on interhuman relationships:

*All love that is contingent on something – when that something ceases, the love ceases; But (love) that is not contingent on anything – will not ever cease*

Belief in Mosheh is *emunah she’einah teluyah badavar* = noncontingent belief; belief on other prophets is *emunah heteluyah badavar* = contingent belief.

But even this does not convey the full radicalness of Meshek Chokhmah’s position. He actually offers two grounds for the contingency of belief in prophets. The first is that the evidence for their status is irrelevant. The second is that prophets are human beings with free will, and someone may be a true prophet one day and corrupt the next. Mosheh Rabbeinu is an exception to the first issue because his status is established differently; but how could G-d tell the Jews to believe in Mosheh **forever**? Shouldn’t they keep in mind that even he might be corrupted? As Meshek Chokhmah writes:

*If so, how could G-d command that they believe forever in Mosheh – does not Berakhot 33a teach that “All is in the hands of Heaven except the fear of Heaven”, and (therefore) that knowledge does not*

*compel choice? (Should they not be concerned) lest Mosheh afterward choose, G-d forbid, to add (to the Torah) out of his own mind? !*

He concludes:

*Against our will, (we must say) that Hashem the Blessed removed choice from Mosheh utterly, and he was left determined, as the angels are.*

Two subtly ironic touches show that he understands just how extreme this conclusion seems. The first is his statement that the position that Mosheh Rabbeinu did not have free will is reached *al karchin* = against our will. The second is his citation of the source for his argument:

*Investigate closely all the words of Rabbeinu (=RAMBAM) in the Laws of the Foundations of the Torah Chapters 7 and 8, because all his words are holy, and **they were said in the spirit of prophecy without a doubt.***

In other words, Meshek Chokhmah's argument for the possible falseness of all prophecy other than that of Mosheh Rabbeinu, derives from the words of Rabbeinu Mosheh (ben Maimon, RAMBAM), but the prophetic authenticity of RAMBAM cannot be doubted. Why not? Was Rambam also deprived of his free will?

Note also that in this reading Mosheh becomes the mirror image of Pharaoh.

But let us focus once again on the nexus of love and belief. Meshek Chokhmah suggests that Mosheh's becoming angelic led to his separation from his wife. In his formulation, the issue is a lack of physicality; Mosheh literally becomes an angel.

But it seems to me that a better argument can be made directly from the issue of free will. Genuine relationship requires that both parties maintain the relationship of their own choice, and a man without free will cannot be a real husband. Indeed, while Meshek Chokhmah tries hard to present Mosheh's apotheosis as a reward, G-d created humans precisely because angels cannot freely choose to love Him.

But here is the problem. We argued above that love and belief are parallel. Contingent love, like belief in non-Mosaic prophecy, is subject to change and decay. Love based on direct experience of the other, like the Jewish people's prophetic experience of Mosheh's prophecy, is eternal. How can this be so? Why doesn't it depend on the lover's choice to act in accordance with his or her experience?

One might suggest that true lovers are deprived of free will. But we just argued based on Mosheh that true love requires free will!

I'm not at all sure that we should try to resolve this contradiction. As Rabbi Akiva does with the apparent contradiction between Divine foreknowledge and human free will, sometimes you just have to embrace the paradox: "*Everything is foreseen, and yet autonomy is granted*". (Avot 3:15).

Instead, we should bless the newly married couple that their love, so deeply grounded in genuine experience of each other's souls, provide them with both the security that stems from a promise of eternity and the wonder generated by the constant experience of freely choosing to share one's life, and of having that choice freely reciprocated.

## **Drinking Eyes and Kissing Ewes**

November 24, 2017

*When Yaakov saw Rachel, daughter of Lavan, brother of his mother,  
and the flock of Lavan, brother of his mother,  
Yaakov approached  
He rolled/revealed/rejoiced the stone off the mouth of the well  
He kissed the flock of Lavan, brother of his mother  
Yaakov gave Rachel a drink . . .*

Nechamah Leibowitz z”l used to joke that every Yeshiva student knew ten explanations for how Yaakov could kiss Rachel, but not that an explicit verse in the Torah forbids lying. Now we can (tongue in cheek) suggest an eleventh explanation. Yaakov did not actually kiss Rachel; he merely gave her a drink, albeit after drinking in her appearance. What he kissed were Lavan’s sheep. The mistake arose because the Torah here uses verbs with identical letters – vav, yud, shin, qof – to mean “kiss” and “give drink to”.

But our confusion about Yaakov’s actions seems to mirror Yaakov’s own confusion in the text. Both Rachel and the flocks belong to “Lavan, brother of his mother”, and he notices them both before deciding which to water and which to kiss. Furthermore, is Rachel a name, or rather a common noun? If the latter, it means “ewe”, so Yaakov was kissing sheep either way?

Now we might say that Rachel must be human because she is the daughter of Lavan, who is human. But later in the parshah, Lavan removes from Yaakov’s flock all the speckled and brown sheep, so that Yaakov remains with the flock of leftovers that are Lavan, or white.

Lavan removes the speckled and brown sheep because he has agreed that Yaakov’s salary for shepherding will be all the speckled and brown lambs born that year. But his original offer to Yaakov in Hebrew is “NKBH your salary on me, and I will give it”. The standard commentators translate NKBH as “make clear” or “cut” (meaning give a fixed value to). The Zohar, however, notices that NKBH can also spell nekeivah, female. Lavan expects Yaakov to again ask for a woman as recompense for his work, just as he had worked seven or fourteen years for Rachel. He is taken aback when Yaakov asks for actual sheep.

Asking for sheep rather than women reflects a new maturity in Yaakov. The Torah explains clearly what causes this development: Yaakov thinks of leaving Lavan only after Yosef is born. The birth of Yosef enables Yaakov to recognize Rachel as a person, rather than as the best-looking of Lavan’s flock.

This new recognition makes him feel the need to have his own flock, and not depend on Lavan, in part because he realizes – perhaps for the first time – that he would like to grow old together with Rachel rather than replace her if she ages poorly.

Rachel was fully aware of Yaakov’s attitude. Perhaps she was present when Yaakov, after completing his first seven years of labor, came to Lavan and said: “Hubba my wife, and I will have sex with her” (29:21). His failure to mention Rachel by name may have given Lavan the idea of substituting Leah, and In Chazal’s understanding of the narrative, may have induced Rachel to cooperate with the switch. In any case, Rachel throws Yaakov’s words back in his teeth when she says “Hubba sons to me, and if not, I am dead/will die”. She is correct that only bearing his child will make her fully alive to Yaakov. But her words become bitterly ironic in retrospect when she dies in childbirth.

The late medieval commentator R. Isaac Arama, in his Aqeidat Yitzchak, points out that Yaakov never accepts a traditional salary from Lavan; he works either for Rachel or for his own flock. R. Arama suggests that Yaakov and Lavan were engaged in a complex social negotiation from the very beginning. Lavan’s seemingly generous offers (29:15 and 30:20) to let Yaakov set his own salary are actually attempts to subordinate him, to convert him from an honored guest into a contract laborer. By demanding first Lavan’s Rachel, and then a share of the flock, Yaakov constructs modes of compensation that he believes will generate rather than diminish social equality. The success of his last mode is captured by Lavan’s

sons declaration (31:1) that “it is from that which is our father’s that he has achieved all this *kavod/dignity*.” Yaakov’s possessions are for the first time not seen as part of Lavan’s family fortune. Having his own sheep gives him enormous dignity.

What about his first mode? A difference between people and sheep is that Rachel and Leah do not stop being Lavan’s daughters just because they marry Yaakov. Truth be told, it is not clear that Lavan’s sheep would ever fully cease being his if they were given to Yaakov as salary. Maybe Yaakov insists on his novel compensation regimen because it is only the next generation of lambs, who have known no previous owner, that can truly be his. By the same token, it is only the birth of Yosef to Rachel that makes him think of breaking free of Lavan.

Breaking free of Lavan is not easy. On the one hand, Yaakov makes an enormous step forward by speaking to Rachel and Leah together about his plans, and at least as importantly, they respond together. This might mean that Yaakov now sees Leah and Rachel each individually as full human partners. The problem with this theory is that he calls them (31:4) *toward the field, to his flock*. Yet that he calls them at all suggests a profound progression in the relationships.

When Yaakov speaks to them, moreover, he makes himself incredibly vulnerable by sharing with them his experience of G-d. Rachel and Leah might have responded mockingly. Perhaps worse, they might have responded separately and contradictorily, thus forcing him to choose between them. Instead, Rachel and Leah respond in the best way possible. They utterly sever their connection with Lavan, thus giving Yaakov the dignity of his own family. They affirm and support the normative implications of his religious experience. “*All the wealth which G-d saved from our father is ours and our sons. Now -everything which G-d said to you, do!*”

The result of this harmony is that Rachel and Yaakov now seem to be in tune. While Lavan is off shearing his flock, Rachel steals his terafim, and Yaakov steals his heart (31:19-20). Perhaps Rachel’s action is inspired by Yaakov’s newfound religious confidence in her. It is also possible that Rachel liked going to extremes.

But Yaakov and Rachel don’t really know each other. He does not realize that Rachel has stolen the *terafim*, and so he affirms that whoever has done so will die – perhaps his words contribute to her early death. Moreover, Yakov’s dialogue with Lavan is all about who the women belong to, not about what they want or whom they feel loyalty to. The profound respect he showed in his conversation with them seems to melt in the heat of disputational polemics.

In the end, fervor is no substitute for depth of understanding and sustained commitment.

# Who Owns the Torah? Elitism and Democracy in Torah Perspective

September 8, 2017

The Torah in numerous places appears to assume that halakhic knowledge and authority would be centralized in the tribe of Levi.

Nonetheless, throughout Jewish history Torah scholars have come from all tribes, and from converts. Was this part of the Divine plan? If yes, why does the Torah so often associate scholarship with Levi? If not, does making halakhic authority accessible to everyone replace the Torah's vision of an ideal social order with anarchy and chaos?

Rambam (Laws of Shmittah 13:12-13) seeks to resolve this tension by turning all scholars into honorary Levites.

*Why wasn't Levi granted a share in the inheritance of the Land of Israel and its spoils together with his brothers?*

*Because he was separated-out to serve Hashem,  
to attend Him and to teach His straight ways and righteous statutes to the masses  
as Scripture says:*

*"They will teach Your statutes to Jacob, and your Torah to Israel"*

*Therefore they were separated from the ways of the world –*

*they do not go out to battle like the rest of Israel*

*they do not inherit land and they are not granted property via the exertion of their bodies  
rather they are the troop of Hashem*

*as Scripture says:*

*"Hashem blesses his troops"*

*And He the Blessed grants them (what they need)  
as Scripture says:*

*"I am your share and land-inheritance".*

*But this is not true only of the tribe of Levi;  
rather,*

*each and every person from all those present in the world  
whose spirit volunteered him and whose intellect made him comprehend  
to become separated and stand before Hashem to attend and serve Him,  
and to know Hashem,*

*and walked straight as the Divine made him,*

*and removed from his neck the yoke of the many calculations which human beings have sought –*

*He is sanctified as holy of holies,*

*and Hashem will be his share and land-inheritance for eternity and beyond,  
and he will be granted in this world what is sufficient for him,  
as He granted to the kohanim and Levites,*

*as behold David said:*

*"Hashem is my share and portion; You direct me as I choose my lot"*

Turning Levi into a symbol or metaphor enables Rambam to maintain that the Torah intends there to be a social divide between the scholarly elite and the rest of the Jewish community. The elite give up all interest in money or power – G-d takes care of their minimal this-worldly needs – and as a result they can be trusted with Torah authority.

It is a pretty vision. Unfortunately, the politics of this world rarely turn out that way. G-d tends to provide for the this-worldly needs of scholars by way of non-scholars, who accordingly and properly have great influence over their Torah dependents. Scholars are not always satisfied with the bare minimum of physical comfort. Desire for power may be as prevalent among scholars as among businessmen. Scholars

compete for the best fellowships, jobs, and students, not always nicely or with proper regard for ultimate ends. In sum: Concentrating authority in scholars does not successfully insulate Torah against the evils endemic to other political systems.

We might seek to insulate scholars from the direct influence of the rich by creating a government-sponsored fellowship, a National Endowment for the Metahumanities. Socialist Torah, rather than capitalist. After all, the Torah does not say that G-d will provide for the Levites' this-worldly needs on an ad hoc basis; rather, it sets up a tax system to support them.

I think the best way to evaluate this theoretically attractive vision is to think about the Rabbanut in Israel.

An alternative vision emerges from a midrash cited by Rashi to Devarim 29:3.

*"And Hashem did not give you a heart to know until this day" –  
I have heard that on the very day that Moshe gave the scroll of the Torah to the Children of Levi  
as Scripture writes (31:9):  
"He gave it to the kohanim Children of Levi"  
all Israel came before Moshe and said to him:  
Moshe Rabbeinu,  
we too stood at Sinai and received the Torah, and it was given to us,  
so why are you giving the members of your tribe dominion over it? !  
They will say to us tomorrow:  
'It was not given to you; it was given to us'.  
Moshe rejoiced over the matter.  
It was about this that he said to them (27:9):  
"This day you have become a nation to Hashem your G-d" –  
this day I have understood that you are cleaving to and desirous of the Omnipresent.*

It seems from this midrash that Moshe Rabbeinu originally inclined to either the socialist or capitalist visions above, or perhaps to Rambam's imagined Republic. But when the other tribes – all Israel! – came to him and protested that they too wanted to study Torah, he rejoiced.

This midrash is likely related to the dialogue between Moshe and Yehoshua about Eldad and Meidad (Bamidbar 11:28-29), where Moshe, to Yehoshua's surprise and perhaps dismay, expresses comfort with the idea of a community in which everyone is a prophet, and therefore no one has more access to the Divine than anyone else. Moshe was comfortable in principle with both spiritual and halakhic democracy.

Comfort in principle does not imply endorsement in practice. Democracy, in both its pure and representative/republican varieties, has its own weaknesses. As Socrates loved to point out, democracy works well only when its constituents know the limits of their own knowledge, and prefer truth to power. In fact, only Eldad and Meidad were prophets, not the entire people of Hashem. By the same token, not all of us – even among those who live the life of Levi – are halakhically competent scholars.

Nonetheless, the democratic ideal properly has consequences. The chief of these are that scholars must be accountable to their constituents, must constantly seek to spread rather than hoard knowledge and authority, and must recognize the autonomy of individual men and women as a core religious value.

In the coming weeks I expect to publish several essays that have as their immediate practical aim the constriction of halakhic authority, and therefore might reasonably be seen as in tension with the last commitment above. So in the spirit of the first and second commitments, and of the month of Elul, I ask and invite you to look for them, read them carefully, and then hold me accountable.

## **In the Space Between Korach and Shamai: Dealing with Torah Arguments That Might or Might Not Be for the Sake of Heaven**

June 23, 2017

*Every faction that exists for the sake of Heaven – will ultimately endure;*

*Every faction that exists not for the sake of Heaven – will not ultimately endure.*

*Which are factions that exist for the sake of Heaven? These are the factions of Hillel and Shamai.*

*Which is a faction that exists not for the sake of Heaven? This is the faction of Korach and his edah.*

(Pirkei Avot 5:17)

Careless readers of this beautiful mishneh might conclude that each and every faction can be classified as either “for the sake of Heaven” or else “not for the sake of Heaven”. But nothing about the Mishneh denies a more complex reality in which factions are coalitions of people with different motives, and in which individual human beings often have mixed motives. Meshekh Chokhmah (quoted in [my Jewish Press column this week](#)) implies that even “Korach and all his *edah*” must be read narrowly to exclude the 250 elders who came with Korach, as their motives were pure. The Mishnah should be used as a *mussar* self-check rather than to dismiss opposing factions as ephemeral.

It should also be clear that there is no necessary relationship between purity of motives and quality of argument. The best of arguments will be appropriated by the greedy if it serves their interests; and the righteous are fully capable of gross analytic or interpretational error. A demonstration of sordid motives does not absolve us of the obligation to accept the truth from whoever speaks it, and to reject the false likewise.

But we must acknowledge that the halakhah does not always follow the best argument. Philosophy is properly a world of *emet vasheker*, truth and falsehood, in which arguments are evaluated without regard to who makes them. But practical halakhah is a normative system, which is to say it exists in the realm of *tov vara*, good and evil. In that world, it matters very much **who** has authority, and order is better than chaos. Therefore, at times one must follow a weaker argument made by a greater authority over a stronger argument made by a lesser or non-authority, and law has an inertial preference for continuity.

Halakhic decisionmaking must nevertheless not be allowed to depend **exclusively** or even **primarily** on who has authority rather than on the strength of arguments. G-d made halakhah depend on textual interpretation and rational argument in order to ensure that Jewish religious leaders would always be intellectually accountable to the people.

The mistaken idea that halakhah depends exclusively on personal authority leads to a politics of personal destruction, in which the only effective response to disagreement is to delegitimize the disagreeing person (or community).

The mistaken idea that halakhah depends exclusively on perceived analytic superiority leads to a politics of intellectual dishonesty. If truth is in and of itself a sufficient ground for practice, then we cannot risk allowing anyone to think even for a moment that the arguments for a position we disagree with are compelling.

Orthodoxy is currently plagued by an incoherent and malignant combination of these two mistakes. The consequences are that people who make bad arguments for positions we disagree with are attacked personally to deny them authority; and good arguments made by people without personal authority are ignored or disingenuously dismissed to ensure that no one follows them until they are given authority.

Each of these consequences is immoral, and also very poor policy.

Rabbi Zevulun Charlop shlita, Dean Emeritus of RIETS, likes to say that *mechadshim* (creative Torah scholars) should be evaluated like baseball batters: even the best only hit safely once every three tries, and

those with power are regarded as successful at much lower ratios. *Mechadshim* with power are more likely to be wrong, and their mistakes are likely to be doozies.

What happens to a Torah community that delegitimizes public intellectuals after their first error, and rejects all disruptively creative ideas out of hand? A Torah community needs to be able to tolerate and survive significant and even potentially dangerous errors, or else it will stifle the creativity that is essential to its intellectual and spiritual health.

Our panic when confronted by presumptive halakhic authorities who make bad arguments about important issues, or presumptive nonauthorities who make good arguments, reflects a deep lack of trust in our community. We suspect first of all that our nonscholars cannot distinguish weak from strong arguments, especially when they have a rooting interest in the outcome. Secondly, we suspect that many members of our community do not care about the strength of an argument, or about the consensus of scholars. Rather, they see the existence of any sort of argument as a *matir*, as giving them the right to do what they want.

These suspicions are not groundless. But we overreact to them when we seek to prevent non-poskim from having any input into halakhah, or seek to shoehorn all scholars into a conformist mold. A healthy halakhic wants to be accountable to its laity, and wants everyone to be as autonomous as is consistent with preserving the role of halakhah as law rather than as subjective religious expression.

These overreactions often generate a vicious cycle. The overbearing push for conformity leads to a celebration of even shallow ideoyncrasy. Telling nonscholars or lesser scholars that they have no say leads them to deny the legitimacy of authority. Each then side then uses the other's reactive misbehavior to justify its own escalation.

By the same token, error should not be without consequences, especially if the error is not acknowledged. On Gittin 43a Rabbah bar Rav Huna tells us that “A person does not find his footing in words of Torah unless he stumbles in them first” – in the context of correcting his previous mistaken ruling. Home run hitters usually strike out a lot because they take big swings, but not everyone who takes big swings is a home run hitter. Some people simply can't hit at all. Obviously, a past record of achievement makes it more likely that we'll keep you in the lineup when you're slumping.

I think we can admit that Orthodoxy faces enormous challenges. Not so much to our survival, as to our capacity to live integrated religious lives in modernity. We have not yet developed sufficiently compelling intellectual responses to Biblical criticism, or halakhic responses to the (wonderful) ethical challenge of participating as full citizens in a pluralistic society, or sociological responses to the existence of large numbers of Jews who see intermarriage as no bar to full communal membership, or moral responses to Jews who see no justification for heteronormativity.

These are just some of the many issues we confront where past ideas are insufficiently developed to guide us. We need intellectual incubators, not sterile industrial egg farms.

One can of course deny the value of living an integrated religious life anywhere outside the beit midrash. One can shrug off the reality that less than 10% of American Jews identify as Orthodox, let alone live halakhically observant lives, by blaming the audience and absolving the product, or by waiting for demography to change that reality.

But if we are not prepared to do any of these, it's time we learned to leave a greater margin for error.

## Some Kind of Blue? Tradition, Tekhelet, and the Rav

March 2, 2017

The color of an object can be defined by the wavelengths of light that it reflects, which means that objects really have no color at all. Identical reflected lightwaves can then hit human retinas and generate wholly different mental experiences. Wittgenstein thought that our capacity to communicate about color at all was miraculous. Regardless, there is no way to convey subtleties of color reliably through pure language.

For this reason, halakhic treatments of color are heavily based on practical tradition. Which colors create *niddah* and which don't is learned by show and tell, not by reading ArtScroll.

All this by way of introduction to the topic of tekhelet, the dye of uncertain color (sky-blue? sea-green? wine-dark like the Homeric ocean?) that was used in the High Priest's garments and that we have a mitzvah to place on our tzitzit. The fundamental halakhic difficulty with tekhelet is that it disappeared from history for a millennium. In "Two Types of Tradition" ([שערורים לזכר אבא מרן ז"ל כרך א](#)), the Rav made famous a family tradition about his great-grandfather the Beit Halevi's response to the Radziner Rebbe's attempt to recover tekhelet in the late nineteenth century.

דוע מה שaireע  
בין זקני הגאון רבי יוסף דוב הלווי ובין האדמו"ר הגאון מראדזין  
בנוגע לתכלת שבציצית,  
שהרבו מראדזין חידשה וציוו לכל חסידיו להטיל תכלת במציצותיהן.  
האדמו"ר ניסח להוכיח על יסוד הרבה ראיות  
כי הצבע הזה הוא באמת התכלת.  
רב יוסף דוב טען ניגד ואמר  
שאיין ראיות וסבירות יכולות להוכיח שום דבר  
במיל' דשייכי למסורת של' שאלה אביך ויגזר.  
שם אין הסבראה מכריעה כי אם המסורת עצמה:  
כך ראו אבותך וכך היו נהגים וכך צריכים לנוהג הבנים.  
*It is well known what happened*  
*between my ancestor the Gaon Rav Yosef Dov Halevi and the ADMOR Gaon from Radzin*  
*with regard to the tekhelet in tzitzit,*  
*that the Rebbe from Radzin renewed it and ordered all his chasidim to put tekhelet among their tzitzit.*  
*The ADMOR tried to demonstrate on the basis of many proofs*  
*that this dye is in truth the (halakhic) tekhelet.*

*Rav Yosef Dov countered that proofs and rational arguments cannot demonstrate anything with regard to matters that affiliate with the tradition of Ask your father and he will tell it to you.*

*In such matters, reason is not decisive, but rather the tradition itself:*

*This is what the fathers saw, and so they practiced, and so the children must practice.*

The Rav understood the Beit HaLevi to be sealing the issue of tekhelet off from the realm of argument and discussion. What is not clear is exactly what aspect of tekhelet is off-limits to reason and evidence.

I always thought the issue was color; how could we possibly know that we had matched the Torah's intent or Chazal's practice? The discovery of ancient tekhelet textiles would not help with that, as surely even a colorfast dye will change significantly over a thousand years. The fascinating disputes about how best to restore medieval paintings suffice to demonstrate this.

But rereading the Rav's essay this week, it seemed more likely that he had in mind the identity of the *chilazon*, the creature from which the dye is produced. But this made his claim much harder to accept – why shouldn't archaeological or chemical evidence be sufficient to identify ancient dye works, and then the *chilazon*?

The Rav makes the identity of the *chilazon* a quasi-*halakhah l'Mosheh miSinai*, and analogizes identifying the *chilazon* to identifying the *etrog* as the *pri eitz hadar* required by Vayikra 23:40. Let us accept the

analogy for the sake of argument. If the identity of the *etrog* were lost for a thousand years, there would be a reasonable basis for claiming that it could not be restored on the basis of arguments from texts, no matter how clever or clear. But if we found an ancient repository of palm, willow, and myrtle branches, and together with them the right quantity of one and only one species of fruit, would that not be sufficient grounds to reconnect us with the original tradition?

Proponents of contemporary *tekhelet* make this argument, with a [shiur by Rav Herschel Schachter](#) providing far and away the most coherent and compelling version I have heard or seen. But Rav Schachter adds a wrinkle. As part of the ongoing debate over his *tekhelet*, the Radziner published on p. 13 of the introduction to his *Ein HaTekhelet* [a letter that he described as being an authorized representation of the Beit Halevi's position](#). That letter seems to undermine the Soloveitchik family tradition.

הגאב"ך בריסק דליתא שיחיה  
 מסר כל טעמו ונימוקו בדבר מיאומו במצות התכלת  
 לאחד ממינדיינים  
 שיכתוב יאמר לנו משמו בהה הלשון:  
 כמו"ל לא בירא בדבריו מה מצא אחר שנשכח,  
 אם מציאת הדג או הוצאת צבעו,  
 ורק אחרי אשר כמו"ל יברר זאת, היינו האם היה בהזדמנות והוא מצאה,  
 אך נניה מחוייבים לשמעו אליו וללבשו.  
 אכן אם נאמר כי הדג היה במציאות,  
 וגם הוצאת צבעו היה ידוע בכל זמן מהזמן שפסקה התכלת בישראל,  
 ועל כל זה לא לבשו אבותינו ואבות אבותינו,  
 הרי הוא אכן יש לנו קבלה ומסורת מאבותינו  
 כי זה הדג וצבעו אינם החלוץ והתכלת  
 אף שהוא בכל הסימנים שסמננו חז"ל,  
 כי אפילו נרבה כחול ראיות, לא יעלו נגד הקבלה והמסורת.  
 ורק אחרי אשר יברר לנו כי דג זה או מלאכת צבעו נפסק ונשכח מציאתו או ידיעתו בשום זמן מהזמנים ונפסקה בהזדמנות בזאת הקבלה, אז  
 היה לנו דברי ההלכה לראה  
 ע"כ דבריו שיחיה.

The Gaon Av Beit Din of Brisk in Lithuania, may he live,  
 gave over all his reasons and rationales in the matter of his eschewing the mitzvah of *tekhelet*  
 to one of our intimates,  
 so that he would write and say to us in his name, as follows:  
*Your Honor did not explain in his words what it is that he found after it had been forgotten.*  
*whether it is the finding of the fish or of the way to extract its dye,*  
*and it is only after Your Honor explains this,*  
*namely whether there was something here that was lost and that he found,*  
*that we will be obligated to heed him and to wear it.*  
*However, if we say that this fish was in existence,*  
*and the extraction of its dye was known in all the times that have passed over us from the time that*  
*tekhelet ceased to be in Israel,*  
*and that despite all this it was not worn by our fathers and our fathers' fathers,*  
*that would be as if we had a received tradition from our ancestors*  
*that this fish and its dye are not the chilazon and the tekhelet*  
*even if it fits all the identifying characteristics given by Chazal,*  
*and even if we multiplied proofs like sand,*  
*they would not prevail against a received tradition*  
*Only after it became clear to us that this fish or the craft of making its dye had its existence or*  
*knowledge ceased and forgotten at some time and this interrupted the reception,*  
*then we would use the words of the halakhah as proofs.*

Rav Schachter reads this letter as saying that empirical evidence is perfectly sufficient in the absence of a positive tradition, but cannot overcome a negative tradition. In this case the negative tradition was that

no known creature and manufacturing process could yield tekhelet. Rav Schachter then cites Rav Elyashiv as finding the Radziner's letter a more plausible account of the Beit HaLevi's position than the Rav's report, and this seems clearly to be his own opinion, even though the Rav's report is confirmed by other branches of the Soloveitchik family.

Now the whole point of "Two Types of Tradition" is that students can challenge their teachers' intellectual traditions but must simply receive their practical traditions. Rav Schachter implicitly points out that this metatradition of the Rav is grounded in intellect, and therefore can be challenged and even rejected by his students.

I suggest that metatrads by their nature as abstractions are always grounded in intellect rather than pure reception, and therefore can never have unchallenged authority. A claim of authority on the basis of tradition is therefore never self-sufficient. It can succeed only if there is a shared prior metatradition about the authority of tradition, and that metatradition will be accountable to the ordinary intellectual processes of Torah.

Even without Beit HaLevi's authority, however, I find the argument that color requires a live tradition to be powerful. Furthermore, Beit HaLevi seems to have been quite right in doubting that the Radziner had properly identified the *chilazon* with the cuttlefish, and I remain unconvinced by the partisans of *murex trunculus* (with the caveat that Rav Schachter argues that neither precision of color nor of mollusk are necessary). The barriers to reconstructing lapsed traditions such as tekhelet should not be impassable, but they can and should be quite high.

## **Excerpts and Edits from The Mesorah Blogcast**

November 27, 2017  
JOFA Blogcast

Anything passed on from the past, even accidentally, can be termed a mesorah. But I prefer to use the term in a richer sense, as describing a passed-on coherent body of knowledge – intellectual or experiential – that enhances our understanding or behavior. The broader the sphere of understanding or behavior that is enhanced, the more valuable the mesorah.

Thus for example in the realm of religious norms – one can have a mesorah that a particular subspecies of grasshopper is kosher, or one can have a mesorah that political support for civil rights is a religious obligation, or a mesorah that when the only halakhic decision one can make with integrity will cause great human suffering, one should make sure to leave as much room as possible to be overruled by others who can make a different decision with equal integrity. I do not at all dismiss the first, but I find the second and third more compelling, and it is those sorts of mesorah that I have tried my best to acquire and transmit.

But these examples are still reductive – the deepest kind of mesorah is one that is more than the distillation of its parts, and cannot be boiled down into propositions. A Mesorah is the product of an ongoing dance between text and culture in which each recognizes the necessity of partnering, although they may compete as to who gets to lead. (The dance metaphor is admittedly risky because it's utterly beyond my experience, and because of its highly gendered history. Let us agree that whatever text can do, culture can do backwards and in heels; and also vice versa.)

Here – leaving aside any religious commitments – is why I have trouble with the notion that one can abandon enormous sections of a coherent culture and still claim to be carrying on its mesorah.

Judaism at its core is rooted in Torah, and Torah at its core requires – though it certainly cannot be reduced to – the proposition that the Jewish people are a political community bound by Jewish law. Take that away, and one is engaged in the equivalent of transmitting the mesorah of America without reference to the Constitution, government structure, and the like.

But this does not mean that there can be only one meaningfully masoretic culture.

I'm very grateful that my family and education have given me access to a wide variety of experiential, epistemological, and intellectual masorot within the framework of halakhah. A family simchah may have more substantive Jewish pluralism than most interdenominational get-togethers; Zionists and Neturei Karta, feminists and anti-feminists, Chabad and Satmar, Yeshivish and Yekkish, etc., all sharing religious experience. Orthodoxy has walls, and they both wall in and wall out; but it is certainly not homogeneous. This diversity means that even within Orthodoxy, every mesorah is partially constructed by individual choices.

This means that Torah is a *morashah* but not a *yerushah* – it is an inheritance that nonetheless has to be actively acquired. This model, as Rabbi Aviva Richman beautifully pointed out, requires finding a place within the tradition that gives you the hope of living a life that accords fully with your deepest values and aspirations. This hope is grounded in the faith that the tradition embodies what is good for the Jews to do. Where it gets hard is that one has to live in the here and now, where the hope has not yet been fulfilled, the faith not yet justified.

I understand why people often try to “eat their tradition and have it too”, i.e. to introduce radical departures while claiming that they are true heirs. But I have more sympathy with the project of reclaiming the “ghost” mesorot, as Rabbi Richman put it, of people whose thoughts and experiences have been excluded from the mainstream.

Perhaps a better metaphor, influenced by Tolkien's Silmarillion and my dear friend Rabbi Dr. Elisha Ancselovits' theory of halakhah, is that of reclaiming lost harmonies and counterpoints.

Tolkien's symphony is composed by G-d, and so the devil's best efforts to introduce discordance inevitably fail. This is not the case with humanly composed symphonies, or traditions. Years ago, at my first interdenominational event, two nonOrthodox rabbinic students learning in chavruta with me argued that since goddess-worship was so vociferously denounced by the prophet Yechezkel, it clearly represented a manifestation of "women's Judaism" that had been suppressed by the patriarchy. This strikes me as illegitimate cultural appropriation, or unassimilable discord.

Here is a model that strikes me very differently. Dr. Avivah Zornberg notes in the introduction to The Particulars of Rapture that according to Rashi, women participated neither in the Sin of the Golden Calf nor in the Sin of the Spies. Now the Book of Numbers is all about the experience of being denied access to the Land because one has sinned – but this is a purely male viewpoint. For the women, who did not sin, the experience was – perhaps – of choosing to stay in Exile rather than reaching the Land without those one loves. Yet we have almost no direct record of this experience. There is so much we can learn by exploring it, which will enhance all the rest of our Torah.

Certainly women should be at the forefront of that exploration. But the goal cannot be to create a wholly independent women's mesorah. Rather, this exploration must still be grounded in the text of the Torah G-d gave us, and in the context of the mesorah of its interpretation, or Torah sheb'al Peh. We are emphatically not standing again at Sinai.

Masoret and chiddush = tradition and creativity are mutually necessary, not mutually exclusive. T.S. Eliot argued compellingly that creativity only exists in the context of tradition, and a key purpose of a tradition is to enable human beings to navigate change intentionally. The alternative is randomness and meaninglessness.

This means that women must be given equal access to the mesorah as we have it. My commitment to women's equal opportunity in Torah study goes back to fifth grade, when my Modern Orthodox school started a Talmud enrichment program for three of the four best Mishnah students, i.e. the boys. I also had the advantage of growing up in a family that surrounded me with brilliant women, so that the idea that women were intellectually less capable never seemed plausible to me.

We have an enormous responsibility to ensure that the mesorah we think best survives, even "wins" minimally in the sense that all halakhic communities recognize it as a legitimate basis for practice. The motto of the Center for Modern Torah Leadership is "Taking Responsibility for Torah"! It's vital that we understand that halakhah is subject to politics like any other legal system, and so choices about which institutions to fund, where to educate our children, which religious professionals to hire, how we react to people taking positions, all have enormous effect on the development of halakhah. It's also vital that we understand that these effects often take a long time to manifest, and don't always manifest in the way we expected.

There are at least two reasons for this. The first is that circumstances change over time, and the effects of the ideas we invest in change accordingly. The second is that our investments are often embodied in people, and people change as they age or assume new positions in society. The career of Justice Souter is a useful for-instance.

The principle of acharei rabbim lehatot (treated in the third installment of my LOOKJED "Teaching Halakhah" podcast) has at most very limited application in contemporary Orthodox halakhah. There are no formal "votes" in halakhah outside of the Rabbanut Court System, and on the whole no formal bodies with halakhic authority that could even imagine holding such a vote outside of small local areas. Orthodox halakhic authority is pixelated among Chassidic groups, individual yeshivot, ideological camps, ethnic subgroups, geographic communities, and along many other axes.

A core contemporary challenge is preserving or developing a conception of authority that can hold in such circumstances, if one holds as I do that halakhah without authority is meaningless.

A core question regarding inclusion is inclusion within what? The case study I like to bring, grounded in Chaim Grade's terrifyingly instructive novel The Agunah, are people who wish to change halakhah so as to free women without considering whether those women will consider themselves free, or whether anyone they would wish to subsequently marry will consider them as free. This can be merely a political problem. But sometimes it is more than that. (Many) Orthodox women rabbis wish to serve communities that accept them and also have a deep sense of commandedness and of the halakhic system as Divinely ordained and binding upon all Jews. (Many) Orthodox people who understand themselves as exclusively homosexual want to build lives within communities that believe that G-d dictated every word of the Torah literally to Moses along with a comprehensive Oral Torah, and that Moses transmitted this Oral Torah to Joshua, and so on down to the Orthodox halakhic scholars of our day. They gain nothing if they are included at the price of undermining the authority that provides their life with meaning.

## **Music During the Omer? A Model Modern Orthodox Responsum**

April 21, 2017

Dear Rabbi Klapper,

*What are your thoughts listening to live music during the Omer? I know that different people do different things regarding this.*

Thanks!

Jack Smith

Dear Jack,

Thank you for your question! Every halakhic question is vitally important in and of itself, but your formulation properly raises a really “big” and broad issue: How should an individual Jew in America today (or Israel, but that deserves separate treatment) decide or discover what their *minhag* is on issues where multiple legitimate *minhagim* exist?

A good first step is to study about the existing options. For an excellent survey of halakhic positions regarding “mourning”, I encourage you to read the essay by Rabbi David Brofsky [here](#). A very different and valuable presentation is by Rabbi Eliezer Melamed [here](#). (It may be instructive to compare the breadth and depth of each to the presentations that come up first on Google.) I won’t try to duplicate their work here, and to some extent will rely on them. Rather, I will try to frame the discussion in a way that empowers you to make informed and meaningful choices, and look forward to further correspondence.

Mourning is the secondary halakhah of the omer period. The primary halakhah is the Biblical mitzvah of counting the omer. This mitzvah connects the barley and wheat harvests, the pilgrimage holidays of Pesach and Shavuot, and marks the period between the Exodus and the Revelation at Sinai. The counting seems intended to create throughout an atmosphere of excitement, celebration, and anticipation that is wholly incompatible with mourning. Even without the Beit Hamikdash, and therefore without the mitzvot of sacrifices and pilgrimages, it seems inappropriate to be mourning while on the way to Sinai.

The Omer period begins with Chol HaMoed and the last Yom Tov of Pesach, which override any mourning restrictions. The rest of Nisan is a period in which certain forms of public mourning, such as eulogies, are forbidden. If mourning begins on day 1, the first sixteen days are our “Vulcan” period, in which the restrictions of Pesach, Nisan and the Omer combine to forbid both happiness and sadness. It seems that we are required to be purely rational and emotionless, at least in public. But that doesn’t seem realistic or healthy, and one needs to think about how to handle situations in which, for example, insisting on the absence of music would constitute obvious mourning. Then Yom HaAtzmaut comes only five days later (or six; another issue deserving separate treatment)! At the other end, the 3 Days of Hagbalah immediately preceding Shavuot, which commemorate our preparation for Revelation, are also clearly a time of joy. The New Moons of Sivan and Iyyar also fall within the Omer period. So how can we mourn?

Yet there is no denying that just about every pre-20th century community observed an Omer mourning custom of 32 or 33 days, starting either from Omer day 1 (=16 Nissan) or else on 1 or 2 Iyyar. These customs are generally connected to the report that vast numbers of Rabbi Akiva’s students died during the first 32 or 33 days (as the result of interpersonal misbehavior, the Bar Kochba revolt, or both). The regnant explanation of the later starting dates (1 or 2 Iyyar) is that the mourning period was shifted in some parts of Ashkenaz in order to commemorate the Jewish victims of the Crusades, which reached Ashkenaz in Iyyar. But why move the dates, rather than just extending them? I wonder if it was an excuse to leave at least Nissan’s happiness unblemished.

The shifting of the dates yields a very odd halakhic result. A doubtful custom cannot overcome a certain prohibition (and there is room to question the power of a definite custom as well). Because there are divergent customs with regard to all dates except Iyyar 2-4 and 6-18, and the vast majority of American Jews do not belong to geographic communities bound by a particular custom, a good formal halakhic argument could be constructed to forbid mourning on many or all the other dates. Instead, the standard halakhah in practice has been that at least those who identify as generic Ashkenazim may adopt any of the preexisting customs as to dates, and even to change their custom from year to year without *hatarat nedarim*. One should ideally develop a consistent practice over time, and strive for consistency within any given year; but there is much space for accommodating the needs of friends who have different minhagim, e.g. friends' celebrations or roommates who listen to music. And speaking of music . . .

There are two basic frameworks for Omer mourning

- 1) Simchat m'reut – essentially, parties. In this framework there is no issue with live music per se, only with the atmosphere often generated by live music. So for example chamber music concerts in a concert hall, when you're not allowed to talk, would be fine (but receptions before and after would not be, even if there were no music). Conversely, a party with dancing to recorded music would be forbidden. Generally any combination of alcohol and music would be forbidden.
- 2) Specific customs – Obviously there can be no minhag going back more than a century about recorded music. Various practices have developed as to whether and how to extend a prior minhag about live music.

These options may reflect two radically divergent approaches to religious expression generally.

The first approach, which was championed (at least in this case) by Rav Yosef Dov Soloveitchik, contends that formal halakhah should set the pattern for all religious behavior. Ritual creativity is inherently suspect as a potential violation of *bal tosif* (adding to the Torah) or as an imposition of subjective desire onto objective obligation.

By contrast, Rav Ovadiah Yosef sees popular intuition as a valuable guide to balancing conflicting religious emotions and spiritual sensibilities. The omer period is legitimately a time of both mourning and celebration. I contend that this balance is and should be affected by the establishment of the State of Israel and the development of Yom HaAtzmaut, Yom Yerushalayim, Yom HaZikaron, and Yom HaShoah.

If your friends and religious peers do not have a clear practice regarding dates and/or music, and a broadly respected local halakhic authority hasn't taken a firm stand, and you haven't been clear about your approach in previous years, there's a great deal of room for personal choices, but one should have in mind "beli neder" if you want to be able to switch again next year.

I think you should aspire to adopt consistent frameworks for making those choices.

How do you balance the advantages and risks of giving halakhic force to popular spiritual intuition? Do you see halakhah as a stabilizing force, a kind of spiritual insurance, that enables risk-taking? As a potentially stultifying and homogenizing force that must be balanced by creativity? As the best or sole method of turning self-satisfying human actions into service of G-d?

What role does music, recorded or live play in your life and the life of the communities? Is it an essential and constant background that accompanies all emotions, or limited to celebratory contexts? Does its periodic conscious absence enable you to focus on religious ideas and contexts that you might otherwise give short shrift to? Does it make you more susceptible to dwelling unconstructively on negative emotions? Bear in mind that a powerful halakhic argument can be made that music should always be forbidden while we have no Beit haMikdash, but is nonetheless permitted as a concession to our emotional and religious psychology.

How do you balance the “background” religious emotions generated by the ongoing state of the world and condition of the Jewish people? Should that balance be different in Israel and the United States?

While you grapple with these questions, I suggest that the default American Modern Orthodox framework is that one should not listen to live music in any context from after Pesach through day 32 (other mourning practices may continue through day 33 for those who identify as Sefardim), excluding Yom Ha’atzmaut, but that listening to recorded music is generally permitted.

Bivrakhah,

Aryeh Klapper

## **Are Jews Permitted to Enter a Church for a Secular Ceremony?**

January 2017  
Jewish Values Online

*You have been requested to be the Response panelist for the following question:*

*I am the Jewish Chaplain in a University in the U.K. Our graduation ceremony is held annually in our nearby city cathedral. The building is over 1000 years old and the experience is awe inspiring. One of my students is strictly orthodox and is concerned that he is not permitted to enter therein. He is also concerned that in entering the cathedral he will be walking through the attached cemetery where some of the graves are marked with a cross. He is not a Cohen so the cemetery prohibition does not apply. I would like to assure him that attendance by him and his parents will be permissible.*

Orthodox answer by Rabbi Aryeh Klapper:

Dear Chaplain,

Thank you for bringing this question to me through JVO. As the former Orthodox Jewish chaplain at Harvard University, and the current dean of an institution which attracts many elite university students, I have deep appreciation for the office you hold.

I suspect that I cannot give you the assurance you prefer, for reasons I will set forth briefly. I hope that you'll read what follows nonetheless. At the end I have some broader comments on the university chaplaincy.

The formal halakhic issue generally raised in this context is that of benefiting from a space dedicated to "avodah zarah". Avodah Zarah is often mistranslated "idol worship", but really refers to both worship of a false god or gods and egregiously improper worship of the true G-d.

Jewish scholars have debated for a millennium whether Christianity falls into this category. Leaving aside the technical legal discussion (you can read my opinion [here](#)), there is today on the one hand a recognition and acknowledgement of the good that Christianity does in the world and for Jews, including Catholic opposition to anti-Semitism and Evangelical support for Israel, and on the other hand an awareness of a long history of deadly violence, religious war, and persecution, and of Jews who martyred themselves rather than accept Christianity (which is only necessary halakhically if Christianity is classified as avodah zarah).

Contemporary Orthodox Halakhists respond to this tension in various ways. They distinguish between the religion and the religionist, and/or between "technical" and "substantive" avodah zarah. Some hold that Christianity is avodah zarah for Jews but not for Gentiles. Some hold that Trinitarian **beliefs** are not avodah zarah, but that specific **practices** such as the Eucharist (if one believes in transubstantiation or an equivalent) or kneeling before crucifixes are avodah zarah. Regardless, to the best of my understanding, the prohibition against entering sanctuaries actively used for and dedicated to Catholic or Anglican worship remains in force. It is redoubled rather than mitigated when associated with powerful ritual such as university commencements.

A pluralistic ethos has led some universities to rededicate their initially Christian sacred spaces as generic religious spaces into which religiously particularist symbols and accoutrements are inserted as necessary. If Muslim and Jewish and Sikh et al worship are now genuinely at home in the space in the same way as Christian worship, rather than (even the most honored of) guests, in my opinion the prohibition no longer applies. Possibly the same is true of some UK public cathedrals.

I should note that in my opinion none of this applies to walking through Christian cemeteries.

There remain two questions. First, all halakhic prohibitions exist within a matrix of values, and one might argue that other values supervene here. Second, what is the proper role of a university chaplain when a student expresses this sort of sensibility?

On the first:

There are circumstances under which I agree that Jews, especially public Jewish figures, may or must enter such spaces for the communal good. However, your formulation of the question argues only that it would provide the student himself with an edifying experience.

It would be foolish and dishonest to deny that Christian ritual itself can be powerful and uplifting and a genuine experience of transcendence. Nonetheless, Halakhah forbids Jews to seek out this experience. Let us grant the objective truth of your report of the positive power of the experience. Religious exclusivity has its costs, as does all exclusivity. We pay them willingly.

Moreover, I hold that a self-confident and historically aware Jewish community should strongly resist efforts to make Christian spaces the mandatory locus of universal rites of passage, even when there may be technical workarounds. The Harvard baccalaureate takes place in Memorial Chapel. I am proud of Deborah Klapper for choosing (before she met me) not to attend that portion of her Harvard graduation, and of the Harvard Divinity School valedictorian who did the same *davka* to make that point. And of the many others who did the same.

On the second:

A university chaplain should always be pushing students to develop their autonomous religiosity, especially when dealing with students who do not belong to one's specific sect or denomination or confession. One can share one's own core beliefs and experience, when the student has actively requested such sharing. Within specific terms of engagement, one can even seek to persuade.

With respect, however, and recognizing that my experience and attitudes may be parochially American, I don't see it as the proper role of a chaplain to reassure an Orthodox student, who expressed an authentic religious discomfort, that something is halakhically permitted. Rather, I think you should encourage the student to do their own halakhic research; to develop relationships with Orthodox halakhists; and if they have discomfort with the results, to explore what that means for their religious identity. Under some circumstances, it might be your responsibility to represent the student's discomfort to the university and advocate for the ceremony's location to be changed. I am not comfortable with your trying to mediate or shield students from aspects of their tradition that you feel would deny them a worthwhile experience, any more than it would have been proper for me to reassure a Reform student that his or her denomination really opposes intermarriage, on the basis of finding some rabbis who held that way.

I acknowledge that this issue can generate serious intrafamily tension. Parents often have a deeper desire to see their child's diploma ceremony than the child has to participate, and these sorts of prohibitions are observed more broadly and punctiliously in Orthodoxy today than in much of the 20<sup>th</sup> century. Helping students navigate the balance between honoring parents and their religious intuitions is a valid and vital pastoral role, and exactly what serious halakhic life and study should be about. (Deborah adds that the chaplain's loyalty must always be to the student, and not to the parents.) The essay above incorporates my own experience playing that role with regard to this very question. You are welcome to contact me directly to continue the dialogue.

With all best wishes for your success,  
Aryeh Klapper

## **The Elor Azaria Case: A Halakhic Framework**

January 13, 2017

Last spring, IDF soldier Elor Azaria deliberately shot and killed a wounded man lying on the ground. Several minutes before, that man had deliberately knifed one of Elor's comrades.

Last week, a military tribunal found Azaria guilty of “*harigah*”. Generals and philosophers and rabbis weighed in to support or denounce the verdict, while accusing each other of ignoring or distorting Torah and ethics. Some voices supported the verdict but called for either a pardon or for very lenient sentencing.

The verdict depended on both a determination of fact – that Azaria had no reasonable basis to believe that the man posed a threat – and a determination of law.

Given the determination of fact, was the determination of law compatible with the letter and spirit of Halakhah?

One halakhic framework many opiners cited is Maimonides' ruling (Laws of Murder and Life-Preservation 1:13) that one must use the minimum force necessary to stop a *rodef* (person attempting to kill another). One who kills a *rodef* unnecessarily is called a *shofekh damim* (bloodshedder), but is not executed by Torah courts.

Why is he not executed? Maimonides distinguishes between *retzichah* (murder), which is automatically punished by execution, and *shefiklut damim* (bloodshedding), which is not. As in many legal systems, a variety of mitigating factors can lower a crime from first to second degree homicide, or from murder to manslaughter.

The Israeli military system apparently makes a similar distinction between “*retzichah*” and “*harigah*”, with *harigah* parallel to *shefiklut damim*. (The analogy some have made to the halakhic category *retzichah beshogeg* (accidental homicide), which is punished by internal exile, is incorrect.)

While halakhah does not **mandate** executing a *shofekh damim*, Maimonides makes clear that the state has the authority to punish the sinner in accordance with social need and communal ethics.

Therefore, if *rodef* is the proper framework, Halakhah leaves Azaria's punishment to the judgement of the secular authorities. It is within the letter and spirit of halakhah to argue for leniency or stringency on moral or policy grounds.

However, *rodef* is not the proper framework, for several reasons.

1) Maimonides discusses situations where the *rodef* is still dangerous; he never considers permitting the extrajudicial killing of an incapacitated *rodef*. If a terrorist no longer poses a threat, only formally constituted authorities may execute him. (The related halakhic framework of *ba bamachteret* (furtive trespass) yields the same result.)

2) *Rodef* does not apply in the context of war. Soldiers engaged in battle have no halakhic obligation to wound rather than kill enemies, even when wounding would accomplish the same military objective. (I discuss captured or surrendering soldiers below.)

With *rodef* eliminated, what is the proper framework? Should the man Elor Azaria killed be treated as a civilian who attempted murder, or rather as a soldier in an enemy army?

Professor Asa Kasher,<sup>1</sup> an author of the IDF code of ethics, contends that terrorists must be treated as civilian criminals. I suggest that from a halakhic perspective, the issue may depend on the status of non-Jews living under Jewish rule in the Land of Israel today.

Popular halakhah often uses the term *gerei toshav* (resident aliens) to refer to non-Jews who observe the Seven Noachide Commandments, including the prohibition against bloodshedding. However, this halakhic category formally applies only when the Jubilee is in force, and only in territory under Jewish rule. The Jubilee is not in force today, and throughout the Diaspora Jews live and have lived under non-Jewish sovereignty. Clearly the non-Jews of those societies are not formal *gerei toshav*. There must be a category that covers at least non-Jews living under their own sovereignty outside the Land of Israel.

My tradition from my teachers is to distinguish between de jure and de facto *gerei toshav*. De jure *gerei toshav* undergo a formal naturalization process which includes acceptance of Jewish rule and of the binding force of the Seven Noachide Commandments, including the prohibition against bloodshedding. De facto *gerei toshav* simply live in accordance with the Seven Noachide Commandments. The conditions of the Jubilee et al apply only to de jure *gerei toshav*, whereas our obligations of sustaining (including the law of pursuit) apply to both categories of *gerei toshav*.

Three relevant questions remain open:

1. What is the status of a de facto *ger toshav* who lives in an area under legitimate Jewish rule but actively resists that rule?
2. Can the status of de facto *ger toshav* result from membership in a community or group, or must it be acquired individually on the basis of behavior?
3. If a de facto *ger toshav* deliberately violates one of the Seven Noachide Commandments, is he or she now considered a sinning *ger toshav*, or rather an ex-*ger toshav*?

I suggest that along these three axes it is possible to distinguish between citizens of Israel and non-citizens living in the Territories. Perhaps Israeli citizenship automatically grants a person the status of de facto *ger toshav*, and so long as the person retains citizenship, regardless of their crimes, they remain *gerei toshav*. However, residents of the territories living under military administration have no such collective grant. Their status depends on their individual actions, and so an attempted murderer from the territories loses the status of *ger toshav*. Furthermore, perhaps attempted murderers with political motivations, having lost the status of *ger toshav*, may be treated halakhically as enemy combatants. (But there really is very little halakhic discussion of irregular warfare.)

Terrorists who are not Israeli citizens are therefore not *gerei toshav*, and likely should be regarded as enemy combatants. (We must still consider whether soldiers should presume that terrorists are citizens.) Elor Azaria's case should accordingly be treated as equivalent to shooting an incapacitated prisoner of war.

The halakhah regarding prisoners of war is undeveloped. But there is universal agreement that the IDF can hold its soldiers accountable to its own code of conduct in this regard. The IDF has the right to punish Elor Azaria as it sees fit for violating its halakhically legitimate ethical norms.

I celebrate the continued vitality of those norms, and support their robust enforcement.

Some of those who demonstrated against the Azaria verdict did so with reprehensible motivations, such as racism, or actions, such as threats of violence. There is no room for threats against a legitimate system of justice. The defendant seems to show no remorse. There is grave danger of a slippery slope, and of emboldening dangerous elements of Israeli society. For all these reasons, I oppose showing Azaria extraordinary leniency.

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<sup>1</sup> see [here](#) for a Torah in Motion panel on military ethics featuring Dr. Kasher and myself

But I do not think it is fair to tar all those who call for leniency as denying obvious principles of halakhah or Jewish ethics. There is no developed body of halakhah dealing with the ethics of ethically asymmetrical warfare. Having never been a soldier, I prefer not to make absolute judgments about what it is fair to expect of human beings in the fog of battle, although in this case my instincts are with the prosecution.

It is rarely good for justice when individual cases become symbols. For example, symbolic defendants often cannot be acquitted when there is strong evidence of guilt, even if reasonable doubt remains. Such cases are a good time for scholars to heed the Rabbinic injunction “Sages, be cautious with your words”, lest you mislead your students and they suffer the consequences. I hope my words here meet that standard.

## **What Our Negotiators Can Learn from Yitzchak**

November 14, 2017

Jewish Press

Once upon a time, Jews and Palestinians made a lasting peace treaty.

The bad relations between Yitzchak the Jew and Avimelekh the Plishti begins with Plishti generosity and a Jewish lie. Yitzchak leaves a famine-stricken Negev to settle in Avimelekh's city Gerar. He is a refugee from food insecurity, but economically self-sufficient, and is given a green card immediately. However, Gerarian immigration officers watch him carefully, and soon discover that his application falsely described his wife Rivkah as his sister.

Avimelekh confronts him, and Yitzchak provides no explanation or apology. Yet rather than expelling Yitzchak, Avimelekh grants him royal protection. But when Yitzchak prospers exceptionally, Avimelekh orders him to depart. When Yitzchak tries to remain in the general vicinity, Plishtim begin filling his wells or denying him access to water, and Plishti shepherds fight with Yitzchak's shepherds. Finally, Yitzchak moves to Rechovot, and then back to Beersheva.

By this point there is plenty of room for bitterness and suspicion on both sides. When a Plishti delegation arrives in Bereshit 26:26, Yitzchak greets them – apparently before they have a chance to say anything – by saying “Why have you come to me! You have hated me, and you sent me away from you!” Yet 26:31 records that Yitzchak sent the delegation away after mutual oaths, “and they went from him in peace”. What enables the movement from recrimination to covenant and peace?

My mother Dr. Molly Klapper z”l edited a collection titled ‘*Definitive Creative Impasse-Breaking Techniques in Mediation*.’ The chapter she wrote in that collection offers several negotiation insights that seem directly relevant. To take an obvious example, section 1:33 is headed “Bring Along Snacks”, with the comment that food is especially useful when parties in a negotiation are tiring. And indeed, in 26:30 Yitzchak throws a mishteh at night, and the next morning the negotiations are concluded smoothly.

Perhaps more profoundly, (section 1. 5) mediators understand that the venting of strong emotions is often a positive sign – it (section 1:10) “puts all the issues on the table” and therefore enables holistic negotiations that genuinely address both parties’ feelings as well as their interests. Otherwise, negotiations often hit impasses that seem like unjustified nitpicking or stubbornness. Thus both Yitzchak’s initial outburst, and the Plishtim’s pointed rejoinder that Yitzchak owes them gratitude for not taking advantage of his earlier vulnerability, were necessary precursors to peace rather than obstacles.

It is also important (section 1:9) to address whether the negotiation is about a one-time deal, or rather about a specific episode in a longstanding relationship which one or both parties have an interest in continuing. Here, the traditional commentators note *inter alia* that Yitzchak went to Avimelekh because their fathers had established a covenant, and it was in Yitzchak’s interest to maintain the family option of going to Gerar during famines. (Indeed, there should be no surprise that no Plishti touched Rivkah even when Yitzchak said she was his sister; they knew all about Abrahamites and sisters).

We should also briefly note the power of Avimelekh’s bald acknowledgement that he has come not to apologize but rather “because Hashem is with you”. Midrashim comment that the Plishtim were initially jealous when Yitzchak outprospered them, but after his departure, they realized that his presence had caused them to prosper as well. R. Yosef Ibn Caspi unsentimentally summarizes the Plishtim’s motives: “the masses only come to a man when they have need of him . . . Here we have learned an important matter about the nature of the world, namely that the successful man is the one who is honored and valued and loved by many, whereas the reverse is true in times of trouble, and therefore Avimelekh’s response to Yitzchak was compelling”. This kind of hardheadedness is useful when it generates realism

rather than cynicism; there were no illusions or pretenses on either side. Avimelekh and Yitzchak were each capable of “distinguishing between positions and interests” (section 1:26).

These are all negotiating pointers – but do Avimelekh and Yitzchak realize all these on their own, without mediation? There is a longstanding question as to why Avimelekh’s delegation includes “Achuzat Mreieihu”. Some see Achuzat as a name, and suggest he was a counselor; others suggest that Avimelekh traveled with a posse, and achuzat means “group”. But Meshekh Chokhmah suggests that Avimelekh brought along a group of people who had been Yitzchak’s friends in Grar, and perhaps opposed his being sent away. This, of course, would have blunted the force of “You have hated me”, and perhaps it was that group which served the mediating function.

It is unwise to see contemporary events as exact replays of Biblical history. But it is valuable to recognize that Torah and Mesorah offer narratives of hope as well as gloom about Jewish national relationships; it is not all about Esav hating Yaakov. May we develop the capacity and merit to find realistic and therefore lasting paths to peace with all our fellows.

## **Lot as an Orthodox Mirror**

November 1, 2017  
Jewish Press

Derashot HaRan #11 cites an unnamed sage as saying “There is honor even among thieves”, or more precisely, “even a band of thieves agrees to use integrity as the standard for in-group relationships”. For that purpose, they are best off choosing an honest person as their arbiter. But should an honest person agree to be the judge for a band of thieves? Or is it better to let them tear themselves apart?

This question is intensified when the “thieves” are not outlaws, but rather members of civil society in good standing. What are the responsibilities of a good person in a corrupt society?

One possibility is revolution. But the costs of revolution are always high; success is rare; and not everyone finds the rebel stance psychologically congenial.

A second possibility is withdrawal. But if all good people withdraw, does this not assure the triumph of evil?

In any case, total withdrawal is rarely practical – society comes to collect its taxes and tolls regardless, and not everyone has the multiple talents necessary to be wholly self-sufficient with regard to food, clothing and shelter, let alone sanity.

So religion must face the question of how its followers should behave while members of a corrupt society. How should they relate to the norms of that society, especially when those norms are embodied in law? Perhaps most challengingly, how should they react when they are offered the opportunity to exercise power within that society?

Chazal read the story of Lot in Sodom as a case study. Lot *lived* in Sodom, *belonged* to the society of Sodom, and yet did *not* share the values of that society.

What were those values? Sodom was a hyper-legalistic rights-based society. Someone has “the character of Sodom” when they say “Mine is mine and yours is yours” (Avot 5:10). Ownership in Sodom meant refusing to let others benefit from your property, even when that would cost you nothing; but also refusing to benefit from anyone else’s property.

Sodom required all visitors to sleep on a Procrustean bed – those too long for it were shortened, while those too short for it were stretched (Sanhedrin 109b). But Eliezer, Avraham’s servant, asserts that he swore an oath after his mother’s death to never sleep in a bed again – and he escapes unscathed, as Sodom would never force anyone to break an oath.

Indeed, the Procrustean bed is itself a very useful metaphor for law, when law is interpreted and applied mechanically rather than humanistically. Why did Chazal understand Sodom this way? A close reading of Bereishis 19:9 was a partial impetus.

*They said (to Lot): Approach away!  
They said (to Lot): The one came to dwell vayishpot shafot (=and he judged judgment) –  
now, we will do worse to you than (to) them!  
They pleaded with the man – with Lot – greatly  
They approached to break the door*

A striking feature of this narrative is that the mob *negotiates* with Lot rather than simply taking what they want. They even plead with Lot before resolving to use force. Mobs can be cowed by resolute individuals, but their words suggest that they expect him to be on their side, and cannot understand why he is opposing them.

Chazal therefore read *vayishpot shafot* as an accusation that Lot, an outsider chosen *shofet* (=judge) on the assumption that he was completely assimilated, is violating the terms of his selection. Lot is putting the law of Sodom itself in the dock; he is presuming to judge the law rather than according to the law.

Now Chazal were well aware that halakhic society was (at least potentially) hyperlegalistic. Sodom was therefore a way to think about the vulnerability of their own society to decay, and about the responsibility of the good halakhic authority in a society that values sacrifice more than obedience, and privileges legal punctiliousness above kindness. Their portrayal of Sodom as a culture whose corruption was rooted in attachment to the forms of law comes across as self-parody. I am always heartened by their capacity to laugh pointedly at themselves.

Chazal may never have reached a clear answer to the question of when exactly a society becomes so corrupt that it is better to let it collapse than to participate in any way. They knew that their own society was subject to corruption; they felt obligated and compelled to work internally for its improvement; and yet they recognized that matters could reach a point at which they would be enforcing the laws of Sodom.

I suspect that it is the failure to recognize that possibility which makes it most likely to occur in practice. Orthodoxy in America today has good reason to reflect on Lot.

## **Day School Tuition and the Pierced Slave**

August 15, 2017  
Jewish Press

Imagine a society that guarantees to all its members sufficient housing, clothing, food, medical care etc. to ensure that they will never involuntarily suffer hunger or pain owing to a shortage of personal resources. However, accepting those goods from a public agency requires an explicit acknowledgement that one has failed to provide for oneself. Furthermore, the society is constructed in such a way that most family units have no hope of earning enough to be self-sufficient.

From a Torah perspective, is this society a great success, or a terrible failure? Does this society perfectly fulfill the mitzvah of tzedakah, or hopelessly distort it?

The argument in favor assumes that the mitzvah's intent is to eliminate physical want and mental uncertainty. The argument against assumes that tzedakah is a bediavad solution. The Torah's primary social concern is human dignity. This is best accomplished through self-sufficiency. When that fails, providing tzedakah is better than the alternative indignities. But an ethical society's fundamental economic goal must be to maximize self-sufficiency. Which approach better represents Torah?

A careful reading of Devarim Chapter 15 may help answer this question.

Verse 4 states:

*Absolutely! There will be no impoverished among you.*

However, verse 7 explains what one's obligations are:

*when an impoverished person is among you,*

and verse 11 states unreservedly:

*for the impoverished will not cease from the midst of the land.*

So which is it – will the poor absolutely not be among us, or never

cease from our midst?

Looking at the contradictory verses in their respective contexts provides an illuminating answer. The guarantee that poverty will cease is preceded by the law of shmittat kesafim, which (at least *prima facie*) requires the forgiveness of all outstanding loans every seven years.

The Torah emphasizes that this law applies only within the community,

but that one is entitled or even required to demand repayment from nokrim, strangers. This is because the Torah wants this law to function as a form of self-interested business policy rather than as charity. The distinction between insider and outsider is essential for such economic levelling devices to be morally effective – as the communitarians teach, there can be no insiders unless there are outsiders. When we see our fellows as fellow-insiders, we can regard forgiving a loan as a write-off in a long-term partnership rather than as charity.

The poor can disappear from the land only when we don't see providing for each other as charity. The conflicting guarantee in verse 11, that poverty will continue eternally, is followed by the rules of intra-Jewish slavery.

Crucial details include:

- a) He will slave for you six years, but in the seventh year, you must send him free away from you
- b) When you send him free away from you, you must not send him away empty; you must certainly give him severance . . .
- c) You must remember that you were a slave in Egypt, and Hashem your G-d redeemed you; therefore I am commanding you this thing today.
- d) When it happens that he says to you “I will not go out from you” – because he loves you and your household, because it is good for him with you.
- e) You must take the awl and place it in his ear and in the door, and he will become to you an eternal slave. You shall do the same to your maidservant.

The pierced slave chooses economic security over autonomy, and therefore, even though his rights are guaranteed by law, he becomes a permanent charity recipient. If he were truly a member of the household he loves, he could become free and still remain.

Jews must remember that they were slaves in Egypt, and G-d intervened to redeem us. He then led us through a desert existence that often made us think fondly about the economic security of Egypt, despite all the indignities of slavery. That was the point; we were not freed from Egypt so that we would be better taken care of.

Rather, the Torah demands that we assume the responsibilities of freedom. Among these is the responsibility to ensure that our fellows are not enslaved by circumstances, and trapped either in want or dependence. Our goal must be to eliminate charity and maximize dignity.

A society that structures its economic institutions so as to make us all genuine partners, so that no one who contributes to his or her full capacity feels either owed or owing, fulfills the mitzvah of tzedakah. A society that institutionalizes dependence, no matter how reliably it provides for its dependents, has turned them into pierced slaves. (Kal vachomer if it does not even provide for them reliably.)

This lesson deserves a central place in deliberations about the future economic structure of American Orthodoxy.

## **Noach: A High School Seminar Transcript**

October 19, 2017

*(Note: A seminar is a class discussion with rigorous and formal canons of discussion, often including a requirement that opinions be backed by specific textual evidence. In today's class, every student is required to make at least one substantive contribution to receive a passing grade.)*

Teacher: Today's seminar will begin from a very brief opening thesis/dvar Torah by Gittel.

Gittel: *Hashem wanted people to be good, but they were bad and getting worse. Hashem warned them that bad things would happen, but they didn't listen. Finally He destroyed the world in a flood, leaving only Noach and his family alive.*

*We should learn from this that we really need to be good, and that we should believe people when they say that Hashem will destroy the world if we're not good.*

Rivky: But didn't Hashem promise that He would never bring another Flood? I think the lesson is that if people tell us that Hashem will destroy the world if we're not good, we **shouldn't** listen to them: Hashem did that once and he won't do it again.

Elimelekh: Just because He promised not to bring a flood, doesn't mean he isn't going to destroy the world some other way. "G-d gave Noah the rainbow sign/no more water, it's the fire next time." And in fact, when Sodom gets as evil as the Flood generation, Hashem rains fire on them.

Yaakov: That's cheating! What's the point of His promise then?

Rivky: Anyway, people are always telling us that the world's going to end soon. We can't believe all of them, so how do we choose? I think we shouldn't believe any of them.

Gittel: We should listen to prophets.

Rivky: But there are no prophets nowadays! I know that Chazal said that "Prophecy was taken from the wise and given to the insane and children" – is that whom you want us to listen to?

Yaakov: We have people with ruach hakodesh; we should listen to them.

Elimelekh: People with ruach hakodesh can still make really bad mistakes, and anyway we really don't know who has it or what it means.

Shlomo: Maybe it means that we should listen to scientists. I think a lot of them are telling us that the world will become uninhabitable if we don't stop global warming.

Yaakov: But stopping global warming isn't about morality and avodas Hashem! It's about reducing our carbon footprint.

Rivky: And anyway, He promised.

Shlomo: Maybe there's a connection. Maybe a society would only go on doing things that could kill our whole species if it had completely lost control of its appetites, and so it must be a really evil society.

Yael: But we're not really one society in the world, so how could Hashem judge us all together?

Elimelekh: Why should we believe that what scientists tell us is true? Doesn't science keep changing?

Rivky: I think that's cheating. We assume that science is true in every other class in this school.

Yaakov: So let's stop doing that in the other classes too.

Elimelekh: Are we really living in a society that might be so evil that G-d would destroy us, at least if He hadn't promised not to? Didn't Rav Moshe Feinstein say that America is a "government of *chesed*"?

Yaakov: Rav Moshe was niftar many years ago, and things have gotten much worse. One of my rebbeim said that the generation of the Flood was punished because hishchis kol basar es darko al haaretz, meaning rampant sexual confusion – isn't that happening in America today?

Gittel: Chazal also said that Hashem spares any society that is interpersonally good, even if they're terrible at bein adam laMakom. I think at least America qualifies.

Yaakov: I think Hashem does judge the whole world together, as one society, for these purposes. There's something powerful in the idea that we and our worst enemies are all one moral ecosystem from Hashem's perspective.

Batsheva: Why are you so confident that America is a good society interpersonally? Almost everything I read is about African-American being killed by police, women (and men) being sexually assaulted, and enormous gaps between the rich and the poor. It may be true that we profess excellent values, but we don't live up to them.

Elimelekh: I think you need to keep America's faults in perspective. Despite everything, almost everyone in the world realizes that they would prefer to live here if they made a purely rational decision.

Batsheva: Yes, but maybe that's just because we're so rich. If we were a poor country, would people feel the same way?

Shlomo: You're assuming that virtue and success are unrelated. Maybe we're so rich *because* we're so good.

Gittel: Doesn't Kohelet tell us that virtue and success are unrelated?

Shlomo: I didn't mean that Hashem rewards us. I meant that our society gives people the freedom to be creative and the ambition to live well, and that's a recipe for national wealth.

Batsheva: Part of the message of Kohelet is that it often takes a long time for the economic effects of virtue or vice to wear off. We might be rich because our grandparents constructed a virtuous society, even though our society is totally corrupt.

Yaakov: Maybe Hashem judges individuals "ba'asher hu sham", as they are now, but judges societies on the basis of their potential. He only brought the flood when there was no hope that anything worthwhile would ever emerge from that society. Does America still have the potential for moral greatness?

Gittel: I think it would be enough for Hashem if the Jewish people were virtuous or had the potential for moral greatness. But I don't see us being better or worse than anyone else.

Yael: It's very hard to compare societies. But I find it difficult to believe that the world today is worse morally than it was in the 1940s, or in the nineteenth century. So I really don't think it makes sense to say that we're under threat of G-d destroying the world today.

Elimelekh: The whole North Korea situation has really scared me, and I've read a lot about the Cold War, when many people thought nuclear war was inevitable. Maybe we're always under threat of G-d destroying the world:

Shlomo: But why should we be? If we're better than the worst ever, there shouldn't be a threat.

Rivky: Rambam says that every Jew should imagine every year that the whole world's survival depends on whether their next choice is for good or evil. Maybe the possibility of the world being destroyed tomorrow is necessary to make us take our free will seriously.

Teacher: So, last round. What's your one sentence takeaway from Parshat Noach?

Batsheva: Societies should always consider whether they are badly overestimating themselves.

Elimelekh: Existence is always fragile. We survive only while Hashem Wills us to.

Gittel: There really isn't any excuse for being evil if you believe in Hashem.

Rivky: We should act as if the world depends on us, but really G-d will be merciful anyway.

Shlomo: Human beings and animals have the same end, but if we're good, maybe Hashem will know our names.

Yaakov: The world is an ark, and we are all on it together, whether we like it or not.

Yael: Humanity is too diverse and complex for Hashem ever to find us completely valueless.

Teacher: Thank you very much for your serious participation. I think this was a powerful discussion: I learned a lot about the parshah, and about you. I hope you'll share this discussion with your parents and your shuls. Shabbat shalom!

*(Please note: This dialogue is a work of fiction. No actual students were stimulated to think in the course of its preparation, but I would be encouraged if it resembled actual classrooms. Do you agree?)*

## **Noach and Global Warming**

October 18, 2017  
Jewish Press

G-d promised never to destroy the world by flood again. Does this mean that we have a Divine guarantee that our landmasses will not be submerged, no matter how much carbon dioxide we pour into the atmosphere?

The simple answer is no. We should not tie Chumash's credibility to specific claims about the physical world. Just as we should not accept or reject evolution or the big-bang theory on the basis of Genesis Chapter 1, we should not reject or accept global warming on the basis of Chapter 6.

But the question of Noach and global warming can be understood as a theological rather than a factual question: Are there any circumstances under which G-d would allow the human race to be destroyed?

A classic spiritual gives a spectacularly discomfiting answer: G-d gave Noah the rainbow sign/No more floods, it's the fire next time. This reading is well-grounded textually. The Flood occurs because the sin of the human beings is rabboh – great. The next time things go rabboh wrong is at Sodom, and His response is to rain fire on the city.

But what then is the meaning of G-d's promise?

Rabbinic literature plays this tension out in a wonderful series of historical plays:

1. Vayikra Rabbah 96:10 presents Avraham saying the following to G-d:

*At the time that Avraham sought mercy for the people of Sodom, he said before Him:  
Master of the Universe, You swore that you would not bring a flood to the world,  
as Scripture writes (Yeshayahu 54:9), "For that would be the waters of Noach to me"  
(just as I have sworn not to pass the waters of Noach again on the land,  
so I have sworn not to lose patience with you and not to act on anger against you) –  
You won't bring a flood of water, but You will bring a flood of fire?!  
Are You evading Your oath?! If so, You have not fulfilled Your oath!*

*This is what Avraham meant by saying, "It would be a desecration (of Your word) to do such a thing!"*

2. In Mekhilta d'Rabbi Yishmael, the conversation takes place within the Gentile world:

*At the time (of Sinai), all the Gentile kings came to Bil'am.  
They said to him: Is He perhaps bringing a Flood to the world?  
Bil'am said to them: The Holy Blessed One has already sworn not to bring a flood to the world, as  
Scripture writes (Yeshayahu 54:9), "For that would be the waters of Noach to me, etc."  
They said to him: Perhaps he is not bringing a flood of water, but rather a flood of fire?  
Bil'am said to them: He is bringing neither a flood of water nor a flood of fire; rather, The Holy Blessed  
One seeks to give the Torah to His nation . . .*

3. Finally, Tosefta Taanit 2:13 brings the conversation directly into the rabbinic era:

*A story about a pious man whom they told: Pray for rain to fall! He prayed, and rain fell.  
They said to him: Just as you prayed and they fell, pray that they will go away!"  
He said to them: Go and see – If a person can stand on the Horn of Ofel and rinse his legs in Wadi  
Kidron, then we'll pray for rain not to fall, but we are certain that the Omnipresent will not bring a flood  
to the world, as Scripture says, "There will be no further flood", and it also says, "For that would be the  
waters of Noach to me, etc."  
Rabbi Meir says: Not a flood of water, but yes a flood of fire and sulfur as He brought upon the people of  
Sodom, as Scripture says, "And Hashem rained on Sodom, etc."*

Avraham recognizes the possibility that G-d's oath contained a loophole, but objects. His objection is overruled. Bil'am tries to assure the world that the oath is absolute, but his assurances are found unsatisfying. The anonymous pious man (possibly Choni the Circlemaker) seems confident that G-d will not destroy the world, but Rabbi Meir points out the loophole – fire rather than water – and seems to endorse it. In the end, only Bil'am seems convinced, and his own denial was coerced. So it seems that according to Jewish tradition, there is no promise that G-d will not destroy the world and the human race again.

There are other loopholes in G-d's promise as well. We might say, for instance, that G-d promised not to bring complete destruction, but made no commitment to prevent us from causing our own destruction. Or perhaps that G-d promised to prevent rapid but not gradual destruction.

What then does G-d's promise mean?

Here I want to put in a note of perspective. In the 60s, 70s and 80s, the world faced imminent destruction through nuclear war. As scary as global warming may seem today, that humanity survived the Cold War largely unscathed gives some credence to the optimistic notion that the promise has some real-worlds meaning.

But as we have not yet discovered the contours of that meaning, it seems best to be cautious in the meantime.

# **Rav Soloveitchik on Semikhah**

April 7, 2017

## INTRODUCTION

This essay is devoted to a purely conceptual “Brisker” account of the Rav’s analysis, in many contexts, of classical *semikhah* and eligibility for the same. If this analysis survives critique, a subsequent essay will place it in the context of a central theme of the Rav’s philosophic work. If that analysis as well emerges recognizably from critique, a third and last essay will draw tentative but concrete implications for contemporary practice with regard to eligibility for semikhah, and humbly submit them for critique.

No attempt will be made in this essay to evaluate the Rav’s work, only to present it. The practical weight of any implications derived from this analysis will depend on the general weight one assigns to the Rav’s opinions in determining individual or communal practice, and/or on evaluation of the argument on its merits as a reading of the tradition.

I have followed the approach of many of the Rav’s direct talmidim in writing the Rav’s material directly, rather than citing him in the third person. Any content that I believe to be my own is specifically marked {ADK}. There may be places where I have misunderstood the Rav or made an argument that seems necessary for his thesis but which he himself never made. Readers are encouraged to check my analysis against the available evidence of his positions, to which I have tried to provide fairly comprehensive access in the endnotes. Readers who wish to study the Rav’s directly relevant positions in advance of my presentation are directed to

קובץ חידושים תורה in, “קביעת מועדים על פי הראיה ועל פי החשבון”

שיעורים לזכר אבא מאיר ז"ל כרך ב in, “בעני תקנת משה”

ארץ הצבוי in “קונטרס הסמכה”

נדרים ח: שבועות לא„, שבועות לא„, בבא קמא טו„, בבא קמא פד: רשימות שיעורים

The Rav Thinking Aloud on the Parsha: Sefer Bamidbar

“Semichah of Yehoshua” in The Rav Thinking Aloud on the Parsha: Sefer Bamidbar

בית יצחק כרך בעמוד ד, in “הערות בראש מסכת אבות”

## NOTE ON METHODOLOGY

I am not a direct student of the Rav, but rather a student of (many of) his students. My account of his position is therefore of necessity a reconstruction rather than a report. It is a work of intellectual history. As such, I sometime need to choose between conflicting sources, interpretations of sources, and so on.

My basic approach is as follows:

- 1) The articles in קובץ חידושים תורה are the Rav’s ipsissima verba and reflect his positions accurately, at least as of the time of their original publication.
- 2) Rabbi Herschel Reichman and Rabbi Herschel Schachter’s firsthand reports of the Rav’s shiurim, the articles in שיעורים לזכר אבא מאיר ז"ל, and the direct reports in The Rav Thinking Aloud are presumptively accurate. However, on occasion they conflict; see footnote 7 for one clear such case.
- 3) I do not extend the same level of credibility to secondary sources, even those written by great talmidei chakhamim, for example when they are writing up someone else’s notes on a shiur they did not personally hear.
- 4) I use my memory of my teacher Rabbi Michael Rosensweig’s presentation of the Rav’s positions in shiur in 1987 as confirmation of my analysis, but not as primary evidence, especially as in subsequent presentations his own positions seem to differ.
- 5) The Rav famously changed his mind in shiur at least from year to year. This may explain some of the subtler inconsistencies between various reports.

## RAV SOLOVEITCHIK'S UNDERSTANDING OF SEMIKHAH

In Hilkhot Sanhedrin 2:11, Rambam introduces a distinction between judging (=being דין), and serving as a court of justice (=being a court of justice בֵּית דִין).

אחד שהוא מומחה לרבים או שנタル רשות מבית דין –  
הרי זה מותר לו לדון ייחידי, אבל אינו חשוב בית דין

*One who was known to the public as expert, or who received authorization from beit din – he is permitted to judge alone, but is not considered beit din.*

Rambam expands on this distinction in Hilkhot Sanhedrin 5:18:

יחד שהוא מומחה לרבים –  
אף על פי שהוא דין דיני ממונות ייחידי –  
אין הודהה בפניו הודהה בבית דין, ואפילו היה סמור;  
אבל השלישי –  
אף על פי שאינו סמכין, והרי הן הדירות, ואין אני קורא בהם אללים –  
הרי הודהה בפנייהם הודהה בבית דין,  
וכן הכהר בפנייהם ואחר כך באו עדים –  
הוחזק כפרן ואני יכול לחזור ולטעון, כמו שביארנו.  
כללו של דבר:

הרי הן לעניין הודהות ולהלוואות וכיוצא בהן בית דין הסמור לכל הדברים.  
*An individual who is known to the public as expert – even though he may judge monetary cases alone –*

*an admission in his presence is not considered an admission in beit din, even if he has semikhah. But (a panel of) three –*

*even though they do not have semikhah, and they are non-experts, and I do not call them elohim – an admission in their presence is considered an admission in beit din.*

*So too, one who denies something in their presence, and then witnesses come (to contradict him) – he is fixed-as-a-denier and (therefore) is not permitted to reformulate his claim, as we explained.*

*The principle of the matter is:*

*With regard to admissions, denials, et al, they are like a beit din with semikhah for all matters.*

A court comprised of three laymen has the status of a beit din even though it is not an “elohim”. This demonstrates that Rambam holds that the status of “beit din” can exist independently of the status of “elohim”.

Rav Chaim Brisker reads Rambam as saying that the reverse is true as well, i.e. that an expert individual<sup>2</sup> judge has the status of “elohim” despite not having the status of “beit din”. This means that a judging entity can have the status of “elohim” even if does not have the status of “beit din”.

What is the difference between judgement by “elohim” and judgment by “beit din”?

Rav Chaim explains that an individual expert judge can determine for the litigants what their Torah obligations are, but cannot enforce those obligations<sup>3</sup>. In other words, an “elohim” can issue a *hora’ah* but not a *psak din*. A three-person lay “beit din”, by contrast, can issue a *psak din* and compel the litigants to abide by it, but is not able to issue a *hora’ah*. Such a panel cannot exercise any independent judgment about what the law is or should be. Its members merely apply the law as they find it

<sup>2</sup> Kesef Mishnah writes here that this applies to individual highly expert judges even if they don’t have *semikhah*. See on this Rabbi Reichman’s note to Nedarim 8b.

<sup>3</sup>{ADK} A useful analogy may be the status of arbitration panels in American law. Arbitrators produce a judgement which a party can then bring to a civil court, which will generally enforce it, but the arbitrators themselves cannot enforce their decisions. Consider by contrast the US Supreme Court’s refusal to provide advisory opinions, and rather to relate only to actual cases brought by parties with legal standing. But see below for a more Rav-specific account.

ready-made; they are *mar'eh makom*<sup>4</sup> (=point to an authoritative source of law)<sup>5</sup>.

R. Chaim thus establishes two equations:

- 1) *elohim = hora'ah*
- 2) *beit din = psak din.*

R. Chaim uses this approach to explain Rambam's puzzling position in *Hilkhot Sanhedrin* 11:7-8:

דיני ממונות, וכן הטעאות, וכן הטהרות, –  
האב ובנו, הרב ותלמידו, מונין אותן בשניים;  
ודיני נפשות, ומכות, וקדוש החדש, ועיבור השנה –  
אב ובנו או הרב ותלמידו מונין אותן באחד.  
זה שאנו מונין האב עם הבן, בין באחד בין בשניים –  
כגון שהיה האחד מהן בסנהדרין והשני היה מן התלמידים  
שאמר 'יש לי ללמד ذכות או חובה' –  
משמעות דבריו, ונושאיו ונתנו עמו, ומכוון עמו.

*Monetary judgments, also tum'ot, also taharot –*

*a father and his son, a rav and his student, count as two;*

*capital judgments, also lashes, and kiddush hachodesh, and declaring leap years –*  
*father and son or rav and student count as one.*

*That which we count the father with the son, whether as one or as two –*  
*is for example if one of them is on a sanhedrin and the second among the students,*  
*and (the latter) said 'I have a basis for innocence or liability' –*  
*we listen to his words, we engage in debate with him, and we vote with him.*

Rambam gives no explicit rationale for why judges related to one another can serve together in monetary cases, and Raavad claims the ruling resulted from a corrupted text. Raavad also asks a fundamental question:

ח'י ראש!  
אני רואה לא טעם ולא ריח בדברים אלו, כי למשא ומנתן מאן ייכא?  
ובשעת גמר דין – אז הוא המני.  
*By the life of my head!*

*I see neither taste nor aroma in these words, as for (the context of) debate, what vote is there?!*  
*The vote is at the time of the verdict.*

R. Chaim<sup>6</sup> agrees with Raavad that Rambam was describing a vote related to the debate, and not a vote

<sup>4</sup> Rabbi Schachter ascribes this language to *Minchat Chinukh*.

<sup>5</sup> {ADK} Their ruling also has no relevance as legal precedent for judges in any other case.

<sup>6</sup> As reported by Rabbi Reichman in the citations below. Rabbi Schachter reports that the Rav cited what seems to be the same explanation from Rabbi Chaim Korb in *Netivot Chayim*. Rabbi Korb addresses this Rambam in [vol. 1, p.39](#), but I was not able to find anything parallel to what the Rav cites here. I am therefore following Rabbi Reichman's reports here, but am open to new evidence. (N.B. After this draft was complete, I was made aware of R. Yaakov Sasson's [Shiurei HaRav on Sanhedrin](#), which offers a somewhat different set of attributions in footnote 9.)

רישומות שיעורים (ר"ד סולובייצ'יק) מסכת שבאות דין לעמד א'

להסבירת פסק הרמב"ם התחומו, העלה הגר"ח צ"ל שלפי הרמב"ם ישן שטי עמידות למונין בבי"ד:

א) מונין ראשון בשעת משא ומנתן ממשיך להוראת ההלכה מבחינת הלכות התורה בלי להטיל את ההוראה דין על הנידונים. לשם כך אף הפסולים נמנים כשיים כי אינם פסולים להוראת הלכות התורה.

ב) מונין שני בשעת גמר דין שהוא בא להטיל דין תורה על הנידונים. לשם כך נפסלו פסולים.

אמנם רק בדי' ממונות מות alkalik הדין לשני שלבים: שב ההוראת הלכות התורה ושלב הטלית הדין על בעלי הדברים.

ואלו בדי' נפשות מכות וקדה"ח שני השלבים מצטרפים לאחד ולפיכך נפסלו הפסולים גם למשא ומנתן

שכן אף המשא ומנתן נחשב כחולות דין על הנידון (בדי' נפשות ומכות - ובקדה"ח חלק מעשה הב"ד המקדים)

ולא כהוראות הלכות התורה גרידא.

(רישומות שיעורים (ר"ד סולובייצ'יק) מסכת בבא קמא דף טו עמוד א')

להסבירת פסק הרמב"ם התחומו, העלה הגר"ח צ"ל שלפי הרמב"ם ישן שטי עמידות למונין בבי"ד:

א) מונין ראשון בשעת משא ומנתן שהוא לצורכי הוראת ההלכה מבחינת הלכות התורה בלי להטיל את ההוראה דין על הנידונים. לשם כך אף הפסולים נמנים כשיים כי אינם פסולים להוראת הלכות התורה.

ב) מונין שני בשעת גמר דין כדי להטיל דין על הנידונים, לשם כך נפסלו פסולים.

about the verdict, but does not see this as a difficulty. He explains that there are two significant votes in the process of deciding monetary cases.

The first vote determines the law.

The second imposes the law on the litigants.

Judges who are related to each other can debate and vote together when the issue is determining the law, but they cannot serve together for the purpose of imposing the law on people.

These two votes line up exactly with the categories of *hora'ah* and *psak din* that Rav Chaim developed in his analysis of Hilkhot Sanhedrin 2:11 and 5:18. The only difference is that in 2:11 and 5:18, he distinguished between **aspects** or **modalities** of decisions in monetary cases, whereas here he distinguishes between **stages** of deciding such a case (and (or *tum'ot* or *taharot*).

It follows that

the first vote is for the purpose of *hora'ah* (=for determining the law);

the second vote is for the purpose of issuing a *psak din* (=imposing the law on the relevant parties).

However - if *hora'ah* and *psak din* are separable stages of monetary cases (and *tum'ot* and *taharot*), why are they not separable stages of capital or flogging cases, or of *kiddush hachodesh* and declaring leap years, so that relatives can serve together for those cases in the same way they do for monetary cases?<sup>7</sup> Why is there only one vote in such cases?

Answering this question requires us to analyze the nature and functions of batei din in general and the Great Sanhedrin in particular.

Rambam writes in Hilkhot Kiddush HaChodesh 5:1-2:

כל ש商量נו מקבעות ראש החדש על הראייה  
ועיבור השנה מפני הזמן או מפני הצורך –  
אין עושים אותו אלא סנהדרין שבארץ ישראל או בית דין הסתמכים בארץ ישראל שננתנו להן הסנהדרין רשות,  
שכך נאמר למשה ולאהרן: החדש הזה לכם ראש חדש  
ומפני המשמעה למדיו איש איש ממש רבינו  
שכך הוא פירוש הדבר:  
עדות זו תהיה מסורה לכם ולכל העומד אחריה במקומם . . .

*Everything that we have said regarding the fixing of Rosh Chodesh by sight,  
or the declaring of a leap year in order to match the seasons or for some other need...  
can be done only by a Sanhedrin in the Land of Israel  
or by a beit din of semukhim in the Land of Israel to whom the Sanhedrin has delegated authority  
as it was thus said to Mosheh and Aharon: This month shall be for you the head of the months  
and they learned via tradition, person from person going back to Mosheh Rabbeinu  
that this is the explanation of the matter:  
This testimony will be given over to you and to all who stand afterward in their place . . .*

This demonstrates that *kiddush hachodesh* is fundamentally a prerogative of the Great Sanhedrin, although it can be effectuated by a smaller beit din acting under the Great Sanhedrin's authority.

However, the opening chapter of Mishnah Sanhedrin lists *kiddush hachodesh* as requiring a beit din of three. Why is it not listed as requiring 71? Similarly, why does Rambam in Hilkhot Sanhedrin 5:1 not list it among the areas of law that require 71?

The answer is that the Great Sanhedrin has many distinct functions, and both the Mishnah and Rambam

אמנם רק בדיי מוניות מתחילה הדין לשני שלבים: שלב הוראת הלכות התורה ושלב פסק הדין על בעלי הדברים.  
ואילו בדיי נפשות מכות וקדה"ח שני השלבים מצטרפים לאחד אף המשא ומתן נחשב כחולות דין על הנידון ולא כהוראת הלכות התורה גרידא. בהתאם לכך  
גפסלי הפסולים גם למשיא וממן.

<sup>7</sup> {ADK} Alternatively: Why must one be eligible for the second vote in order to participate in the first in such cases?

above relate to some but not all of them<sup>8</sup>. Here we need to distinguish two such functions:

- 1) To be the decisor of the laws of the Torah (= הַפּוֹסֵק וְמִכְרִיעַ בְּכָל דִּין הַתּוֹרָה).

This function includes both *hora'ah* and *psak din*.

It is derived from the law of the Rebellious Elder (Devarim 17:8-13), where the Torah requires us to act judicially on the basis of the *hora'ah* of the Great Sanhedrin rather than on the basis of any conflicting *hora'ah*.

Rambam holds in Hilkhot Mamrim 3:5<sup>9</sup> that only someone *samukh b'sanhedrin* = having *semikhah* and an appointment as a member of the Sanhedrin can become a Rebellious Elder. This is because the status of Rebellious Elder requires issuing a *hora'ah* as the basis for action that conflicts with one issued by the Great Sanhedrin, and Rambam holds that *semikhah* is necessary for *hora'ah*

It follows that the status of "elohim" does not apply to every individual expert judge, rather only to one who has *semikhah*<sup>10</sup>.

It follows that *semikhah* is necessary to participate in the first vote of a beit din in monetary cases, *tum'ot*, and *taharot*.<sup>11</sup>

- 2) to play a symbolic or representative role whenever the knowledge, consent, or action of the entire Jewish people is needed.

This role is unrelated to *hora'ah*, and cannot be derived from the Rebellious Elder. Instead, it is derived from when the spirit of G-d emanates from Moshe to the Seventy Elders in Bamidbar 11:11-17, so that *they can bear* (the weight of the Jewish people) *together with you*.

We can now explain that the first chapter of Mishnah Sanhedrin and Rambam Hilkhot Sanhedrin 5:1 discuss only *hora'ah*-related roles of the Great Sanhedrin. *Kiddush hachodesh* is symbolically an action of the entire Jewish people, and therefore is not treated there. The "two votes", with the first being for *hora'ah*, are separable only when beit din is fundamentally serving a *hora'ah*-related function. They are

<sup>8</sup>קביעת מועדים על פי הראיה ועל פי החשבון", זו קובץ חידושים תורה, 52. p. 52  
נראה דשות הלכות נאמרו בב"ד הגודל:

(1) בהלכות דיני תורה, ד'

"ב"ד הגודלшибורלים - הם עיקר תורה שבבעל פה, והם עמודי ההוראה, מהם חוק ומשפט יוצא לכל ישראל",

זהו הפסיק והמכיר בעכל דיני התורה:

והלכה זו נובעת מפרשת זקן ממרא: "קמת וعلית וכו' על פי התורה אשר יורוך וכו' לא תסור וכו'"

(2) כל היכא דברין דעת כל ישראל או הסכמתם או חלות מעשה של כל ישראל סג', וש בכל הוראותם או מעשיהם רשות מעשה כל האומה . . .

הפרשה של זקן ממרא לבודה עדין אינה אומרת כי יש בכלל מעשה ב"ד הגודל או רשותו הסכמת ומעשה כל ישראל, ולפיכך זקנים אמורים לפרשא אחרת . . .

"אספה לי שבעים איש מקני טריאן אשר דעתם כי הם זקני העם ושווורי וכו' והתחשבו שם עורך וכו' . . .

<sup>9</sup>אינו זקן ממרא ח"ב מיתה נד שירהחכם שהגע בנסחדרין ויחולק על בית דין בדבר שزادונו כרת ושגנתו חטא את או בתפלין וירוח לעשות כהוראותיו, או יעשה הוא עלי פ"י הוראותיו ווילוק עליון והן ישבין בלשכת הגזית, אבל אם היה תלמיד שלא הגיע להוראה והורה לעשות פטור, שנאמר כי פלא

כבר דבר למשפט מי ישאל פלא ממנו לא דבר מופלא.

<sup>10</sup>רשימות שיעורים (ר"ד סולובייצ'יק) מסכת בבא קמא דף פ"ד עמוד ב'

והנה יחד מומחה יכול להורות דין תורה מדאוריתא אייבא דהרבנן" מ"ש כתבת בפ"ב מהל" סנהדרין (הלו"י) וז"ל אף על פ" שואן ב"ד פחות משלהše מותר לאחד לדון מן התורה שא" בצד תשפט שמייך כ' עכ"ל.

ונראה דר"ז יחד שהוא סמור, אך יחד מומחה בעלי סמכה אימנו מורה דין תורה מדאוריתא אלא מרבנן.

ולפ"ז יצא שכ ההוראה בדי התורה נבע מהסמכה שקבל הסמור, דסמכה היא תנאי בחלות שם ההוראה, ורק ההוראה מפי סמור נחשבת להוראת דין תורה, ומайдך בעלי סמכה ואפיו ע"ז מומחה אין חלות שם ההוראה אלא גלוי מילתה בעלמא שאל הגע להוראה והורה בעלמא להלכה למצוא איזה דין דא"ל לומר שיש בזה חלות שם ההוראה, דהו גלוי מילתה בעלמא.

וש להוכיח כן מפסק הרמב"ם (פ"ג מהרי"ם הל"ה) ז"ל  
אין זקן ממרא ח"ב מיתה עד שהראח חכם שהגע להוראה סמור בסנהדרין כ' עכ"ל.

ולאזרה קשיש: למה בעין דזקן מילא מוקן?

ונראה: אכן זקן ממרא אל סמור שפוץ נגד הסנהדרין הגודל, אך אך תחשב הוראות כחפצא של ההוראה ולא כגלי מילתה בעלמא, ורק חלות וחפצא של ההוראה מפי סמור מהוות המראה בב"ד הגודל.

Rabbi Schachter also cites the Rav as saying that there is a machloket between Tosafot and Rambam on this issue. Tosafot claim that *semikhah* is necessary for service on a beit din, but not for *hora'ah*, while Rambam sees it as necessary **only** for *hora'ah*, but not for beit din, although Rambam agrees that *semikhah* is necessary for those *batei din* whose primary function is *hora'ah* – see below.

The same distinction, albeit using terms differently, appears in The Rav Thinking Aloud on the Parsha: Sefer Bamidbar, pp.213-4.

<sup>11</sup> {ADK} There appears to be a weakness in this argument. A Rebellious Elder must issue not only a *hora'ah*, but rather a *hora'ah* that can be acted on in practice. One might suggest that this conforms to the second vote, and not the first, and therefore to become a zaken mamrei one must have the element of *semikhah* necessary to issue **and** impose a *hora'ah*. We then could not prove from here that *semikhah* is necessary solely to issue a *hora'ah*, i.e. for the status of *elohim*.

therefore not separable with regard to *kiddush hachodesh*.

However, we must still explain why they are not separable in capital and flogging cases.

<sup>12</sup>There is a tension in Rambam as to whether Mosheh **constituted** the great Sanhedrin, or rather **headed it**.<sup>13</sup> The same tension appears in the Talmuds<sup>14</sup>. The solution is that for some purposes Mosheh constituted the Sanhedrin, while for others he headed it.

Using the framework above, we might suggest for example that Mosheh constituted the Great Sanhedrin with regard to *hora'ah*-related functions, but headed it with regard to representative functions. But this would not be sufficient, as the tension exists even within the categories above. For example, *kiddush hachodesh* is a prime example of an “action of the whole Jewish people”, and the appointment of a king clearly falls within the same category. Yet *kiddush hachodesh* was done before the appointment of a Sanhedrin, therefore under the authority of Mosheh alone<sup>15</sup>, whereas according to Rambam Hilkhot Melakhim 1:3<sup>16</sup>, Yehoshua was appointed king by Mosheh **and his beit din!**?

We must therefore conclude that Mosheh’s role in the Sanhedrin changed over time. At the very outset of specifically Jewish halakhah, namely the mitzvah of *kiddush hachodesh*, Mosheh constituted the Sanhedrin for all purposes, as well as playing the roles of king (and high priest). By the end of his life, Mosheh had transferred each of these roles to the appropriate successor or successors and arranged for continued succession.

Specifically:

- 1) On the basis of Yitro’s advice (Shemot 18:18-26), he surrendered aspects of his judicial capacity to the *sarei alafim* etc.
- 2) When he complained in Bamidbar 11: “How can I bear by myself your troubles etc.”, Hashem caused his spirit to emanate to 70 others who would share with him the burden of the people, i.e. share his representative authority and responsibility.  
Representative authority, as Bamidbar 11 makes clear, derives from genuine concern for the people’s wellbeing. It therefore carries with it the authority to legislate for the good of the people as well. Rambam therefore ascribes the takkanah of keriat haTorah to Mosheh alone, since it was made before Bamidbar 11. However, he describes Mosheh as acting together with a court when he anointed Yehoshua king, which occurs afterward, in Bamidbar 27.
- 3) The last element of Great Sanhedrin authority that Mosheh shares is his status as the source of Torah sheb’al peh and therefore as one whose *hora’ah* must be accepted. This happens in Bamidbar

<sup>12</sup>בעין תקנת משה”, שיעורים לשכר אבא מאיר ז'לב, 199. k

1) כמו כל ב”ד – של ג’, כ”ג, וכיוצא בהם – תכליות הוא הוראה ופסק, כפי נוסחת הסמיכה, יורה וידין: והוא אומר, הוא סמך להוראה, וזהו תפקידו העיקרי ..

2)... קיימם דברים ... מקרים ווגמר מעשים ידועים. למשל, ב”ד של חיליצה ... גם ב”ד הגدول נתקלים בבחינה זו. למשל, מיוני מלך או כהן גדול בעי ע”א, מבואר ברמב”ם, אך אין מהני הואה אלא מעשה ב”ד סתום... .

<sup>13</sup> See for example

רמב”ם הלכות מלכים פרק א הלכה ג  
אין מעמידין מלך בתחילת אלא על פי בית דין של שבעים זקנים ועל פי נבאי, כי הושע שמיינחו משה רבינו בית דין, וכשאול ודוד שמיינם שמואל הרמתי ובית דין

רמב”ם הלכות אבל פ’ הילכה ג  
צוט עשה להתאבל על הקורבים, שנאמר ואכלתי חטאתי היום הייטב בעני ה’, ואין אבלות מן התורה אלא ביום ראשון בלבד שהוא יום המיתה ויום הקבורה,  
אבל שאר השבעה ימים אינם דין תורה, אף על פי שנאמר בתורה ויש לאבוי אבל שבעת ימים ניתנה תורה ונתחדשה הלכה ומשה רבינו תקן לולם לישראל  
שבעת ימי אבלות ושבעת ימי המשתה.

<sup>14</sup> See for example Sanhedrin 16b

מן לנ’ כדשchan במשה דאקי סנהדראות ומשה במקום שבעים וחוד קאי

and compare

תלמוד ירושלמי (זילנא) מסכת נזיר פרק א  
שהתרין משה ובית דין

<sup>15</sup> {ADK} although it was effectuated by Mosheh and Aharon together. The derivation from is not clear to me.

<sup>16</sup> אין מעמידין מלך בתחילת אלא על פי בית דין של שבעים זקנים ועל פי נבאי, כי הושע שמיינחו משה רבינו בית דין, וכשאול ודוד שמיינם שמואל הרמתי ובית דין.

27:15-23, just before the anointing of Yehoshua as king, when he gives Yehoshua *semikhah*.

To sum up:

Until Shemot 18, Mosheh had exclusive **judicial** authority;

Until Bamidbar 11, he had exclusive **representative** authority.

Until Bamidbar 27, he was the exclusive **source of Oral Torah and hora'ah**.

That Mosheh shared different aspects of his Great Sanhedrin authority at different times demonstrates that **semikhah is divisible**. There is no question that Mosheh appointed the subordinate judges in Yitro to the Sanhedrin, and that appointment to the Sanhedrin is a form of *semikhah*. But one can give Semikhah for one purpose and not another. For example, the *musmakhim* in Yitro were not authorized to **represent** the Jewish people.

On this basis, we can explain why the Torah presents Yehoshua as receiving *semikhah* in Bamidbar: is it really possible that Yehoshua was not among those Mosheh entrusted with the power to judge in Yitro? Furthermore, why does Rambam say in the Introduction to the Mishneh Torah that on the one hand Pinchas learned directly from Mosheh<sup>17</sup>, and on the other that Pinchas received the *mesorah* from Yehoshua<sup>18</sup>?

The answer to both questions is that while Yehoshua and Pinchas had each received *semikhah* in Yitro, Yehoshua received an additional aspect of *semikhah* in Bamidbar 27. Mosheh gave this additional form of *semikhah* exclusively to Yehoshua, so Pinchas had to receive it from Yehoshua.

What was this additional aspect of *semikhah*? We know from Mishnah Avot 1:1 that Yehoshua was the first recipient of the *mesorah*, of the Tradition. Rambam in Hilkhot Mamrim 1:1 describes the Great Sanhedrin's primary role as follows:

בית דין הגדול שבירושלים  
הם עיקר תורה שבعل פה,  
והם עמודי ההוראה  
ומهما חוק ומשפט יצא לכל ישראל,  
ועליהם הבטיחה תורה  
שנאמר על פי התורה אשר יורוך - זו מצות עשה,  
כל המאמין במשה רבינו ובתורתו –  
חייב לסמיך מעשה הדת עליהם ולישען עליהם.  
*The Great Beit Din in Yerushalayim*  
*They are the essence of Oral Torah*  
*and they are the pillars of hora'ah*  
*and from them law and justice go out to all Israel*  
*and the Torah pledges regarding them*

as Scripture says: “On the basis of the Torah which they give you as hora'ah” – this is a DO  
and anyone who believe in Mosheh Rabbeinu and his Torah  
is obligated to lean the actions of religion on them and to rely on them.

We saw above that the verse “On the basis of the Torah etc.” is the source of the Great Sanhedrin's *hora'ah*-related role. It follows that what Yehoshua received from Mosheh was that role<sup>19</sup>.

However, it seems that this cannot be true. The capacity to rule in monetary cases is obviously a *hora'ah*-related role, and that was the role given to the *musmakhim* in Yitro, and Yehoshua was among

<sup>17</sup> אלעזר ופנחס ויושע שלשתן קבלו ממשה. וליהושע שהוא תלמידו של משה רבינו מסר תורה שבעל פה וצוחה עליו. וכן יהושע כל ימי חייו למד על פה. וזקנים  
רבנים קבלו ממשה. וכך עלי מון הקנים ומפניות

<sup>18</sup> נמצא הרבה עד משה רבינו עלי השלים ארבעים דורות ואלו הן . . .  
(ז) ועל מפניהם. לח) ופניהם מיהושע. לט) ויושע ממשה רבינו. מ) ומה שרבינו מפי הגבורה

<sup>19</sup> Yehoshua may have received this semikhah in two ways: from Mosheh and from the entirety of klal Yisroel. In other words, it may be that the power to give *hora'ah* can also be vested in the Jewish people as a whole.

those *musmakhim*. So why would Yehoshua need to receive *hora'ah*-related *semikhah* again?

We must therefore return to the distinction made by Rav Chaim between the determination of the law and its imposition, between *hora'ah* and *psak din*. In Yitro, Yehoshua and the other *sarim* received the authority to **impose** law, but he and they had no authority to **determine** law. They could merely apply unquestioningly the law as Mosheh conveyed it to them.<sup>20</sup> Like a lay court of three, they could issue *piskei din* but not *horaot*; they could function as *beit din* but not as *elohim*<sup>21</sup>.

We can accordingly recognize three different and separable aspects of *semikhah*:

- 1) the capacity to represent and legislate for klal yisrael<sup>22</sup>,
- 2) the capacity to determine law (=issue *hora'ah*), and
- 3) the capacity to impose law (=issue *piskei din*).

We can further distinguish between areas of law where the **primary** function of the *beit din* is *hora'ah*, and areas where the **primary** function of the *beit din* is *psak din*. Where the primary function of *beit din* is *hora'ah*, the ideal and sufficient outcome is for the relevant parties to acknowledge and act on their obligations. Where the primary function is to impose, however, *beit din* must in practice impose its judgement. For instance, as regards punishments, acknowledgement of guilt is insufficient, and defendants who flog themselves are still subject to flogging by the court. {ADK} In such areas, the element of *hora'ah* is not relevant to the specific case. Therefore, while the law under which someone is sentenced is of course determined by a vote of the Sanhedrin, that vote is not considered part of the specific case, but rather as prior to it.<sup>23</sup> Therefore, since the case does not involve a separable element of *hora'ah*, relatives cannot participate together in any aspect of the specific case.

We can now fully explain Rav Chaim's account of the two votes. The votes are separable only in areas of law where *beit din*'s primary function is *hora'ah*. They are not separable when *beit din* is functioning primarily in its representative capacity, such as *kiddush hachodesh*, or its enforcement capacity, such as *dinei nefashot*.

We have demonstrated that the elements of *semikhah* correspond to the functions of *beit din*, and that they are likewise separable. In the case of relatives, we allow joint membership on a *beit din* for the first vote of people who cannot serve together for the second vote. This leads to the question: Can people be given one element of *semikhah* if they are not eligible for all elements?

On the surface, this possibility is explicitly rejected by Rambam in *Hilkhot Sanhedrin* 4:10:

חכם מופלא שהוא סומא בעינו אחת  
אף על פי שהוא ראוי לדיני ממונות - אין סומcin אותו לדיני ממונות  
מן שאים ראוי לכל הדברים  
וכן כל כיוצא בזה.

*An especially expert sage who is blind in one of his eyes,  
even though he is fit to judge financial cases - we do not give him semikhah for financial cases,  
because he is not fit for all matters.  
The same is true in all analogous cases.*

However, two cases force us to reconsider whether we have understood that halakhah correctly.

<sup>20</sup>{ADK} It seems to me that according to this logic the parshah of the Rebellious Elder did not apply to the judges appointed before Yehoshua's *semikhah*.

<sup>21</sup>{ADK} This fits very well with the language of Shemot 18:19 and 18:23.

<sup>22</sup> There are categories of law that require a *beit din* but nonetheless do not involve *hora'ah*. These include, for instance, the act of *chalitzah*. In such cases the *beit din* is a *beit din shel kiyum*, a performative rather than a judicial body. {ADK} Many such cases overlap with representative functions – *chalitzah*, for example, requires that something be *gehrat bishrail* – but it is not necessarily the case that all of them do. There may accordingly be a fourth function of *beit din*, and concomitantly a fourth aspect of *semikhah*, which may also be separable – *semikhah* for *kiyum*.

<sup>23</sup> There is room here for extensive discussion of the implications of this position for our understanding of the *dinei nefashot* process.

Rambam writes in Hilkhot Sanhedrin 2:9:

בֵּית דִין שֶׁל שְׁלָשָׁה שַׁהֲיָה אֶחָד מֵהֶן גָּר - הַרְיָה זֶה פָּסֹול  
*A bet din of three of whom one was a convert – is invalid*<sup>24</sup>

Nonetheless, he writes in the introduction to the Mishneh Torah:

שמעיה ואבטליון גרי הצדק ובית דין  
קיבלו מיהודה (בן טבאי) ושמעון (בן שטח) ובית דין  
*Shmayah and Avtalyon the converts and their bet din*  
*received (the Tradition) from Yehudah (ben Tabai) and Shimon (ben Shetach) and their bet din...*<sup>25</sup>

How could Shmayah and Avtalyon be *nasi* and *av bet din* of a bet din that they were not eligible to serve on?

Similarly, Rambam writes in Hilkhot Sanhedrin 2:4

ואין מושיבין מלך ישראל בסנהדרין  
שאסור לחלק עלייו ולמרות את דברו  
*And we do not seat a king of Israel in a Sanhedrin*  
*because it is forbidden to disagree with or to act against his word*

But he then also writes in the Introduction to the Mishneh Torah:

דוד קיבל משפטואל ובית דין  
ואהיה השילוני מיצאי מצרים היה  
ולוי היה  
ושמע ממשה והוא קטע ביום משה  
והוא קיבל מדוד ובית דין.  
*David received from Shmuel and his bet din.*  
*Achiyah HaShiloni was among those who left Egypt.*  
*He was a Levite,*  
*and he heard (Torah) from Mosheh, in whose day he was a child.*  
*He received (the Tradition) from David and his bet din*

How could David head a Beit Din that he was not eligible to serve on?

The solution is that Shmayah, Avtalyon, and King David had *semikhah* for *hora'a*, to determine the law, and were eligible to participate in the first vote but not the second. Rambam Hilkhot Sanhedrin 4:10 means that one cannot be eligible for any form of *semikhah* in any area of law unless one is eligible for **that form** of *semikhah* in every area of law. However, eligibility for one form of *semikhah* does not, or at least does not necessarily, affect eligibility for other forms.

On this basis, we can also explain a puzzling position of Tosafot Gittin 88b s.v. Tosafot ask how, if women are invalid as *dayanot*, Deborah can be described in Shoftim 4:4-5 as *shofetet*, and as “all Israel came up to her for *mishpat*”? Tosafot and other rishonim have a variety of solutions to this problem. One is simply that women are valid *dayanot*. Several others explain how to evade their invalidity, for example through voluntary communal acceptance. But the answer that interests us is

לא הייתה דעתה  
אלא הייתה מלמדת להם הדינים  
*she did not judge,*

<sup>24</sup> See also רמב"ם הלכות סנהדרין פרק ב

ואין מעמידין בסנהדרין אלא כהנים לויים וישראלים המינויים הרואים להשייא לכוהנה, שנאמר והתייצו שם ערך בדורין לך בחכמה וביראה וביחס.

<sup>25</sup> Rambam makes absolutely clear in the Commentary to the Mishnah that they were converts, and not merely descendants of converts.

*rather she would teach them the laws*

How can this be described as *mishpat*?

The answer is that Devorah had *semikhah* for the first vote, but not the second. She could function in the capacity of *elohim* in monetary cases, and participate on the Sanhedrin for *hora'ah* purposes.<sup>26</sup>

The position that converts and women can receive an element of *semikhah* and serve on the Sanhedrin also seems to contradict Rambam Hilkhot Melakhim 1:4-5, which denies *mesimot* and *serarah* to both converts and women<sup>27</sup>.

אין מעמידין מלך מקהלה גרים אפילו אחר כמה דורות  
עד שתיה אמו מישראל,  
שנאמר לא תוכל לתת עלייך איש נכרי אשר לא אחיך הוא.  
ולא למלכות בלבד, אלא לכל שירות שבישראל,  
לא שר צבא לא שר חמשים או שר עשרה  
אפילו ממנה על אמת המים שמחליך ממנה לשדות  
ואין צרך לומר דזיין או נשיא שלא יהא אלא מישראל  
שנאמר מקרוב אחיך תשיט עלייך מלך –  
כל ממשות שאתה משים לא יהו אלא מקרוב אחיך.  
אין מעמידין אשה במלכות  
שנאמר עלייך מלך ולא מלכה,  
וכן כל ממשות שבישראל אין מנים בהם אלא איש.

*One may not stand up a king from the community of converts, even after several generations until he is born from a Jewish mother who is not descended from converts as Scripture says:* You are not able to place over yourself an alien man who is not your brother

*This is not true only of kingship  
rather of all positions of serarah in Israel  
neither army-sar, nor sar-of-50 nor sar-of-10  
even one appointed over a canal to control its distribution to the fields*

*There is no need to say that a dayan or nasi must be born-Jewish  
as Scripture says from amidst your brothers you meisim over yourself a king  
all mesimot that you are meisim must be only from amidst your brothers.*

*One may not stand a woman up in kingship  
as Scripture says over you a king – not a queen  
so too all mesimot in Israel must be male.*

But there really is no contradiction. *Serarah* is properly defined as authority over other human beings or their property, and *mesimot* refers to appointments which give such authority. *Semikhah*, in the sense of the first vote, is authority over the Law. There is no *serarah* or *mesimah* issue in giving women or converts first-vote *semikhah*.

According to Rambam, one-eyed scholars can receive this form of *semikhah* as well.

{ADK} The question then is: According to Rambam, is there any Jew in good standing who is not eligible for this form of *semikhah*? If not, does this indicate that access to this form of *semikhah* reflects a fundamental Jewish human capacity or right? I will iyH address this question in the next installment.

<sup>26</sup> {ADK} It is possible that all positions in Tosafot agree with Rambam that women (and converts) may receive this form of *semikhah*. The dispute among them may be limited to whether this is the **only** form of *semikhah* they can receive, or whether they can receive *semikhah* for *psak din* as well.

<sup>27</sup> {ADK} The language of Rambam seems laaniyut da'ati to show that there is no prohibition of *serarah* with regard to women, only of *mesimah*. However, I can find no evidence that the Rav took cognizance of this. I intend to discuss his position regarding women slaughterers in one of the sequels to this essay.

## **Devorah As Shofetet: Exception or Paradigm?**

February 10, 2017

In his magnificent introduction to the Sheiltot d’Rabbi Achai Gaon, Rabbi Naftali Tzvi Yehudah Berlin (Netziv) describes two models of halakhic development. One model, which he identifies with the tribe of Levi, works pointilistically and intuitively. It sees each circumstance and set of facts as unique and seeks a religious response that addresses that uniqueness. The second model, which he identifies with the tribe of Yehudah, looks to build general principles and abstractions that apply to all circumstances and all times. It seeks to respond religiously to the universal aspects of particular experience.

Please understand the importance of Netziv’s contention that each of these are **halakhic** approaches. Many other thinkers present similar binaries but see them as fundamentally opposed. What Netziv calls the Levite model, they present as antinomian *aveirah lishmoh*, sinning for the sake of Heaven. They make the compelling argument that the entire purpose of law is to subsume the particular into the general, to produce **rules**. There may be circumstances where the rules should or must be broken, but in such cases, we should honor law by acknowledging the breach rather than claim that the law can bend far enough to accommodate our actions.

By framing intuitive, situation-specific responses as a mode of halakhah – indeed, as **the** proper mode of the *posek* as opposed to the *lamdan* – Netziv rejects this approach entirely.

We might reasonably suggest that Netziv’s own approach is intended to expand the reach of law and domesticate intuition. If halakhah validates situation-specific religious responses, how could there possibly be room left for *aveirah lishmoh*?

But the truth is that Netziv has the most radical and pervasive understanding of *aveirah lishmoh* in the Mitnagdic world. His bon mot was that one must always consider the benefits of a mitzvah (an action mandated by halakhah) against its costs, and the cost of an aveirah (an action forbidden by halakhah) against its benefits, *because sometimes fulfilling the mitzvah isn’t worth its costs, and sometimes violating the aveirah is worth its costs*.

Why should a halakhah that relates to situations in their particularity ever generate counterproductive mandates or prohibitions?

I think Netziv must distinguish between mediated and unmediated religious intuition. The *posek*’s intuition is mediated by halakhah, and must produce law.

Perhaps Netziv imagines a sort of religious state of nature, in which each individual human being reacts to every situation in accordance with their direct perception of Divine Will. The problem is that the Divine Will may be different for you than for me. In Maimonidean terms, for example, my character might best be developed by cultivating uncritical generosity, while you need to overcome the culpable naivete that leads you to donate large sums to fraudulent charities. So the religious state of nature does not enable the building of a religious society, and since human beings are social creatures, it follows that the state of nature does not enable human fulfillment. We therefore need a religious social contract. Cue Sinai; enter the Torah.

Social contracts require individuals to exchange the right to make some choices (“freedom from”) for the ability to make other choices (“freedom to”). We retain the ability to make choices that we no longer have a right to make, and sometimes we may have the obligation to exercise that ability (*aveirah lishmoh*). By organizing as a society, we gain the ability to make new choices that are simply wrong, such as limiting the autonomy of others unnecessarily.

Social contracts are based on principles that harden into rules, and rules harden into laws. Netziv argues that this must be an iterative process. One class of halakhists (*lamdanim*) constantly draws perfectly straight lines connecting previously decided halakhic points, and then argues that the lines define the

boundary of the acceptable; another class (*poskim*) recognizes that an infinite number of curves can be drawn between two points, and contends that the existing pattern of halakhic points does not justify an overwhelming preference for simplicity. The lamdanim must constantly revise their models to account for new points decided by the poskim, and the poskim must stay within lines that have already hardened. Great poskim recognize that lines are two-dimensional, which is to say that they can only create boundaries within a single plane. If we acknowledge the existence of infinite dimensions, then, the lamdanim can never fully constrain the poskim. But the vast majority of us live in a much less exuberant religious geometry.

This tension can be illustrated within midrash halakhah by comparing the terms “binyan av” and “chiddush”. Categorizing a legal detail as a binyan av lets one generalize it to a broad range of halakhot beyond its original context; categorizing it as a chiddush confines it to its original context, and biases one toward defining that context narrowly. The only difference between a binyan av and a chiddush is that the former seems intuitive and the latter seems counterintuitive.

Lamdanim generally have a bias toward seeing things as binyanei av, whereas poskim are more willing to categorize them as chiddushim. But there is at least one exception to this tendency. Points that are halakhic outliers, but that have great appeal on non-halakhic grounds, will often be generalized by poskim and minimized by lamdanim.

This brings us to the case of Devorah the Prophetess. There is no question that existing halakhic lines appear to be drawn with the intention of limiting women’s leadership roles. There is also no question that Devorah led, and more particularly, that she functioned as a judge. This is true even if one concedes that “shoftim” means political leaders rather than judges, since *ויעלו אליה כל ישראל למשפט* clearly means that all Israel went up to her for legal judgement.

The simplest way of drawing the lines is to “*chokify*” Devorah, to say that she was an exceptional case that has no implications for the halakhot of leadership – she was in essence a living *aveirah lishmoh*. This is where lamdanim pull out their literal *deus ex machina*, namely – Devorah functioned on the basis of an explicit Divine decree that suspended all the ordinary laws regarding women.

An alternate approach is to say that the case of Devorah teaches us that the lines we had in mind are wrong, and we were drawing them on the basis of way too little halakhic data. *מקרה מלא אומר והיא שפטה את ישראל* – an explicit and perfectly straightforward verse says that she served as a judge. We might go further and seek to *chokify* any undeniable halakhic restrictions on women’s leadership, while generalizing the example of Devorah to the extent we can.

This is not a new conversation. Tosafot record both options, and each reverberates throughout the subsequent rishonim of both Ashkenaz and Sefard. But more immediately, each found new and enthusiastic exponents during the early years of religious Zionism. For example, in 1920 Rabbi Yaakov Levenson published a book called שווין נשים מנכבדת ההלכה = The Equality of Women from the Halakhic Point of View, which enthusiastically argued that the restrictions in Rambam had essentially no applications in a democratic society. Rabbi Levenson was Chairman and then President of American Mizrachi. See as well the respectful but strong disagreement expressed by Rabbi Yosef Kanovitz of Toronto, President of the Agudat HoRabbonim of the US and Canada, and Rabbi Levenson’s equally civil response. Note particularly that the full exchange was published originally by Rabbi Levenson in his *דברי יօנָן התורה והמדע* and then included in Rabbi Kanovitz’s posthumous collection *דברי יօנָן*.

In this ongoing conversation, I have a quite strong opinion, which largely tracks that of Rabbi Levenson in practice. I think it is correct to say that on the immediate issue he addressed, which was women’s suffrage, there is now a practical halakhic consensus in his favor, and any line-drawers must take that into account. I think it is generally better not to draw lines than to draw absurd lines; hence my rejection of positions that allow Golda Meir to be Prime Minister of Israel but not President of a Young Israel.

I don't think that halakhah should be decided by projections of historical trends, and there certainly remain areas of leadership about which reasonable and responsible halakhists and halakhic communities can differ passionately. For the time being, there will be shuls of observant Jews who eagerly seek the public presence of women as religious leaders, and others who sincerely find that presence to be a violation of the halakhic ethos, and still others where the issue will cause constant tension. But the examples of Rabbis Levenson and Kanovitz should show us that there is no reason, and perhaps no excuse, for making those passionate differences the cause of Orthodox schism. Let us rather try genuinely to convince each other.

## **Women as Clergy**

February 3, 2017

Dear Rabbi Klapper,

*In the last number of years the question of women's role in spiritual leadership in the synagogue in the Modern-Orthodox community has been a contentious issue. The issue has touched on both halakhic discussions as well public policy concerns, the pace of evolution in the halakhic community and "political" concerns related to relationships with other segments of the community. Wherever one falls on the question of the wisdom of whether move "x" or "y" should have been done at point "a" or "b" in the last five years, certain realities now exist in a number of shuls throughout North America. To that end I would like to hear your perspective, in writing, on the following questions:*

1. *On a halakhic level, do you believe that an Orthodox shul that employs a God-fearing, observant, learned woman in a clerical role, consistent with the shul's understanding of kedushat beit haknesset and within the other parameters of Orthodox halakha (e.g mehitzah, use of traditional prayerbook etc.) fully retains its status as an Orthodox shul and "mikdash me'at"?*
2. *What is your view, if the woman employed fills the exact same role as in #1 but uses the title "Maharat"?*
3. *What is your view if the woman employed plays the exact same role but also has the title "Rabba" or "Rabbi"?*

Kevod Horav X,

I am honored by the request you convey, and will do my best to convey my opinion. I hope it will be helpful as the Orthodox community ponders these weighty issues.

On issues of such moment and controversy, clarity and nuance are both vital. I will therefore begin by stating two bottom-line commitments as clearly as I can, and then proceed to nuanced analysis. Here are those commitments:

1. **It is necessary and positive for women to be hired as religious professionals in Orthodox communities. Any such role can be defined as "clerical"; therefore I oppose any blanket ban on women playing clerical roles.**
2. **It is necessary and positive for Orthodox women to attain semikhah-level competence (and far beyond) in Talmud and halakhah. Women who attain such competence must be given titles that attest to their achievement, for both practical and ethical reasons.**

And now for the nuanced analysis:

One challenge in dealing with the question as formulated is that so many of the terms used have no direct halakhic translation. For example, the category "clergy", and the term "clerical role" are English words derived from categories external to Judaism.

The question of whether hiring women to play "clerical roles" violates halakhah is therefore one of definition. Those who seek to exclude synagogues with female clergy will argue that such women will inevitably, now or in the near future, play *all* clerical roles; those who seek to include such synagogues will argue that all such roles will be tightly circumscribed in accordance with "mainstream" halakhah. The flexibility of the category even within Orthodoxy is easily demonstrated by a review of the literature about the parsonage tax privilege.

Another challenge is that "Orthodox" is not identical with "halakhically defensible". Shuls have been accepted as Orthodox that engage openly in halakhically prohibited behavior, and "Orthodoxy" can

legitimately choose to exclude synagogues for halakhically defensible behavior that it deems immoral, unethical, or unwise. Orthodoxy is a religious coalition whose parameters are legitimately determined by hashkafah, realpolitik and sociology as well as halakhah.

Mikdash me'at is somewhat different. The term is almost certainly a melitzah, but it may be one with a halakhic definition, namely that what takes place within it fulfills the obligation of avodah shebelev, and that we would encourage someone to daven there betzibbur rather than davening alone.

By way of illustration: I believe that there has been an Orthodox consensus for some time that one should rather pray alone than pray in a mixed-pew congregation, and a plausible argument that one who prayed in a mixed-pew congregation is obligated to pray again. By contrast, the famous proclamation that one should choose to not hear shofar on Rosh HaShannah than to hear it in a mixed-pew congregation is hard to justify on technical halakhic grounds, as to my knowledge no one has argued that a mehitzah is necessary for shofar-listening. Rather, that proclamation must be understood as an attempted or actual takkanah, a legislative act by prominent rabbis who believed themselves to be broadly accepted as having such authority,

There is a reasonable ongoing prudential debate as to whether the titles given to women with semikhah-level competence in Torah and halakhah should include “rabbi”, רבי, or an obvious feminine analogue such as רביה. Those in favor argue that only such titles can create the proper equal respect for Torah scholarship etc.; those opposed argue that such titles will create a presumption that women can play *all* roles currently played by male rabbis, and that this presumption is false. However, the legal arguments about whether one can give “semikhah” to someone who cannot fulfill all the roles of a “samukh” generally relate to intellectual competence, not to personal status issues such as gender, and have long been decided in practice on the side of minimal qualifications.

The prudential argument can only be settled authoritatively by a legislative act that enjoys consensus support within Orthodoxy. I am not currently aware of any such act. Therefore, while it is perfectly legitimate to oppose such titles with might and main, I think it is incorrect to say that the granting or acceptance of such titles is per se a violation of halakhah. This is true kal vachomer of newly minted titles such as Maharat.

Therefore, I think it would be greatly overreaching to declare that a synagogue that hires a woman as a member of its clergy, and calls her “rabbi”, has thereby violated halakhah, or that one who prays with a minyan in such a synagogue does not fulfill the mitzvah of tefillah betzibbur. It remains a mikdash me'at, even if one thinks it has erred. – בדידי הוה מעשה – I myself have willingly davened in such shuls, without halakhic qualms.

The question of whether it remains an “Orthodox shul”, however, is very different – one can be halakhic on an ideological island, but one cannot meaningfully be Orthodox if the rest of what one recognizes as “Orthodox” excludes you. It is also possible for such exclusion to eventually have a legislative as well as a sociological impact, and certainly more strident opponents will aim for and claim that impact.

Synagogues considering such innovations must consider the risks and rewards of their choices, as must the opponents of such innovations.

This cheshbon will necessarily be affected by one's opinion as to the qualifications, piety, and observance of the women who have assumed these titles and positions or are likely to do so in the future. If, for example, the most qualified, pious, and observant women are less likely to use the title “rabbi”, it seems foolish to fixate on the title.

I have a further difficulty with the question as formulated. You ask my opinion solely about cases where the clerical roles in question are “consistent with the shul's understanding of kedushat beit haknesset and within the other parameters of Orthodox halakha (e.g mehitzah, use of traditional prayerbook etc.” The problem, of course, is that the shul's understanding of these concepts may differ from that of those who

oppose hiring women for such roles, and its understanding, played out in practice, may have halakhic ramifications.

Note also that I have made no effort here to explicate which if any roles of the samukh or rabbi are not available to women, or to limn my own definition of kedushat beit knesset. I am in the course of addressing some of the technical issues in my ongoing series on women and *serarah*. But I want to set out here three negative principles.

1. The halakhic consensus among religious Zionists is that Golda Meir could legitimately become Prime Minister of Israel. At the least it must be acknowledged that many significant halakhic figures held this way. Any limitation on women's roles based on a concept such as *serarah* must be tested for plausibility against a sentence such as "women can be Prime Minister of Israel but not President of a Young Israel", which to me is self-evidently absurd.
2. There is no halakhic barrier to women issuing halakhic positions in areas for which they have been properly trained, and very likely there are situations in which they are obligated to do so.
3. There is no reason that women cannot play the pastoral roles that make up the bulk of the duties of the contemporary synagogue rabbinate.

In the hope that this is useful to klal Yisroel and that I have not erred in my interpretations of Torah,

Aryeh Klapper  
15 Tammuz 5776/July 21, 2016

## **Book Review of *Gender Equality and Prayer in Jewish Law* by Ethan Tucker and Micha'el Rosenberg**

Fall 2017

JOFA Journal

In *Gender Equality and Prayer in Jewish Law*, Rabbis Ethan Tucker and Micha'el Rosenberg have produced a book that is noteworthy for its integrity, accuracy, and clarity. The authors worked for many years to refine the book's content and responded to critiques with thanks and openness to revising their arguments, if not their conclusions. (Full disclosure: I am thanked for my "sharp and serious critiques and criticisms" [p. 9], ongoing from when I was a stripling Orthodox rabbinic adviser at Harvard Hillel while they were undergraduates.) The formal elements of their arguments are consciously crafted to fall within traditional and contemporary Orthodox halakhic parameters.

This hard-earned and well-deserved praise does not mean that the book ought to succeed in directly affecting the davening practices of halakhic communities, nor that it successfully justifies the gender-identical practices of current prayer communities that otherwise follow the *halakhot* of prayer. It is vital to understand why, even if the explanation is lengthy.

In Talmud *Sanhedrin* 17a, Rav Yehudah, citing Rav, states that only scholars who know how "to declare the *sherez* pure from the Torah" may be seated on the Sanhedrin. In other words, membership on the High Court was limited to those who were able to construct intellectually plausible halakhic arguments with results that contradicted explicit Torah verses. This does *not* mean that such scholars were entitled to walk into the Temple with a dead *sherez* in hand. On the contrary: It means that intellectual plausibility cannot be a sufficient basis for halakhic action, because intellectually plausible halakhic arguments are available to justify any action. Supple and open minds are necessary for *halakhah* to respond effectively to reality; authority is necessary for *halakhah* to mean anything at all.

Put differently, where there is inadequate halakhistic will, there is no halakhic way. This is true whether or not one believes that there ought to be such will and way. The key questions are what constitutes adequate halakhistic will, and what—beyond intellectual plausibility—is necessary for an argument to gain authority.

Rabbis Tucker and Rosenberg perform a valuable public service by clearing away the claim that halakhic change to the intersection of gender and prayer is theoretically impossible. (Claims of theoretical halakhic impossibility almost always reflect the intellectual horizons of the claimant rather than those of Torah.) They also make a *prima facie* case that no one has successfully articulated a convincing modern rationale for Orthodoxy's gender-differentiated practice.

This leaves them in the following position: They acknowledge that past *halakhah* has always had—and required—gender-differentiated prayer roles. (Here they implicitly exclude American Conservative Judaism from the live halakhic tradition). However, they find continuing that differentiation to be a morally intolerable signal that women are not full citizens of the Jewish polity.

To resolve this tension, they propose that communities endorse one of two halakhic moves:

1. Asserting that the rationales offered in the past for gender-differentiation would yield different or even opposite results today. Excluding women used to be a way of maximizing the honor of God or the community in a prayer context; today it diminishes honor.
2. Asserting that biological women living in progressive contemporary societies do not fall under the category of "*nashim*" found in past halakhic texts. (This would likely entail saying that such biological women are bound by *mitzvot aseh she-hazman grama*.)

Each of these moves is halakhically conceivable, but neither of them is halakhically compelling in and of itself. The real issue is whether these proposals have enough authority to legitimate action on the part of

those who buy into the underlying analysis. (The book's claims about citizenship, honor, and womanhood require separate treatment; here I am addressing those who are unalterably convinced of these claims.)

Arguments about authority tend to be inherently arrogant, circular, and off-putting. Asserting the need for great scholarship, for example, implies that the level of one's own scholarship is sufficient to judge that of others. Claiming that community X isn't *frum* enough to self-legitimate its idiosyncratic practices invites a recitation of one's own community's all-too-evident flaws. I have little expectation from the attempt, and yet I cannot simply concede the field.

Halakhic legitimacy for a given position, as I understand it, requires that it be supported by scholars with some degree of some or all of communal recognition, personal character, personal scholarship, relevant experience, sociological responsibility, intellectual persuasiveness, moral persuasiveness, and spiritual persuasiveness. (This list may not be exhaustive.) All these are evaluated within the boundaries of those who accept the authority of current *halakhah* as binding Divine Law.

This seems intuitive to me, but I recognize that my intuition is not universally shared. So here is a preliminary and inadequate effort at explication.

A fundamental assumption at the heart of Torah is that the Jewish people constitute a political community bound by religious law. Like any constitutional republic, *halakhah* limits formal political influence to those who accept the authority of the constitution and its authorized interpreters.

Those interpreters may well get it wrong; the existence of the sacrifice-brought-when-the-Sanhedrin-errs demonstrates that the Torah assumes the fallibility of its authorized interpreters, and that the Law has meaning independent of their interpretations.

As an analogy: I believe that the Supreme Court has often gotten the U.S. Constitution wrong. But I accept that its interpretations are binding law until I succeed in getting the Supreme Court to rule differently.

Of course, *halakhah* has no Sanhedrin nowadays. No one should consider granting the *Rabbanut*, the Moetzet Gedolei HaTorah, the Rabbinical Council of America, the International Rabbinic Fellowship, Beit Hillel, Tzohar, or any other existing body anything resembling that sort of authority. These groups are not representative of the halakhic citizenry as a whole, and often they are not accountable to anyone but themselves.

But we can and must maintain a middle ground between oligarchy and anarchy, or between the ideology of *da'as Torah* and the belief that everyone can decide the legal meaning of the Tradition entirely and unaccountably for himself or herself.

I acknowledge with shame that the battle, as it stands, is largely lost. The halakhic citizenry is a small percentage of the Jewish people. The overwhelming majority of Jews do not see themselves as bound by Jewish law (except perhaps, to some extent, on some issues of personal status, where the secessionists are correspondingly more impassioned). Most halakhists make their decisions in total disregard of the interests and values of the Jews who reject their own authority, let alone of those who reject the authority of *halakhah* entirely; this generates a vicious cycle of alienation. Despair would not be unreasonable, and allies are desperately needed.

There is no question that Rabbis Tucker and Rosenberg are such allies. Their book is genuinely intended to fortify *halakhah*, and to show those whose commitments on issues of gender are *a priori* that there is space for them within *halakhah*. In this I wish them all success.

However, I believe that the currently appropriate space is that of loyal opposition. The loyal opposition is entitled to keep agitating for change, but must recognize the authority of the legal status quo. But for the role to be meaningful, and therefore psychologically tolerable, it is vital that those who support the status quo genuinely listen to those who seek change, acknowledge that change is not inconceivable, and indicate

that they would themselves become a loyal opposition should change happen legitimately. Failure to do these things breeds cynicism, and then disengagement and/or rebellion.

Furthermore - if it were likely that eliminating gender distinctions in prayer would engender a mass return to general halakhic loyalty, or prevent a mass exodus, I think a way would be found. For exactly such purposes, the category *hora'at sha'ah* (emergency decree) was instituted, even if all other halakhic mechanisms were found too implausible.

But I see no evidence that existing gender-identical services attract large numbers of Jews to recognize the authority of the rest of *halakhah*, although Rabbis Tucker and Rosenberg strongly encourage and very much wish this. We are fooling ourselves if we believe that prayer issues are all that keep large segments of American Jewry from embracing *kashrut*, *taharat hamishpahah*, endogamy, and the biblical prohibition against certain male homosexual acts as binding Divine law, to list just a few issues.

We are equally fooling ourselves if we expect that creating gender-identical prayer services in response to sociologically based critiques will bring peace to those who already love and practice *halakhah* but have moral difficulties with its positions on gender. For these women and men, prayer is often a secondary issue. More often, by making it evident that *halakhah* cannot stand against the moral pressure of the times, we will undermine a fundamental basis of their observance and commitment.

In these regards, it is relevant that Rabbis Tucker and Rosenberg themselves advocate for change without accepting the legal status quo as binding. Their book evangelizes for practices that they have long since adopted themselves and implemented in communities they lead. No halakhic arguments could persuade them to do otherwise.

Why does this matter? The Halakhic system sets up different standards for evaluating halakhic arguments, depending on their relationship to existing practice. Arguments that support an idiosyncratic practice of a community that generally accepts conventional halakhic authority may need only meet the standard of *limmud zekhut*, which can hover around bare plausibility. Arguments that seek to legitimate the practice of a community that rejects conventional halakhic authority, or halakhic authority altogether, may need to be utterly compelling to overcome concerns such as “strengthening the hands of sinners”. It matters a great deal whether gender-identical prayer practices are evaluated under one rubric or rather the other.

It also matters a great deal that Rabbis Tucker and Rosenberg implemented their practices *before* developing the specific arguments in their book, and that they will continue to follow those practices *regardless* of the acceptance or rejection of those arguments by other halakhists. It seems reasonable to say that those who are not open to halakhic persuasion cannot lend personal authority to their halakhic arguments; rather, they cannot be given personal halakhic authority, at least with regard to those specific issues, until after their arguments are accepted.

I recognize that this argument can be reversed. Halakhists who require gender-differentiation, it will be argued, are as impervious to argumentation on their side as Rabbis Tucker and Rosenberg are on theirs. Perhaps no one can be granted authority on the issue outside their ideologically kindred community, and the ordinary processes of halakhah are helpless. This is how we get sectarianism, or “the Torah becoming two Torahs”.

Rabbis Tucker and Rosenberg deserve great credit for seeking to prevent or overcome sectarianism by making their argument on common halakhic ground. But this by itself cannot be a sufficient basis for success. Halakhic argumentation matters only because some arguments fail.

Moreover,

1. arguments for radical sociological change must meet a higher standard than arguments for minor sociological change, and

2. arguments for assimilating the practices or values of a nonhalakhic or failed halakhic community must meet a higher standard than arguments for the legitimacy of practices indigenous to a halakhically observant community.

In light of all the above, my best judgment is that, despite my deep personal appreciation of its authors, this book does not succeed in gaining practical halakhic legitimacy for gender-identical, or “identitarian,” prayer services.

This does not mean that such legitimacy is eternally precluded. Practical *halakhah* **is** responsive to both social change and intellectual creativity, and in general it is unwise to make absolute predictions about its course. There is no question that many men and women who are absolutely faithful to *halakhah* as-it-is would prefer that it be different. The most anyone can properly say is that he or she cannot imagine circumstances in which this or that practice would become halakhically legitimate, and that, as he or she now understands the issue, any community adopting such a practice now or in the future would be in violation of *halakhah*.

But neither God nor Torah is bound by our present imaginations, let alone by the imaginations of specific scholars. The gates of halakhic debate close rarely, if ever—and, ideally, never.

## **Mental Illness and Religious Life: A Case Study**

August 10, 2017

SBM 2017 Shaylah:

Kaila Adamah Jellison was a junior at Samuel Myerson High School when she suffered her first attack of manic-depressive illness.

*It began with exhilaration. I had always been a highly competent and painstaking student, but prone to two-dimensional readings of texts and human beings. Suddenly I could see into the depths of literature and people, made giant intuitive leaps, and everything made so much sense! I still experience the world more richly as a result of that first week. But the crash came soon after. My limbs became concrete; my mind, an uncomprehending blank. Nothing made sense; nothing interested me. Then came an obsession with death – I wandered through the local cemetery for several nights in a row writing endless morbid poems and reciting kaddish at each gravestone that seemed to have a Jewish name . . . But no one in school seemed to notice anything amiss; I still don't understand how.*

A second attack came in graduate school, soon after her marriage to Marcus. This time the manic phase led to uncontrolled spending and impulsive rule-breaking; the depressive phase almost killed her.

*I bought fountain pens – tens of fountain pens, because my ideas deserved to be expressed in perfect calligraphic form. I shoplifted some of them because the line at the store was too long. Then I started collecting wild turkey feathers and sharpening them into quills so that I could write the perfect Megillat Esther – and I did! . . . a few days later I was hallucinating, and thinking suicidally in very specific ways . . .*

A psychiatrist put her on lithium, which worked. But for several years she would stop taking the pills whenever she felt good enough for a while – the highs were too seductive, and the lows no longer seemed real. She thought she could take them in time if her moods seemed to be spiraling out of control; but she was constantly in danger of falling completely over one cliff or the other. But one day in Elul, Marcus came home to find her in the grip of a paranoid/grandiose fantasy.

*The world was out to get me; or maybe the world was broken, and only I could fix it, by repenting properly on Yom Kippur. But my whole community was conspiring to stop me . . .*

Kaila was hospitalized on 28 Ellul, in a facility well out of walking distance of any motel or Orthodox community and with no space for guests and limited visiting hours. She is prescribed medication that makes her ravenously hungry. Her doctors say that while it is almost certain that she will return to normal moods soon, having caring visitors daily will probably lead to a significantly faster return to normalcy. They also warn that this is remission, not recovery, and that this cycle will happen again unless she succeeds in staying on her meds.

As you are a close friend of the family, and an informal halakhic authority of some repute, it is not surprising that when you visited that night, both Kaila and Marcus had questions they want to ask you:

Kaila:

- 1) Is the megillah kosher?
- 2) If I blow shofar for myself, can I make the berakhah?
- 3) Should/may/must I fast on Yom Kippur?

Marcus

- 1) Can I take a cab to visit her on Shabbat and yom tov?

- 2) Our minhag has always been for her to make the hamotzi on Friday nights. Can I be yotzei with her berakhah while she is hospitalized? (Was I yotzei with her berakhot during these interim periods?)

Sometime before Pesach, with Kaila having been out of the hospital after Sukkot and medication-compliant since, she decides to write a magazine article about her experiences for the OUs Jewish Action, with the goal of destigmatizing mental illness in the Orthodox community. Jewish Action accepts the article and asks you if you're willing to write up the answers you gave her, with your reasoning, so they can either publish or link to it. They also pass on that several rabbis on their advisory board expressed deep interest in reading as fully developed a teshuvah on the questions as you can produce.

Rabbi Klapper's response:

Kaila and Marcus Jellison are an exceptional couple who deserve our admiration and gratitude. Their courage opens the space for a much-needed conversation about the spiritual and halakhic lives of the mentally ill and how they can best be included in our communities. I emphasize that we need to discuss all three aspects: halakhah, spirituality, and inclusion. My focus here will be on how halakhic deliberations and conclusions affect and are affected by all three aspects.

The halakhic tradition discusses mental disability primarily in one narrow and probably atypical context: the competence of a husband to issue a Jewish divorce. The context is narrow because divorce has no necessary connection to any other aspect of Jewish law. On the one hand, it requires an unparalleled type of mental "force" on the part of the husband. He must write or delegate the writing of the get in a fashion that imbues it with the semi-mystical quality of "lishmoh-ness". This requires his willing consent and intent, and is often understood as requiring his physical presence. On the other hand, as my teacher Rabbi J. David Bleich has noted in the context of American constitutional law, a husband can produce a valid get without having any degree of religious intent or belief, so long as he understands its consequences within the realm of Jewish law for those who accept its authority.

Divorce law may also be halakhically anomalous with regard to issues of mental disability because it involves one of the supreme ethical imperatives within halakhah: the drive to free women from marriages that provide them with no companionship. A man who is declared incompetent to divorce will generally also be useless as a husband. The less relationally competent he is, therefore, the more pressure there is to declare him legally competent *in the area of divorce*. There may be correspondingly greater reason to declare him incompetent with regard to other areas of halakhah.

This brings us back to our initial triumvirate: From the perspectives of the spiritual and communal lives of the mentally ill, what are the central halakhic issues, and how are they best approached<sup>28</sup>?

For example, Kaila and Marcus asked two questions about blessings. The first was whether she was permitted to make a birkat hamitzvah before blowing shofar for herself on Rosh HaShannah. The second was whether she could make a birkat hanehenin on behalf of herself and another obligated adult.

It is possible to approach these issues from a purely technical, although humane and clever, perspective. For example, one might suggest a *mimah nafshakh*: If Kaila is competent, then she is permitted to make a birkat hamitzvah; if she is not, then she is not subject to the prohibition against making berakhot levatalah. So either way there is no reason for a *posek* to tell her not to make the berakhah before the shofar. Or a pragmatic workaround: Marcus can mutter the blessing under his breath while pretending to fulfill his obligation through Kaila. These are perfectly legitimate practical approaches to the issue at hand, and yet they require absolutely no consideration of Kaila's spiritual life or communal place (even though they cater to her presumed psychological best interests).

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<sup>28</sup> A more complete, and yet still very preliminary, analysis of the underlying traditional texts and rulings can be found in my forthcoming Teshuvah. In this venue I will present the halakhah as I would currently decide it.

A very different approach would ask: What sort of intellectual, emotional, or religious understandings or capacities are necessary to make these blessings meaningfully for oneself, and for others? To what extent is that meaning or meanings dependent on the religious reality of being obligated, or on the religious condition of being capable of obligation? To what extent should or must halakhic categories of obligation correspond to such spiritual and psychological realities?

Let me be clear that the answer to the last question is not obvious. For example, one strand of the tradition holds that blind people are exempt from all Torah obligations despite being perfectly capable of obligation. Some modern *poskim* continue to exempt deaf-mutes from all obligations on the grounds that this exemption is a rationale-less and therefore unchangeable *halakhah leMoshe miSinai*. Rav Moshe Feinstein held (in one responsum; he appears to hold differently elsewhere) that anyone exempted from one mitzvah on grounds of mental incompetence is exempt from all mitzvot, even if they are fully competent with regard to those other mitzvot. A standard contemporary ruling is that adults with the mental age of kindergarteners are legally obligated in all mitzvot, even though they cannot be held more liable than kindergarteners when they transgress. So we have both exemptions and obligations that explicitly do not correspond to spiritual and psychological realities.

Nonetheless, I believe that it is generally best to pasken with a bias toward correspondence. We therefore must turn to Kaila's realities.

Manic-depressive illness is not explicitly discussed in Rabbinic literature. The Rabbinic term *shotah* is defined in one core discussion by a set of actions that include one that may mark depression, sleeping in cemeteries, and another that may mark mania, going out alone at night. But there is no hint of bipolarity as a defined condition<sup>29</sup>, let alone as a progressive disease with varying degrees of severity. There is of course also no discussion of its treatment, or of the status of manic-depressives in the various stages of taking effective medicines.

As SBM 2017 Fellow Shoshana Jakobovits correctly notes, manic-depressive illness is not a “secular” condition that can be evaluated in isolation from religion. Rather, at each stage it is often associated with religion. As with other mental illnesses such as obsessive-compulsive disorder, the expression of the disease in otherwise religious people is especially likely to take a religious form. Thus in our case Kaila **said kaddish** in graveyards while depressed, and **learned safrut and wrote a Megillat Esther** while manic.

We can therefore separate two questions:

- 1) What are the halakhic status and consequences of religious acts that are expressions of the underlying illness, recognizing that those actions are likely to be exaggerated expressions of “genuine” feelings?
- 2) What are the halakhic status and consequences of the religious acts of people suffering from mental illness, but which they plausibly contend are not expressions of the underlying illness?

Now we are not called on to discuss the kaddishes per se. We can presume that Kaila was aware that as a *davar shebikedushah*, the halakhah generally does not permit the kaddish to be said liturgically without a minyan present, and that in a neuronormal condition she would have abided by this halakhic restriction. It is accordingly clear that her illness is capable of causing her to violate halakhah in a manner that the Talmud likely would describe as *העבירה על דעתה*, against her actual will. It is possible that this particular expression of the disease was wholly accidental, and she might equally well have violated any other halakhah. It is also possible that her underlying halakhic inhibitions would have prevented her from violating halakhah except in service to what seemed like a necessary positive religious outpouring. If the first hypothesis is correct, it seems to me likely that she must be ruled legally unaccountable for all

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<sup>29</sup> There are a few discussions of conditions that may approximate clinical depression.

matters. If the second is correct, we must address whether this distinction can become the basis for a coherent and plausible halakhic framework.

We must also discuss whether “legally unaccountable” should or must entail “not halakhically obligated”. As noted above, modern decisors have regarded adults with Down’s Syndrome as simultaneously legally unaccountable and halakhically obligated. However, perhaps the moral pressures in that case exceed those in ours. The Talmud also records the category of the *tinok shehishbah*, the Jewish infant captured and raised by non-observant aliens. As an adult, such an infant is legally unaccountable; he or she incurs liability for one sacrifice when they first commit a sin of appropriate severity, and incurs no further liability no matter how numerous or varied their sins. Rav Moshe Feinstein in one responsum states explicitly a position that seems implicit in much contemporary psak regarding American Jewry, namely that such an adult is nonetheless treated halakhically as fully obligated, and so can for instance make birkot hanehenin for other fully obligated adults. Perhaps then Kaila can also do so even if we rule that he is legally unaccountable for all matters. One might argue that she can do so *kal vachomer*, since her unaccountability may stem from an exaggerated spiritual sensibility rather than from the absence of any such sensibility.

But here it may also necessary to distinguish the stages of illness. In OCD, for example, the religious expression has no real connection to the mitzvah; the disease just seizes on available anxieties and amplifies them generically. In severe mania, this is also the case. But there may be a hypomanic point at which this is not so, or at least not so absolutely.

Many halakhic scholars have offered variations on a legal distinction between a person who is intrinsically not obligated, and one who is obligated-but-excused. This distinction may have concrete halakhic consequences, for example whether one may say a birkat hamitzvah. The category “shotah” has been assigned to each side of this divide, and other scholars have split the category, so that some *shotim* fall on one side and other *shotim* on the other. Some scholars have offered more theological distinctions, in which people can be categorized as religiously obligated even though not halakhically obligated. Such scholars may distinguish between rational and other commandments, for example. Each of these distinctions can be seen as relevant to our case.

The question of violating Shabbat to visit psychiatric inpatients can also be the subject of profound theological/halakhic discourse. Is it considered “life-saving” to restore someone to full sanity? If yes, does that mean that the insane are not fully alive (and how does one avoid the disturbing potential moral and halakhic implications of such a statement)? However, these are all moot in the present case. An in-patient for psychosis resulting from manic-depressive illness is at non-negligible risk for self-harm at essentially every moment. Any non-negligible possibility of speeding their return to neuronormalcy has the status of life-saving, and for a patient who expresses a desire or gratitude for visitors, visiting certainly has that possibility. As there is no issue of immediacy, care should be taken to violate Shabbat in the least halakhically severe way possible, but the underlying law is clear.

To conclude: My hope is that this synopsis honors the Jellison’s courage by jumpstarting overdue conversations among both scholars and laity, and by making our communities safer and more supportive spaces for members with mental illnesses. I pray that I have not committed any errors, and encourage readers to email me with questions or correction.

# May a Chazan Lead High Holidays Services from a Wheelchair?

## Part 1

September 20, 2017

Dear Rabbi:

*Mr. Toviah Goodman has davened 1st day Rosh Hashannah Shacharit and Yom Kippur Neilah for our shul since its founding in 1993. However, he suffered several health setbacks this year, and now is in a wheelchair full time. Should he continue to serve as shaliach tzibbur, or should we replace him with someone who is able to stand?*

*Sincerely,  
The Members of the Ritual Committee, Congregation Mevakshei Psak*

Dear Ritual Committee Members,

I am answering you in writing and at length because of the broad issues involved here. I encourage you to share my answer with your general membership.

### PART 1

The question of whether physical disability might be a disqualification for the role of shaliach tzibbur (communal prayer leader) was probably first raised by an anonymous questioner to Maharam (R. Meir of Rothenburg) in the 13th century. Here is the question, with R. Meir's response, as quoted from manuscript by Maharshal (R. Shlomo Luria) in the 16th century.

וששאלת  
אם אדם שפגעה בו מدة הדין  
שנפלו לו זרעוותין  
ראוי להיות ש"ז?  
פשיטה דראוי וראוי הוא,  
ואדרבה מצוה מן המובהך,  
דמלך מלכי המלכים חפץ להשתמש בכלים שבורים,  
ולא כדרך שרים בשר ודם,  
שנאמר (תהלים נ"א י"ט) לב נשבר וג',  
דאין נפסל במונין אלא כהנים עכ"ל  
That which you asked:

*Whether a person who has been injured by the Attribute of Justice  
whose arms fell*

*is fitting to be a shaliach tzibbur?  
It is obvious that he is more than fitting  
and just the opposite – he is an ideal candidate  
since the Ultimate King wants to use broken vessels,  
unlike the practice of flesh-and-blood officials  
as Psalms 51:19 says:*

*A heart that is shattered and crushed – G-d, You will not despise.  
because no one but kohanim are invalidated by mumim (physical blemishes)*

Maharshal heartily endorses Maharam's response.

ואני אבואר אחריו למלא את דברי,  
זהה אף' ליום שעבודתנו בשירות בשיילה ובית עולם,  
אף'ה אין נפסלן אלא בקhol, כמ"ש לעיל,  
כ"ש ש"ץ שלמן.

*I will follow in his wake to add the final touches to his words*

*that even Levites, whose Service was by singing (in the Tabernacle) at Shiloh and in the Temple nonetheless were only invalidated because of vocal issues, as I wrote above all the more so our shluchei tzibbur.*

Two highly clever elements of this brief comment deserve explication.

1) Maharam's Biblical prooftext was from Psalms 51, which is introduced as David's response to the Prophet Natan's criticism of him for first sleeping with Batsheva. The opening sentence of Maharshal's sequel is a reference to 1Kings 1:14

וְאַנְּיִ אֶבְּנָא אֶחָדְךָ וּמִלְּאָתִי אֶת־זְבֻּרִין  
*I will follow in your wake to add the final touch to your words*

These are the words of Natan to Batsheva, concluding his plan to have her son Shlomoh become King David's successor. All's well that ends well.

2) Maharam simply asserted that prayer leaders are not subject to the same disqualifications as priests; but why not? Isn't prayer in place of sacrifice, as "our lips compensate for bulls"? Maharshal argues that the shaliach tzibbur does not play the same role as the kohen. He does not actually bring the sacrifice; he merely provides the atmospheric music, as did the Levites.

There are two obvious weaknesses with Maharam's argument. The first is that David is clearly not speaking of a **physically** shattered heart; he is using a metaphor, and the midrash is also using a rhetorical sleight of hand in making the comparison to flesh-and-blood kings. The second is that G-d **does** require the kohanim who perform His physical Temple service to be *mumless*, rather than preferring them to be physically broken vessels. Maharshal's clever attempt to finesse the point is not very convincing, as the shaliach tzibbur is actually the one praying on everyone else's behalf, not a mere musical accompanist.

These difficulties might be brushed aside on the basis of Maharam's authority. But did Maharam actually say this? The footnotes in the printed Maharshal (Yam Shel Shlomoh Chullin 1:48) refer one to #249 of the edition of Maharam's responsum printed in Cremona. However, the question in that edition reads

וששאלות  
 אם אדם שפוגעה בו מדת הדין  
 ראוי להיות שליח צבור?  
*That which you asked:*  
*Whether a person who has been injured by the Attribute of Justice*  
*is fitting to be a shaliach tzibbur?*

This version makes no reference to physical disability at all. The question may be whether a person who clearly has suffered Divine Justice is a fitting representative for a community seeking Divine Mercy. To which Maharam answers: If the person has a broken heart, *in other words if he has repented*, G-d is pleased with his service.

Apparently unbeknownst to Maharshal, the question about physical blemishes was asked to Rabbi Yisrael of Brona in the 15th Century (Shu"t Mahari Brona #25). He gave a very different, and somewhat odd, answer:

נשאלתי בקלהות ברונא מארץ האגר  
 אם למןotta ש"צ בעל מום ...  
 והשבתי שאין נכוון בעני,  
 רק ראייתי בא"ז שאין למןotta ש"צ בעל מום  
 ושכחתי מוקומו  
 אך נ"ל ראייה מס"פ האומר דקדושים (טז ב)  
 דמסיק בעל מום עבדתו פסולה בדייעבד ...

כיון דתפלתינו במקום קרבן,  
 שנא' ונשלמה פרים שפטינו,  
 א"כ אין נכון כל למןוטו לכתלה לש"צ קבוע,  
 אבל באקראי יכול  
 דלא גרע מסונה דמתפלל לפעמים  
 אבל היכא דלא אפשר אחר –  
 אין לבטל תפלהינו בשבל זה,  
 כיון דכלנו מתפללים ביחידים והתפלה אינן אלא מדרבנן,  
 אף על גב דכתיב שעבדתם בכל לבבכם,  
 ודרשי' (תענית ב א)  
 איזהו עבודה שהיא בלב? הוא אומר זו תפלה –  
 אסמכתא היא  
 או בעת צורה היא דאוריתא ...

*I was asked while in the community of Brona a question from Hungary whether to appoint a shaliach tzibbur who has a mum ...*

*I responded that it is not proper in my opinion*

*I have even seen in Or Zarua that one should not appoint a shaliach tzibbur who has a mum but I have forgotten the location of that ruling*

*But it seems to me that proof can be brought from the end of Talmud Kiddushin Chapter 3 where it concludes that the Service of someone with a mum is invalid even after the fact ...*

**so since our prayers take the place of sacrifice,**  
*as Scripture says "and our lips will compensate for bulls",*

*therefore it is not proper at all to appoint him in the first place as a permanent shaliach tzibbur, but this can be done on an ad hoc basis*

*as he is not worse than a blind person, who may lead prayers on an ad hoc basis but where no one else can do it –*

*we should not idle ourselves from praying for this reason, since we all pray individually now and prayer is only a Rabbinic obligation.*

*Even though Scripture writes "you must serve Him with all your hearts", and we derive (Taanit 2a)*

*What Service is in the heart? Say that this is prayer – this is a mnemonic*

*or perhaps prayer in a time of crisis is a Biblical obligation ...*

Mahari Brona takes the comparison to priests and Service seriously – but how seriously? Priests with *mumim* cannot serve ad hoc in the Temple! So it seems at least possible that his prooftexts are marshalled in support of the missing citation from Or Zarua, rather than independently sufficient arguments.

But Mahari Brona's claim to have forgotten the location of the Or Zarua is odd; at least in our editions, the seemingly relevant line appears in a collection of halakhot relating to *shluchei tzibbur*.

ציריך להיות צדיק וישר ונקי בגוף  
 ואם אינו כן עליו הכתוב אומר ...  
 הקריבתו נא לפחתך הירצך או הישא פניך.  
 והורה רב יודאי גאון  
 דשליח צבור סומא כשר והוא  
 ואין מסלקין אותו כל זמן שעמישו הגונים.

*He must be righteous and straight and naki begufo (literally: clean in his body)*

*If he is not such, Scripture says about him ... (Malakhi 1:8)*

Bring this (blemished sacrifice) to your baron – will he acknowledge you, or show you favor?

*and/but Rabbi Y(eh)udai Gaon ruled  
 that a blind shaliach tzibbur is valid,*

*and that he should not be removed so long as his deeds are proper.*

What does *naki begufo* mean? If we read Rav Yehudai Gaon's ruling about blind people as a contrast – “**but** R. Yehudai Gaon ruled” – it might mean that one's body has to be clean of *mumim*. Perhaps that is how Mahari Brona read it in his youth.

However, it turns out that Or Zarua was actually citing a Geonic responsum, and the texts of that responsum make it almost certain that *naki begufo* refers to a character trait, not a physical condition. It may have meant simple cleanliness; or, as *guf naki* came to mean regarding *tefillin*, it may have referred to specific practices regarding bathroom issues.

So what we have so far is a Maharshal endorsing a Maharam that probably, but not certainly, preferred a disabled Shaliach Tzibbur to one who had not suffered any physical ravages; and a Mahari Brona that follows an Or Zarua that almost certainly says nothing relevant.

STAY TUNED FOR PART 2 NEXT WEEK! (Spoiler: Mr. Goodman probably keeps his slot.)

## **May a Chazan Lead High Holiday Services from a Wheelchair?**

### **Part 2**

September 28, 2017

Last week we learned that:

Maharam probably prefers a disabled shaliach tzibbur to one who had not suffered any physical ravages. He states explicitly that *mumim* (any from a list of physical blemishes) invalidate kohanim and not shluchei tzibbur.

Maharshal strongly endorses the version of Maharshal's position that prefers a disabled shaliach tzibbur. Mahari Brona opposes appointing a person with a *mum* to a formal communal position as shaliach tzibbur, but he permits having such a person serve as an ad hoc prayer leader, or if there is no alternative. Mahari Brona states that he saw this position in Or Zarua, but cannot remember where. Our analysis of the most likely reference in Or Zarua concluded that it was probably irrelevant to the question of *mumim* or disability.

A few other points before we move on from Mahari Brona.

1) Maharam's case involved a physical disability that was also a formal legal *mum*. Mahari Brona only discusses formal *mumim*; disability per se is not mentioned, and it is possible that he considered it irrelevant.

2) Mahari Brona takes it as given that a blind man can serve as an ad hoc chazan. He does not cite a source. Blindness is a formal *mum*. That could have ended the discussion of *mumim*. However, Mahari Brona assumes that one can distinguish between "official" and ad hoc shluchei tzibbur, and that blind people can only serve ad hoc.

What is his basis for this distinction?

Or Zarua cites Rav Yehudai Gaon, from Sefer Miktzo'ot, as follows:

והורה רב יודאי גאון  
דשליח צבור סומא כשר הווא  
אי מסלקין אותו כל זמן שמעשי הגויים  
*Rav Yudai Gaon ruled*  
*that a blind shaliach tzibbur is valid*  
*and one must not remove him so long as his actions are proper.*

The phrase "one must not remove him" can be read as only post facto, meaning that he cannot be appointed to such a position.

However, Or Zarua also quotes a geonic responsum, as follows:

ובתשובה כתוב  
ושליך צבור סומא או זקן שזכה עיניו מרוב זקנה  
והם יודעים להתפלל כראוי  
ושאלתם  
מהו ליד לפני התיבה להוציא את הרבים ידי חובתן  
כך רأינו  
שיורדין לפני התיבה ומוציאין את הרבים ידי חובתן . . .  
*But in the response he writes*  
*A shaliach tzibbur who is blind, or one so elderly that his eyes have dimmed from great age,*  
*but they know how to daven as is fitting,*  
*and you asked*

*whether they can go down before the ark in order to fulfill the masses' obligation for them –*

*Here is how we saw it –*

*They may go down before the ark and fulfill the masses' obligation for them . . .*

This responsum seems to support blind shluchei tzibbur without qualification, and suggests that we should not read the official/ad hoc distinction into Rav Yehudai either. Indeed, Rav Yehudai Gaon can be read as making the opposite point, that not only is a blind shaliach tzibbur valid, he is every bit as good as a seeing man, and therefore should not be replaced for any reason other than impropriety.

The next major halakhist to address our issue from first principles is Chavot Yair. His responsum is very tricky to read, and I have seen scholars completely reverse its meaning! So please check my translation-with-commentary as carefully as you can, and see whether you agree that I have it right.

**שׁו"ת חווות יאיר סימן קענ**

שאלת

תמהת על אשר שמעת שהרעה בעני שהעבירותם ק"ק פלווי סומה בא' מעינו ביום הנורא'

*Question:*

*You were astonished at hearing that I was displeased that Congregation X put forward a man blind in one eye as shaliach tzibbur on the High Holidays.*

מיimi לא אמרתי דבר וחזרת לאחרי

*(Answer)*

*In all my days I have never said anything and then turned around and denied it  
(so if I had been displeased, I would certainly admit it)*

– וידעתי בני ידעת מ"ש ר"ל שהקב"ה משתמש בכלים שבורים

*I know full well that which Chazal say, that "The Holy Blessed One prefers to use broken vessels  
(meaning men with broken hearts, and one might infer that He also prefers men with missing eyes)*

ר' דמשם אין ראייה,  
זההיא לא מקרי מום ע"פ האמת, וכל לב נשרב שפיר מקרי צדיק תמים,  
מש"כ מום בגוף י"ל כל מום רע

*But there is no proof from there*

*Since (a broken heart) is not truly called a mum, and every brokenhearted man can properly be called  
"unblemishedly righteous"  
unlike physical blemishes, which are called "every bad mum".*

ומיimi לא עלה על לבי דעתול ממשום דתפלה במקומם קרבנו וכחון העובד צריך שייה בלי מום  
כמו שעלה על דעתך ואמרת

*(Nonetheless) in all my days, I never considered declaring (someone with a physical mum invalid as a shaliach tzibbur) on the ground that prayer is in place of sacrifice, and a kohen who serves (at a sacrifice) must be without any mum, (and the shaliach tzibbur is parallel to the kohen),  
as you considered and said,*

דא"כ למה לא חשיב ליה במעלות ומידות דש"ז פ"ב דתענית  
אף דזה ודאי ל"ק

*שם מירי בסותם אדם בלתי חסרון בגוף*

*because if that were so, why is mumlessness not on the list of the elevated character and traits of the proper shaliach tzibbur in the second chapter of Taanit (16a)?!*

*Although this is certainly not a dispositive question,  
since that list is dealing with a standard person, who has no physical lack (that would count as a mum).*

מ"מ לא מחשבותיך מחשבתי דברור דין לדמותו לכחן בכחה"ג,

דא"כ כל אדם גמי,

אם"ש הטור ס' צ"ח,

ועוד שהרי כתוב הרא"ש הביאו הטור ס' נ"ג  
 שאין להתרעם על חן שהוא ממשפה בזיה שטוב ל Kohan מזרע רוחקים ע"ש,  
 וכח"ג בכחן העובד לא, שהרי אמרו ר' ל' אין בודקין מזבח ומלعلا  
 ואפילו גור כשר להיות ש"ץ

*Nonetheless your thoughts are not my thoughts,*

*as it is clear that a shaliach tzibbur should not be compared to a kohen in that fashion,  
 since if that were so, every individual person also (would have to be mumless in order to pray)  
 as Tur OC 98 writes (a set of rules for individual prayer built off the analogy to sacrifices)!*

*Additionally, because Rosh wrote, and he was cited by Tur OC 53,  
 that there is no ground for objecting to a chazzan from a despised family, as it is good to bring near the  
 descendants of the distant – see there,  
 but this is not so regarding a kohen doing the Temple service, as Chazal said: “There is no need to check  
 lineage past someone who served at the Altar”  
 and even a convert (who has no family lineage) is valid to be a shaliach tzibbur (whereas obviously  
 converts can't be kohanim).*

ועם כל זה קראתי תגר כמו שכתבת

*But despite all this I did object vociferously (to the one-eyed chazan), as you wrote,*

**כי נ"ל בדבריהם והוא אמichesh מיהה היכא אחר הגון ורואו כיוצא בזה**

*because it seems to me that one should nonetheless be concerned regarding both (a chazan with a mum  
 and a chazan from a family with lineage issues) where there is another who is similarly proper and fit,*

**כי ידוע שרמ"ח איברים הם כסא ודמות לרמ"ח אורות עליונים ורמ"ח איברים רוחניים שבנשמה  
 וא"כ כל כה"ג הרי הכסא פגום.**

*because it is known that the 248 organs/limbs are the throne and image for 248 Upper Lights and 248  
 spiritual organs/limbs that are in the soul  
 and if so, in any case like (a one-eyed chazan), the throne is damaged*

**והפילוסופים כתבו בהפקד חוש מה יפקד מושכל מהו, עי' עקידה פ' שמות שער ל"ה דף צ"ז ע"ב  
 and (also) the philosophers wrote that where a sense goes dormant, some element of understanding  
 goes dormant with it – see Akeidat Yitzchak Shemot Gate 35 p. 97b.**

**וכיווץ זה כתבת במקומ אחר שאין ליתן לברך ב"הם לקטו עצבוע ואפילו למכה שחין  
 דלא עדיף זה מידיו מזוהמות דצרכן להעביר הזזה מא כבוי, קכ"א  
 ה"נ אפשר לאחר**

*I wrote similarly elsewhere that one should preferably not honor someone missing a finger with leading  
 birkat hamazon, nor even someone with boils.  
 as the latter is not better than someone with filthy hands, who has to remove the filth, as in SA OC 181 –  
 so here too it is possible to have someone else do it*

**מלבד מה שיש זהה העדר כבוד למצווה  
 ואפילו בגלה הקריבתו נא לפחתך**

*All this aside from there being in this a lack of honor for the mitzvah  
 and even in the exoteric framework, “Bring him then to your baron” (Malachi 1:8 criticizes the Jews for  
 bringing blind, lame, and sick animal sacrifices, when they would not give such to a human overlord)*

**אף כי ע"פ הנסתור יש תיל' תיל' סודות נסתרים באברי הגוף גם בפרק הידים  
 אף קצטם תמצא בהקדמה בן מהה שנה  
 יש כאן חסרון שפער בכוס של ברכה העליון  
 איך חיים בברך**

*and certainly according to the esoteric there are heaps and heaps of secrets hidden in the limbs of the  
 body and even the joints of the hands  
 you will find but a few of them if you prepare for one hundred years  
 so there is a diminution in the overflow of the Cup of the Upper Blessing*

*Yair Chaim Bachrach*

Chavot Yair rejects the application of Maharam's argument to physical blemishes (perhaps without being aware of Maharam). His rejection is perhaps based on Zohar, which emphasizes that G-d's use of broken vessels in no way contradicts the need for kohanim to be without *mumim*.

Chavot Yair equally rejects giving Mahari Brona's concern about the analogy to kohanim any halakhic weight. He makes the compelling argument that in terms of the analogy to sacrifice, there is no difference between private prayer and that of the shaliach tzibbur.

Nonetheless, Chavot Yair rules that one should prefer physically whole chazanim, to the point of making a public fuss about the issue on Yom Kippur. He does this on the basis of a broad set of arguments.

The first is that kabbalah takes the body as a metaphor very seriously.

The second is that a rabbinic philosopher claimed that the loss of a sense must lead to a fundamental loss of understanding.

The third is that the analogy to a human baron holds, and it diminishes the honor of the mitzvah to have a person with a *mum* leading it.

The question for us is how much weight to give Chavot Yair.

- 1) We might say that he has less authority than Maharam, and Maharshal. Perhaps, as he does not cite them explicitly (although he may implicitly), we can contend that he was unaware of them, and would have conceded had he become aware.
- 2) We might say that he couches his position in nonhalakhic terms, even though he clearly tried to mandate it in practice.
- 3) We might give less (or more) weight to arguments based on kabbalah
- 4) We might say that we do not accept the truth of the position he cites from "the philosophers"
- 5) We might say that social norms have changed, and in our time there would be no hesitation about sending a physically blemished person to lead a delegation to the local baron. Or we might argue that the analogy is off – in all societies delegations are often headed by elders, even if they are bringing the choicest of animal specimens as gifts or sacrifices.

Stay tuned for Part 3 soon! Shabbat shalom and gmar chatimah tovah.

# **May a Chazan Lead High Holidays Services from a Wheelchair?**

## **Part 3**

October 4, 2017

### TESHUVAH PART 3 – METHODOLOGICAL EXCURSUS

Halakhic data can be arranged synchronically or diachronically. Synchronic means presenting all positions as if they exist at the same time; diachronic means showing how positions originated, were eliminated, developed or changed over time.

A certain element of diachronicity is ineluctable in current Orthodox halakhah. We have a structure of authority that is popularly understood to give more authority to a precedent the further back it goes. This is not quite true; what is generally true is that halakhah gives more formal authority to texts from an earlier era than texts from a later era. Roughly speaking, there are four eras: Tannaim, Amoraim, Rishonim, and Acharonim.

Halakhah actually has a counter-principle known as *halakhah k'batrai*, meaning that the law follows the latest authority *within every era* in a dispute. However, this principle does not seem to operate well in the era of the Rishonim, which from a halakhic perspective ended more with a whimper than a bang. The extent to which it will operate regarding the period of the Acharonim is in question; we'd first have to settle whether that era has ended.

All these principles functioned on the presumption that the halakhic world could reasonably be understood as revolving on a single axis. Thus we speak of “the Rishonim” and “Acharonim” as if the cultural progression of medieval Judaism in Yemen and France were perfectly coordinated. Of course, this was not the case. But each culture could imagine that it was. When cultures met, either one attained dominance, or they negotiated a rough compromise, so that the presumption could be plausibly maintained.

Why should legal authority be affected by who comes first? The notion of descending authority, in Hebrew *yeridat hadorot* (which Rabbi Norman Lamm brilliantly termed “the degeneration theory”), is rooted in the sense that Torah still emerges out of the experience of Sinai, which grows more and more attenuated over time. The notion of ascending authority uses the imagery of *nanas al gabei anak*, the dwarf standing on a giant’s shoulders. Since we believe in the possibility of Redemption, progress must be possible. How can progress be possible, if we are moving further away from Sinai? The answer is that our contributions never start from scratch; we build on the advances of our greater predecessors

Standing on the intellectual shoulders of our predecessors requires us to be aware of their work. Here is where modernity and what we might call the “Standard Model of Halakhah” can come into conflict. A combination of astounding wealth and the growth of information technology means that the contemporary talmid chakham has access to a broad array of past texts and halakhic cultures that did not make it into earlier cuts of the tradition, or at least of his or her tradition.

Moreover, it is much easier than before to make a convincing argument that a later source was unaware of an earlier source, or had access only to corrupted versions of that source.

Why does this matter?

Halakhah has a category called *toeh bidvar Mishnah*, which roughly means that a halakhic ruling can be declared null and void if its author demonstrably was unaware of a relevant precedent that, had he or she known it, would or should have changed the ruling. This demonstration is difficult to accomplish directly; how can you know what you yourself would have thought, let alone what someone else would have thought? So we adopt essentially a “reasonable halakhist” standard, namely that if in our opinion a

reasonable halakhist would or should certainly have changed his or her mind, then the ruling can be declared null and void.

Now we have access to much more material of the Rishonim than any of the later Rishonim or early Acharonim did. By the formal rules of halakhah as we understand them today, this means that *halakhah k'batrai* does not apply; instead, if an acharon decides an issue differently than it was previously decided by a rishon, but was unaware of that rishon's decision – the acharon's decision is null and void, and certainly we should pasken like the rishon rather than the acharon.

All this brings us back to our specific question of the shaliach tzibbur who uses a wheelchair.

In the previous two sections of this teshuvah, we studied three strands of the tradition.

The 13th century R. Meir of Rothenburg (Maharam) probably ruled that the disabled are ideal chazzanim. We noted that his responsum exists in at least two versions, only one of which explicitly addresses disability, but thought that the version which does so is likely correct. This version, printed and heartily endorsed by Maharshal in the 16th century, is the one cited by all subsequent authorities.

The 15th century R. Israel (Mahari) of Brona conceded that there was no halakhah barring a disabled shaliach tzibbur. He nonetheless opposes appointing a disabled man as the official shaliach tzibbur, rather than to lead services ad hoc, and, all things being equal, would rather have services led by a man who has none of the physical conditions or characteristics that disqualify a kohen from serving at sacrifices in the Temple. He cites as precedent the 13th century Or Zarua, without a specific source; we were not convinced that Or Zarua took any relevant position.

R. Israel seems wholly unaware of Maharam. We can plausibly conjecture that he would have changed his mind had he known of Maharam. So on a halakhic level, we are entitled to rule like Maharam even though a later rishon ruled otherwise.

It is also true that Maharshal was unaware of Mahari Brona. However, he would likely have made the same calculation we did, and thus discount him.

The 17th century Chavot Yair agrees with Mahari Brona that there is no halakhic issue, and furthermore rejects any analogy to the Temple service. He comes up with a host of independent reasons, however, for reaching Mahari Brona's conclusion.

Chavot Yair makes a reference to a prooftext cited by Maharam, and soundly rejects its relevance, but he nowhere indicates awareness that Maharam's authority was relevant to the issue. Can we presume that he was unaware of Maharam's ruling, and that he would have changed his mind had he been aware of it? It seems to me at least as likely that he would have developed a compromise similar to that of Mahari Brona.

In the 20th century, Rabbi Yitzchak Zilberstein (Chashukei Chemed to Berakhot 39a) casually introduced an early 13th century (pre-Maharam) source that had either been overlooked or been unavailable to all previous decisors. Sefer Chasidim (Margoliot edition) #5756 reads as follows:

אחד זקן היה רגיל להתפלל ביום הקפורים  
שנה אחת לא היה חזק לעמוד (ולהתפלל בעמידה)  
אמרו מקרים  
כיוון שאין לנו כיצא בו מוטב להתפלל בישיבה,  
אמרו הזרים  
כיוון שאינו יכול לעמוד – להתפלל אחר אף על פי שאינו כל כך הגון  
פ"ן ילמדו ממנו אחרים ויתפללו מושב,  
ואשר כתוב (ש"ב ז' ו"ח) "שב (דוד) לפני ה'" –  
שב לבו בתפלה  
ואמרו במכילתין ויקחו אבן ישימו תחתו וישב עליו (שםות י"ז י"ב) –  
"יקחו אבן אלו האבות"

וישימו תחתיו אלו מעשה האבות  
וישב עליה אלו מעשה האמות  
הרי לא ישב ממש.

*An elderly man regularly served as shaliach tzibbur on Yom haKippurim  
One year, he was not strong enough to stand (throughout the prayer)*

*Some of the (?congregants?) said:*

*Since we have no one equal to him, it is best that he lead services while seated.*

*The elders said:*

*Since he cannot stand – let another lead, even though he is not as appropriate  
lest others learn from him to pray while seated*

*As for 2 Samuel 17:12, He yashav=sat before Hashem –*

*Translate instead he yashav-settled his heart in prayer.*

*and Mekhilta to Shemot 17:12 They took a rock and they placed it under him and he sat on it*

*They took a rock – meaning the forefathers;*

*they placed it under him – these are the deeds of the forefathers*

*he sat on it- these are the deeds of the foremothers*

*so (Moshe) never actually sat.*

If one takes Sefer Chasidim as a halakhic source, must we take it as halakhically dispositive? Note that Sefer Chasidim is not addressing the question of the nature of the disabled body; he is concerned with the actual inability to stand. Perhaps Maharam would concede in such a case; we cannot prove otherwise, as Maharam's case so far as we know involved a chazzan whose disability (an arm injury?) had no effect on any of the ritual of prayer. Very likely Mahari Brona and Chavot Yair would agree that this specific form of disability would pose a formal halakhic difficulty.

This week's section has treated halakhah as if it were purely a formal game – authority is determined by rules, and whoever has more authority, wins. But that is far from an accurate portrait of halakhah. What about our own intellectual evaluation of the evidence provided in precedents? What about values? Moadim lesimchah and please look for Part 4 next week.

## **May a Chazan Lead High Holidays Services from a Wheelchair?**

### **Part 4**

October 11, 2017

#### **ANSWER PART 4**

We can sum up our pre-20th century precedents as follows:

Maharam and Maharshal prefer blemished shluchei tzibbur.

Mahari Brona and Chavot Yair prefer shluchei tzibbur who are unblemished and physically whole.

Sefer Chassidim is indifferent to the question of blemishes. However, Sefer Chasidim sees disability as an issue if it prevents a shaliach tzibbur from fulfilling the prayer obligation in the manner incumbent upon, or perhaps even preferential for, people without disabilities, lest they learn from him.

In the 20th century, the question of a shaliach tzibbur in a wheelchair was addressed, whether analytically, by reporting anecdotes, or by reporting responses they received, by

1. Rabbi Ezra Batzri in Techumin vol. 4
  2. Rabbi Shmuel Toledano in Tzohar vol. 3 (5758), and again in Tzohar vol. 10
  3. Rabbi Yitzchak Zilberstein in Chashukei Chemed to Berakhot 30a
  4. Rabbi Hillel Herzl Yitzchak in Beit Hillel 35 (5768)
  5. Rabbi Yitzchak Isaac Leibes in Responsa Beit Avi OC3:38
  6. Rabbi Pinchas Toledano in Responsa Brit Shalom 3:7
  7. Rabbi Mordekhai Tzvi HaLevi Tziyyon in #8 השואל ש"ת
1. R. Batzri concludes forcefully that there is no halakhic issue so long as the community does not object, and the community ought not to object.
  2. R. Shmuel Toledano in Tzohar vol. 3 (5758) concludes that there is no issue ad hoc or when the person has a chiyuv. For Yamim Noraim, the same is true if it is clear that the congregation forgives its dignity in this regard. (However, he discourages appointing an amputee lekhatchilah for the Yamim Noraim or regularly).
- He reports that R. Wozner, author of Responsa Shevet Levi, told him that a chazan who cannot stand can be appointed for the Yamim Noraim if he is best for the tzibbur's kavvanah, and that he might remember R. Meir Shapiro, founder of Yeshivat Chakhmei Lublin, sitting while being shaliach tzibbur for the Yamim Noraim.
- In Tzohar vol. 10, R. Toledano revisits the issue and provides more fascinating anecdotes:
- a) Rabbi Moshe Shaul Klein reported that the Imrei Chayyim (Gerrer Rebbe) served as shaliach tzibbur on the Yamim Noraim while seated.
  - b) R. Chaim Kanievski distinguishes between ad hoc and regular service. The logic seems to be that the shaliach tzibbur standing is a matter of the dignity of the congregation, and the congregations is permitted to forgive its dignity only on an ad hoc basis.
3. R. Zilberstein reports that R. Elyashiv preferred a shalaich tzibbur who could stand even if that meant a decline in piety or vocal ability. He assumes that the shaliach tzibbur standing is not only an issue of the dignity of the congregation, but a fundamental requirement of prayer.
  4. In Beit Hillel 35 (5768), Rabbi Hillel Herzl Yitzchak notes that one might argue that when the Chazan is using a wheelchair, everyone will know that he is unable to stand, and there is no risk that people will

learn from him to sit. This would remove the proof from Sefer Chassidim. He nonetheless adopts the positions of Rabbis Elyashiv and Kanievski.

5. R. Leibes argued that in America, where in his perception standards had slipped, it is particularly important that the shaliach tzibbur stand. He also finds Chavot Yair's arguments compelling. Unfortunately, the specific question he is responding to is elided on Hebrewbooks.org. It seems that he believed that a shaliach tzibbur who cannot stand should not be allowed to serve on the Yamim Noraim, even if he has already been appointed and will have to be bought off financially.

6. R. Pinchas Toledano in Responsa Brit Shalom 3:7, assumes the issue is purely one of the dignity of the congregation, and concludes that a chazan whom the community desires can therefore serve, as the community may forgive its honor.

7. R. Tziyyon in Responsa HaShoeil #8 cites a wealth of contemporary poskim, of varying stature, as follows:

- a) R. Aviner strongly supported Maharam.
- b) R. Nebenzahl also ruled that there was no basis for objecting.
- c) The book Tefilah Kehilkatah rules like Maharam in principle. However, for the Yamim Noraim it prefers to follow Chavot Yair. However, if there would be a loss of human dignity in excluding someone from serving as shaliach tzibbur, he goes back to Maharam.
- d) R. Shammai Gross (following Magen Avrohom) thought that one should not follow Maharam lekhatchilah
- e) R. Elchanan Prince distinguishes between ad hoc and fixed appointment
- f) R. Eliyahu Schlesinger was opposed
- g) R. Herschel Schachter reports that Rav S.Z. Auerbach ruled the same way as R. Zilberstein's report of R. Elyashiv, and thus Rav Shimon Schwab ceased being shaliach tzibbur for Neilah in Breuer's
- h) R. Tziyyon cites Rav Ovadiah Yosef as opposed. (However, I think this report is an error, and Rav Ovadiah was referring only to a shaliach tzibbur for *keriat haTorah*.)
- i) R. Tziyyon cites the newsletter Vayishma Moshe, however, as reporting some of these same poskim very differently. For example, it cites Rav S. Z. Auerbach as saying that there is no issue if the community is agreeable, whereas Rav Schachter's report indicated a substantive opposition. It also quotes R. Chaim Wozner, son of the author of Shevet Levi, as saying that he could not imagine any Jew raising the issue against someone who wished to be shaliach tzibbur for a yahrtzeit.

Where does all this leave us?

Major contemporary poskim apparently reach conclusions ranging from unqualified paskening like Maharam to a hard lekhatchilah preference for chazanim who can stand, even if they are less pious or musical. However, none of them has given the issue a sustained treatment in print, and the secondhand or anecdotal reports are often contradictory even regarding the same posek.

From my perspective, the two figures here whose opinions might significantly change the landscape of psak are R. S. Z. Auerbach and R. Yosef. However, the former's opinion is reported in contradictory ways, and the report of the latter I think reflects a misunderstanding. So there is no controlling contemporary authority.

One option is to say that there is no real basis for adjudication here. Once all the formal arguments have been made, and all positions have survived relatively and roughly equally intact, the issue can and should be left to the lay community to decide. They may choose to ask a halakhic authority to decide for them anyway, either because leaving it to the congregation would likely lead to intracommunal dissension, or because they resonate with that halakhic authority's religious intuition. But that is their choice, and the decision would not be made on what Modern Orthodoxy generally recognizes as formal halakhic grounds.

A second approach is to evaluate the textual evidence ourselves, without regard to the weight of previous authorities. But in this case, we have already concluded that there is essentially no primary textual evidence.

A third approach is to frame the issue in terms of broader halakhic issues and values. For example, three kinds of dignity, or *kavod*, are mentioned in the responses above.

1. Kavod hamitzvah – the dignity of the commandment.
2. Kavod hatzibbur – the dignity of the congregation
3. Kavod haberiyot – the dignity of the individual human being

Key questions include:

Is there a halakhic hierarchy among these types of *kavod*? How do we evaluate their strength, and relative strength, regarding specific issues and cases?

Modern Orthodoxy often frames itself as strongly committed to the value of “inclusion”. Is this just another way of saying “*kavod haberiyot*”, or does it have different connotations and implications? How does “inclusion” play out halakhically?

A related but not identical approach is to frame the issue in terms of the experiences of the people involved. For example: Maharam prefers a disabled shaliach tzibbur since “G-d’s formal table-service is broken vessels”. Would disabled people wish to be shluchei tzibbur if that requires them to perceive themselves as “broken vessels”?

Stay tuned next week for the exciting conclusion of Rabbi Klapper’s responsum!

# **May a Chazan Lead High Holidays Services from a Wheelchair?**

## **Part 5**

October 27, 2017

### PART 5 – CONCLUSIONS

The halakhic tradition is unequivocal that disability, even a disability that would disqualify a priest from serving in the Temple, is from a purely halakhic perspective fundamentally irrelevant to serving as a shaliach tzibbur. The simplest proof of this is the universal agreement that a blind man can serve as shaliach tzibbur (so long as one adopts the consensus position that blind people are fully obligated in mitzvot).

One might nonetheless raise the technical objection that a shaliach tzibbur in a wheelchair cannot stand. However, there is no question that such a person is obligated to pray in a private capacity, and would be able to fulfill that obligation while seated in his wheelchair. There is no evidence that a shaliach tzibbur is more obligated to stand than an individual. It follows that inability to stand is not a fundamental bar to being a shaliach tzibbur.

One might nonetheless raise the concern that people who are able to stand will mistakenly learn that standing during prayer is unnecessary. This concern is found in Sefer Chasidim, and cited by some contemporary halakhists. However, it seems to me that the case in Sefer Chasidim is explicitly one of someone who had no externally obvious disability, but merely lacked strength, and therefore sat on occasion in an ordinary chair. A casual observer might therefore conclude that he was choosing to sit, and imitate his behavior. By contrast, a person sitting in a wheelchair is presumably not doing so by choice, and there is no concern that members of the congregation will mistakenly learn from him that they too may sit.

There is accordingly no question that a person in a wheelchair may serve as a shaliach tzibbur, and that the tzibbur led by such a person fulfills all their halakhic obligations.

What remains is the question of whether, all other things being equal, selecting such a shaliach tzibbur is equal, preferable, or less desirable than selecting a person who is able to stand.

Chavot Yair cites kabbalistic reasons for preferring a non-disabled chazan. I am not competent to evaluate these arguments directly. But I am comfortable saying that they carry an implication that disturbs me. So far as I can see, they relate to the nature of the prayer itself, rather than to the quality of representation. As such, they suggest that a physical disability inherently damages the quality of a person's prayer. This is directly against the position of Maharam and Maharshal. Chavot Yair cites no precedents for applying his arguments in a halakhic context. One therefore need not be *choshesh* for them in our case against Maharam and Maharshal.

Chavot Yair further claims that there is a lack of kavod hamitzvah in appointing such a shaliach tzibbur. Even those who are not kabbalists, he says, should recognize that this is parallel to Malachi's criticism of the Jews for bringing lame animals as sacrifices. If such animals were brought as gifts to an overlord, they would generate disfavor rather than favor: why should we expect G-d to act differently?

Maharam explained why – “The dignity of G-d is not like the dignity of flesh and blood”. But the truth is, Chavot Yair himself explained that it is the *tefillah* that is the sacrifice, not the *mitpallel* (pray-er). Otherwise, one would be devaluating the individual prayers of the disabled.

It is possible that Chavot Yair is not referring to G-d's reaction, but rather to that of the community: they will perceive themselves as offering G-d the moral equivalent of blemished animals, and they will therefore devalue their own mitzvot. One might also suggest, as a supplement to Chavot Yair, that there is

an issue of kavod hatzibbur in appointing such a shaliach tzibbur, meaning that **other communities** will see this community as devaluing itself.

I suggest that even if this is halakhically significant in cases where Torah is otherwise neutral, it is not true where Torah is morally committed to opposing and altering the public perception. In this case, it seems to me that Maharam and Maharshal understood Torah to have such a commitment, while Chavot Yair did not. On that analysis, I would be comfortable following Maharam and Maharshal.

The problem is that Maharam's position itself challenges contemporary sensibility regarding disability. Our social ideal is for men in wheelchairs to become shluchei tzibbur, or not, at the same rate as men on feet, and for the same reasons. We do not wish to regard disabled men as broken vessels, or for disabled men to relate to themselves as broken.

The reciprocal problem is that contemporary sensibility is also *prima facie* incompatible with the ban on kohanim with certain disabilities or blemishes serving in the Temple, and that ban is explicit in the Torah.

This difficulty can be raised against Maharam as well. As the Zohar points out, G-d bans such physically "broken vessels" from serving in the Temple, and therefore our midrash cannot be understood literally. Rather, it must refer to those with broken spirits or hearts.

Furthermore, Maharam in his teshuvah refers to the disabled man as one who "has been affected by G-d's attribute of justice", and it seems reasonable that the reason G-d's dignity is enhanced by the service of such men is that they remain attached to Him, rather than embittered against Him, despite having been punished. This too is difficult to square with contemporary sensibility.

Some have tried to resolve this conundrum by framing what I am calling "contemporary sensibility" in terms of the halakhic category of kavod haberiyot, human dignity. In other words, they seek to give our sensibility formal halakhic weight, and then to discuss our question in formal halakhic terms.

I prefer to avoid categorizing eligibility or ineligibility for public ritual roles as inherently an issue of kavod haberiyot. It seems to me that halakhah generally understands kavod haberiyot as a function of habit and reasonable expectations based on experience. Thus a *zaken* may refrain from returning a lost object if picking it up is beneath his dignity, even if a non-*zaken* would be obligated. Similarly, people can receive private tzedakah to maintain their public standard of living, even if that standard is beyond their current means, and likely even if it is beyond the means of some of those donating.

I also find it deeply problematic to define kavod haberiyot halakhically in ways that conflict with incontrovertible halakhic precedents, let alone explicit Biblical categories.

However, it is very likely an issue of kavod haberiyot to deprive people who have been accustomed to lead services of the ability to do so when they become disabled. This is the basis for Mas'eit Binyamin's remarkably emotional teshuvah about aliyot for the blind, and for contemporary discussions of whether men with colostomy bags can receive aliyot.

In our case, Mr. Goodman has become accustomed to playing this role, and so our case is comparable to standard precedents regarding kavod haberiyot. Accordingly, one can add kavod haberiyot to the grounds for permitting him to continue his role without understanding it as a universal levelling principle.

But we must be clear that it is an additional reason rather than a necessary reason. The fundamental halakhah remains that being in a wheelchair does not disqualify one from serving as a shaliach tzibbur. What we have failed to resolve is whether, all other things being equal, it is preferable to choose someone in a wheelchair, following Maharam, or preferable not to, following Chavot Yair. In the absence of such a resolution, the halakhah in fact if accidentally should track the contemporary sensibility and treat being in a wheelchair as halakhically irrelevant.

We have also failed to resolve the underlying question of the relationship between contemporary sensibility and halakhic precedent, and we have left numerous approaches unexplored. One might for example argue that in a fundamentally egalitarian society, equal treatment becomes a function of habit and a reasonable expectation. One might argue that the capacity to represent the community ritually has different significances in different societies. One might seek to embed principles of equal treatment in halakhic or hashkafic categories other than kavod haberiyot. One might argue that the weight of halakhic precedent should compel us to position ourselves as countercultural, whether in Maharam's way or in Chavot Yair's. However, none of these arguments are necessary to resolve our case, and so this teshuvah is not the proper place to evaluate them.

## The Silent Tale of a Broken Family

November 2, 2017

By Shoshana Jakobovits (SBM 2017)

There is an oddity in the verses closing the episode of the *Akedah*. After the dramatic interruption by the *mal'ach* and the offering of the ram, God blesses Avraham, and we read:

וַיֵּשֶׁב אֲבָרָהָם אֶל-גְּעֻרוֹן וַיִּקְרֹב וַיַּלְכֵד יְחִידָה אֶל-בָּאָר שְׁבֻע וַיֵּשֶׁב אֲבָרָהָם בָּבָאָר שְׁבֻע: (בראשית כ"ב, י"ט)  
*Avraham then returned to his servants, and they departed together for Be'er Sheva; and Avraham stayed in Be'er Sheva. (Gen. 22:19)*

Contrary to expectation, only Avraham is mentioned returning from *Har HaMoriah*, after the binding of his son, but we hear nothing of Yitzchak. Where was he? Did he not return? This omission is made even more glaring by its textual similarity to Avraham's promise to his servants as he left them to proceed with Yitzchak towards the mountain:

וַיֹּאמֶר אֲבָרָהָם אֶל-גְּעֻרוֹן שְׁבו-לְקַם פֶּה עִם-הַחֲמֹר וְאֶנְגַּע נַלְכֵד עַד-כָּה וְנִשְׁתַּחַווּ וְנִשְׁׁבוּבָה אֲלֵיכֶם: (בראשית כ"ב, ה')  
*Then Avraham said to his servants, "You stay here with the ass. The boy and I will go up there; we will worship and we will return to you." (Gen. 22:5)*

The word “וְנִשְׁׁבוּבָה” – and we (plural) will return stands in stark contrast to the word “וַיֵּשֶׁב” – and he (singular) returned. It really seems Avraham and Yitzchak do not return together from the binding at *Har HaMoriah*. Did Avraham's attempt to kill his son shatter their relationship?

The words of verse 22:19, “וַיַּלְכֵד יְחִידָה” is like an empty echo to the words “וַיַּלְכֵד שְׁנֵיהם יְחִידָה” – “and the two (Avraham and Yitzchak) walked off together”, which appears twice in the first part of the account of the *Akedah* (*Bereshit* 22:6 and 22:8). After the *Akedah* though, there is no more “שְׁנֵיהם” – “the two of them”, Avraham and Yitzchak do not appear to be walking side-by-side anymore; this dual father-son entity seems to be gone. Avraham goes back to *Be'er Sheva*, though he previously lived in *Eretz P'lishtim* (cf *Bereshit* 21:34). As for Yitzchak, we are not told where he goes after the tragic events of *Har haMoriah* and we do not hear of him until he meets Rivkah, at the end of chapter 24. Father and son seem indeed to have gone two separate ways.

Some commentators (like Ibn Ezra and the Radak) reject this reading and state that when Avraham is said to return, it is implied that Yitzchak is with him, but I believe the flagrant omission of the word “שְׁנֵיהם” in “וַיַּלְכֵד יְחִידָה” makes it unlikely. Several other commentators read verse 22:19 as a real separation between Avraham and Yitzchak's paths, each going their separate way, whether Yitzchak momentarily goes to the *yeshiva* of Shem and Ever (*Bereshit Rabbah*, 56:11) or ascends to Gan Eden according to Alshikh:

הנה ארץ ל' (פרק דר' א פ' ל"א) כי יש אמרו כי יצחק הלך לג' לעתרפאת מאשר היחלה הסכין לחתו ר' בו ויש אמרו למקומ אחר

*Our Rabbis said (Pirkei DeRabbi Eliezer 21) that some said that Yitzchak went to Gan Eden to heal from the knife which had started to cut into him, and some people say he went to a different place.*

A more dramatic medieval tradition, succinctly mentioned and rejected by Ibn Ezra (see his commentary on *Bereshit* 22:19) takes Avraham's returning alone to an extreme, and has Avraham killing Yitzchak on the altar, Yitzchak rising to the heavens then being resurrected later, in time to marry Rivkah.

In any case, it is striking that following the *Akedah*, Yitzchak does not appear in the text of the Torah until Rivkah comes to meet him (except as a subject in Avraham's conversation with his slave about finding a wife for his son):

וַיַּצְחַק בָּא מִפּוֹא בָּאָר לְחִי רָאִי וְהִיא יוֹשֵׁב בָּאָר חֲגַב: (בראשית כ"ד, ס"ב)

*Yitzchak had just come back from the vicinity of Beer-lahai-roi, for he was settled in the region of the Negev. (Gen. 24:62)*

All these years between the *Akedah* and meeting Rivkah, Yitzchak seems to have lived not in *Beer Sheva*, where his father goes to after the *Akedah*, nor in *Chevron*, where his mother Sarah is said to have died, but in an entirely different place: *Beer-lahai-roi*. Thus, the *Akedah* appears as a traumatic event that shatters Yitzchak's connection to his parents seemingly forever. A closer read of the first verses of the next *sidra* will reveal that an even deeper rift is dug between Avraham and his family. Not only did Avraham and Yitzchak stop seeing each other after the *Akedah*, but Avraham stopped seeing Sarah as well: we are told of no interaction between them following the *Akedah* up until Sarah's death, which happens in *Chevron*. The verses there state:

וַתָּמָת שֶׁרֶת בְּקָרִית אַרְבָּעָה הוּא חֶבְרוֹן בָּאָרֶץ כְּנָעָן וַיָּבֹא אֲבָרְבָּם לְטֹפֵד לְשָׂרָה וְלִבְּגַתָּה: (בראשית כ"ג, א')

*Sarah died in Kiriath Arba – now Chevron – in the land of Canaan; and Avraham came to mourn for Sarah and to bewail her. (Gen. 23:1)*

Where did Avraham come from? Why wasn't he beside his wife when she was about to die? Relying on the proximity between the episode of the *Akedah* and Sarah's passing occurring immediately afterwards in the text, several *midrashim* have Sarah passing away upon hearing the news of the *Akedah*. These *midrashim* miss fail to account for Avraham's traveling to *Beer Sheva* after the *Akedah* while Sarah dies in *Chevron*. I prefer to read the mentioning of these two different cities as a breakup: after having contemplated and gone through all the motions of killing their son for God's commandment, Avraham and Sarah cannot look each other in the eye anymore.

This family drama unfolds without screams, without words, without tears. We are not told of soaring fights, of heated rancor or good-bye scenes. As readers of the story of the *Akedah*, we are overflowed by sharp and disturbing theological, ethical and philosophical questions, and it is easy to overlook this silent tale of a family dismembered, of people moving away from their parents and their partners, of people so deeply traumatized by the commandment of God to kill a son, so scarred, that from now on they will meet again only in death: Avraham and Sarah at her funeral at *Machpelah* – Yitzchak, Ishmaël and Avraham at the patriarch's funeral. As if life didn't make sense, if it meant living in a world where a father is ready to sacrifice his child, and in which a mother stands idly by.

Curiously, Yitzchak does not make an appearance in Sarah's funeral. Did he not come? Is he angry at his mother Sarah for she let this happen, she didn't see the signs, she didn't stop her husband? She who had been the instigator of the eviction of his brother had not watched out for Yitzchak, had not fought for him as his father set out to kill him.

If that is so, this reading would shed a new light on the words of the Torah spoken about Yitzchak when he meets Rachel:

וַיָּבֹא אֶצְחָק קְהַלְתָּה שָׁרָה אִמּוֹ וַיַּקְרֹב אֶת-רְכָבָה וַתָּהַלֵּל אֶלָּא שָׁרָה וַיַּחַם יַצְחָק אַחֲרָיו אֲפָנוֹ: (בראשית כ"ז, ט')

*Yitzchak then brought her into the tent of his mother Sarah, and he took Rivkah as his wife. Yitzchak loved her, and thus found comfort after his mother. (Gen. 24:67)*

When Yitzchak fell in love with Rivkah, he didn't console himself from Sarah's death, but rather from her silence and her passivity when he was taken by his father for the *Akedah*, and only then, he forgave.

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## **The Primordial Covenant of Life**

October 19, 2017

By Avi Hirsch (SBM 2017)

After the Flood waters have finished receding, Hashem establishes a covenant with Noach and with his children (BeReishit 9:8-11):

ח וַיֹּאמֶר אֱלֹהִים אֶל־נָךְ וְאֶל־בָּנָיו אֶתְּנָהּ לֵאמֹר: ט וְאַתְּ הָנָנוּ מִקְּרָבִים אֶת־בְּרִיתִי אֶתְּכֶם וְאֶת־זְרַעֲכֶם אֶחָדֶיכֶם: וְאֶת־כָּל־גָּמָשׂ הַחַיָּה אֲשֶׁר אֶתְּכֶם בַּעֲזֹב בְּבָהָמה וּבְכָל־חַיָּת הָאָרֶץ אֶתְּכֶם מִכֶּל וְצָאֵי הַתְּבָהָל לְכָל חַיָּת הָאָרֶץ: יא וְקַמְתִּי אֶת־בְּרִיתִי אֶתְּכֶם וְלֹא־כְּפַרְתָּ: כְּל־בָּשָׂר עַד מִפְּנֵי הַמְּבוֹל וְאַדְּיהִיה עַד מִבְּלָשְׁתַּת הָאָרֶץ:

*And God said to Noah and to his sons with him, saying, “I now establish My covenant with you and your offspring to come, and with every living thing that is with you—birds, cattle, and every wild beast as well—all that have come out of the ark, every living thing on earth. I will maintain My covenant with you: never again shall all flesh be cut off by the waters of a flood, and never again shall there be a flood to destroy the earth.”*

Several questions emerge from this passage. First, the language of “**מִקְּרָב**” and “**קַמְתִּי**” (to establish or maintain) is unusual for the creation of a covenant. The root that is usually used in the Torah for this is “**כָּרַת**”.<sup>30</sup>i Furthermore, the classic covenant in the Torah is a two-way pact, with both parties swearing oaths to one another.<sup>31</sup> Here, we find no mention of man’s role in the covenant. Hashem’s promise to uphold life in the world by never again bringing a flood seems to be completely independent of the actions of the other party, namely, Noach and his sons. Where is the other side of the covenant?

To shed light on these questions, we will backtrack to the beginning of the Parashah, where we find another covenant between Hashem and Noach. Hashem tells Noach (6:18):

וְקַמְתִּי אֶת־בְּרִיתִי אֶתְּךָ וּבְאֶתְּלָהַתְּבָה אֶתְּהָ אֶבְיוֹר וְאֶשְׁתָּן וְשִׁׁירְבָּנָר אֶתְּךָ: “  
“And I will establish My covenant with you, and you shall enter the ark, with your sons, your wife, and your sons’ wives.”

The language here is very reminiscent of the second, post-Flood covenant. The same phrase, “**קַמְתִּי**”, “**אֶת־בְּרִיתִי**”, “**And I will establish my covenant**” appears in both passages, and both of our two questions from the later covenant reemerge here. But here there is a new, overarching question that must first be resolved: What is Hashem’s side of the pact? Unlike in the later covenant, here the text does not explicitly tell us what the agreement is that Hashem will be “establishing” with Noach upon his entering the ark.

Several answers to this question are offered by the commentaries. Ibn Ezra, for example, explains that though the text never tells us this explicitly, Hashem had, in fact, sworn to Noach that He will keep him alive during the Flood. Ramban disagrees, and suggests that Hashem’s guarantee is implicit in the next few verses; namely, that Noach, his family, and all the pairs of animals with them will survive the Flood by entering the ark.

Other commentators, such as Abarbanel and the Netziv, take a different approach entirely, explaining that there was an implicit, primordial covenant that already existed from creation. Although the exact approach here differs among the commentators, the general idea is that from the moment Hashem created Man, a covenant was implicitly created between Hashem and all of humanity upholding the life that was created. This ongoing covenant, Hashem now informs Noach, will be upheld through his survival in the ark.

<sup>30</sup> See BeReishit 15:8, 21:27; Shemot 24:8, 34:10 for some of the many examples.

<sup>31</sup> For example, Avraham and Avimelech enter into a two-way pact in BeReishit 21.

It is this primordial covenant, I think, that is upheld and reaffirmed twice in Parashat Noach, once before the Flood and once following it. This is not a new covenant that needs to be “created;” instead, it needs only to be reestablished with Noach, once before the Flood and once after.

What, then, is humanity’s role in this eternal covenant? Upon further examination, we do find a responsibility that the human must fulfill in both covenants in Parashat Noach, but in both cases, it appears before the mention of the covenant itself. Pre-Flood, Noach is commanded to build the ark in which he and the animals will be saved (6:14-16); post-Flood, Noach and his children are warned against murder (9:6). Furthermore, in both cases, Hashem details Man’s responsibility immediately prior to reassuring them of the covenant that He will uphold. And in both cases, the responsibility of the human “supports” that of Hashem: Noach must do his part to save Hashem’s creations by building the ark (which he faithfully fulfills), and Hashem, in turn, will save Noach through that ark (which He, too, fulfills); following the Flood, all of humanity is instructed not to end human life, and Hashem, in turn, swears to never again bring a flood to end human life.

Thus, both times the covenant is mentioned in Parashat Noach, it follows the same basic three-part structure: first we have an instruction to humanity to fulfill their responsibility in the covenant, then there is mention of the covenant itself, and finally Hashem’s part in upholding this “primordial” covenant is explained.

However, if the primordial covenant has existed since the creation of the first humans, we would expect to find humanity’s role in this covenant already mentioned when the first humans are created. And indeed, we do find a life-affirming commandment there (1:27-28):

כִּי יְבָרֵא אֱלֹהִים אֶת־הָאָדָם בְּצַלְמוֹ בְּצַלְמֹוֹ זֶכֶר וָקְבָּח בְּצַרְא אֶתְכֶם אֱלֹהִים וְאָמַר לְךָ  
אֱלֹהִים פָּרוּ וּרְבוּ וּמְלָאוּ אֶת־הָאָרֶץ וְכַרְשֵׁהוּ וְהִרְאֵת הַמְּלָאָכִים וְכַל־תְּחִנֵּן:  
*And God created man in His image, in the image of God He created him; male and female He created them. God blessed them and God said to them, “Be fertile and increase, fill the earth and master it; and rule the fish of the sea, the birds of the sky, and all the living things that creep on earth.”*

Immediately following the creation of man in God’s image, man is commanded to be fruitful, multiply, and fill the earth. This commandment of “פָּרוּ וּרְבוּ,” then, is man’s responsibility in the primordial covenant to preserve life.

The commandment to reproduce, of course, perfectly parallels and supports Hashem’s creation of humanity. Through this process, humanity, having been made “in God’s image,” becomes His partner in creation. While Hashem created the first humans, we have a responsibility to continue that creation.<sup>32</sup>

However, not until Parashat Noach do we find this covenant made explicit in the text. Why is Noach chosen to fulfill humanity’s role as Hashem’s partner in this covenant? Noach is one of the few individuals in the Torah to be described as a man who “walks with God” (6:9). Not only that, but until the Flood, Noach consistently fulfills Hashem’s commands immediately without pausing to question or second guess them.<sup>33</sup> Noach is, therefore, the perfect person to work with Hashem in fulfilling the covenant of life.

But the primordial covenant is eternal. All of humanity, in every generation, has a responsibility to fulfill its part in the covenant by obeying Hashem’s command to preserve life in the world. In this way, we, like Noach, will “walk with God,” becoming His partner by fulfilling His will.

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<sup>32</sup> The connection between this passage and the reaffirming of the covenant after the Flood (in BeReishit 9) is emphasized by the repetition there of both humanity’s original mission to be fruitful and multiply (9:1,7), and the nature of humanity as having been created “in the image of God” (9:6).

<sup>33</sup> See BeReishit 6:22, 7:5. In fact, until the Flood, the only thing Noach does that is not a response to an immediate command of Hashem is to have three sons, thereby fulfilling his role in the primordial covenant.

## **Teshuvah in the Age of Dataism**

September 28, 2017

By Rabbi Avraham Bronstein (SBM 2002)

In the thought of Rabbi Joseph B. Soloveitchik, *teshuvah* is inextricably connected to humanity's overriding mandate to create. "God wills man to be a creator – his first job is to create himself as a complete being," he wrote. "Man, through repentance, creates himself, his own I."

Soloveitchik's emphasis on the human ability to create and shape both oneself and one's surrounding reality echoes his own context. As Yuval Noah Harari charts in his bestsellers *Sapiens* and *Homo Deus*, the modern era has been about humanism and has seen authority stripped from external forces, whether rulers, gods, or some combination, and refocused within individuals. We see the effects of this shift in terms of politics (democracy), economics (market capitalism), and a variety of other fields.

The underlying assumption of our era, Harari notes, is the belief in the inherent integrity and dignity of individuals who possess the free will to express themselves. Increasingly, and along the same lines as Soloveitchik, this is what many contemporary Jewish thinkers came to mean by *Tzelem Elokim* – of humanity created in the "image of God." Rather than seeing *teshuvah* simply as contrition for wrongdoings, Soloveitchik saw genuine *teshuvah*, the recreation of the self, as the most profound form of *imitatio dei*.

Harari's point, though, is that these humanist assumptions were the product of their times – and times are quickly changing. Humanism is becoming obsolete, and is being replaced by what he calls "Dataism," a worldview focused on the creation and free flow of ever-increasing amounts of information that is analyzed and shared by increasingly powerful computers. Human agency is quickly becoming outstripped by biotechnology and AI that know more about ourselves than we do – and we are increasingly comfortable outsourcing control of our lives to the Cloud.

In Soloveitchik's footsteps, Rabbi Jonathan Sacks recently wrote,

*It was Judaism, through the concept of teshuvah, that brought into the world the idea that we can change. We are not predestined to continue to be what we are. Even today, this remains a radical idea. Many biologists and neuroscientists believe that our character and actions are wholly determined by our genes, our DNA. Choice, character change, and free will, are – they say – illusions.*

Sacks' foil here is the determinism and predestination at the heart of the Greek tragedies. Today, however, we are less certain about how independent our choices actually are than we have been in centuries. In particular, we are increasingly aware of the external forces that push us seamlessly in specific directions. In a world where our belief in democracy is shaken by fake news driven by social media algorithms, and our belief in market capitalism is shaken by custom-tailored Amazon recommendations and Google search results, it should be myopic to have faith in our ability to perform self-creation through *teshuvah*.

Harari himself addresses this concern. He concludes:

*If you don't like this, and you want to stay beyond the reach of the algorithms, there is probably just one piece of advice to give you, the oldest in the book: know thyself. In the end, it's a simple empirical question. As long as you have greater insight and self-knowledge than the algorithms, your choices will still be superior and you will keep at least some authority in your hands. If the algorithms nevertheless seem poised to take over, it is mainly because most human beings hardly know themselves at all.*

Read this way, our introspection during this High Holy Days season takes on special urgency. As Harari notes, the technology is improving much more quickly than our ability to adapt to it. The question of questioning who we are – really – and to what extent we are simply responding to stimuli that are carefully calibrated by a computer somewhere to generate our response is critical, even existential. If we don't want to lose agency over our own lives, this is the time to reassert control. In his Laws of *Teshuvah*,

Maimonides explains that the biblical Pharaoh, by the end, did not actually have control over his choices – the consequence for the life he had lived to that point. Likewise, the self-creation of *teshuva*h is, increasingly, all that stands between us and a passive, AI-driven journey through life.

Another avenue forward is shifting our understanding of *Tzelem Elokim* to a meaning that may survive our Dataist future. Even if we admit that we simply don't have that complete control to shape ourselves and our lives – and perhaps that was always the reality behind the curtain – being created in God's image still challenges us in a fundamental way.

Harari admits than modern science, for all its success in comprehending human responses and thought patterns, has not yet come to a satisfactory understanding of consciousness itself. Though we know which neurons and chemicals are involved, the actual feeling of transcendent love is still mysterious and awe-inspiring. Perhaps in this spirit, Rabbi Eliyahu Dessler wrote that *Tzelem Elokim* is really about the human capacity to feel compassion and empathy, and responding to others with generosity and kindness. God is not to be emulated so much as a Creator, in this reading, but as a Giver.

Our liturgy may already know this. According to one popular reading of *Unetaneh Tokef*, we assert that repentance does not affect the circumstances of our lives, but the quality of our response. Our *teshuva*h – and *avodat Hashem* more broadly – might likewise focus less on our agency and choices, and more on the strength of our human connections and relationships, and the cultivation of empathy and love.

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## Place and Displacement

July 28, 2017

By Elliot Salinger (SBM 2012, 2014)

Moshe's final speech to *Benei Yisrael* in *Parashat Devarim* possesses several remarkable features.

First, in describing *Benei Yisrael's* journey from *Mitzrayim* through the desert, Moshe chooses to begin his address not at the story's beginning but at its middle: **רַב־לְכָם שְׁבַת בָּהּ הַזֹּה.** (Devarim 1:6). Moshe's narrative begins with God's command that *Benei Yisrael* leave their place, mirroring the narrative displacement of the events that follow from their proper order in the temporal sequence. Moshe narrates the story of *chet ha-meraglim*, then *Benei Yisrael's* encounters with other nations in Transjordan, and finally the settlement there of *Reuven*, *Gad*, and *chatzi shevet Menasheh*. It is not until 4:10, in *Parashat Vaetchanan*, that Moshe describes *Matan Torah*, the events immediately prior to the departure from Sinai. Why does Moshe begin his speech *in medias res*?

Second, Moshe's speech is punctuated by asides that offer information about other peoples and places mentioned in Moshe's narrative. The first such aside comes after Moshe recounts how God warned him not to attack *Moav*, since God gave it to the descendants of Lot as *yerushah*. This triggers a rather odd aside about the history of *Moav* and *Se'ir*: **האמים לפנים ישבו בה עם גדול וברם כענקים. רפאים יחשבו אֶת הַמִּן לְפָנִים וּבְנֵי עַשׂ יְרֻשָּׁם וּשְׁמִידָם מִפְנֵיהם וַיָּשִׁיבוּ תְחִתָּם** ... **כענקים והמאבים יקראו להם אמים.** Devarim 2:10-12. Abrupt in the narrative, these *pesukim* seem discontinuous with Moshe's speech. In fact, they seem to be written not in Moshe's voice, but in the voice of the Torah's Narrator, like אלה הדברים אשר דבר. The Torah similarly notes the history of the next people that *Benei Yisrael* encounter, ארץ רפאים תהשׁב אף הוא רפאים ישבו בה **לפניהם והעמנים:** *Amon*, which was also *yerushah* to Lot's descendants: **קראו להם זמזרים עם גדול וברם כענקים וברם כענקים וירשם וישובו תחתם.** אשר עשה לבני עשו היישבים בשער (Devarim 2:20-22). And finally, after the victory over Og is discussed and *Benei Yisrael's* control of the land between *Nachal Arnon* and the *Chermon* is noted, the Torah writes, **צידנים יקראו לחרמון שריין והאמרין יקראו לו שביר.** כל ערי המישר וכל הגלעד וכל הבשן עד סלכה, (Devarim 3:9-10). Why does the Torah insert these seemingly irrelevant details into Moshe's speech?

Third, in *Parashat Devarim* the Torah's narrative voice often sounds as if it were spoken far after Moshe gave his speech in *Arvot Moav*. To use a (perhaps strained) contemporary analogy, the Torah's narrative voice sounds less like that of a journalist providing background to a recent speech than that of a historian providing scholarly commentary on an already famous address. The Torah's narration engenders this literary distance in three places, two of which were noted by Ibn Ezra. The first instance comes in the Torah's locating Moshe's speech, ב עבר הירדן, a Cisjordanian perspective on *Benei Yisrael*'s encampment. Ibn Ezra (to 1:2 s.v. *achad asar yom*) links this phrase with others in the Torah (the famous סוד השנים "secret of the years") including the *pasuk* that concludes the aside about Og: עשר מילך הבשן נשאר מיתר הרפאים הנה ערשו: ("the tenth ruler of the Geshurites remained after the other kings"), including the *pasuk* that concludes the aside about Og: עשר ברצל הלה הוא ברכת בני עמנון תשע אמות ארכה וארבעה אמות רחבה באמת איש (Devarim 3:11). This *pasuk*, the second instance of distancing, seems to reflect a temporal rather than merely geographic remove from the setting of Moshe's address. Finally, the third instance is found at the close of the first aside we considered above, concerning the history of *Se'ir*. After noting how the descendants of Esav dispossessed *Se'ir*'s previous inhabitants, the Torah concludes, כאשר עשה ישראל לאזרץ ירשותו אשר נתן לו (Devarim 2:11). Why does the Torah write at a distance from the speech it records?

I'd like to propose that these literary features serve to reinforce prominent themes of Moshe's speech. Let us begin with the first feature we noted above, the displacement of **מעמד הר סיני** in Moshe's narration. When **רַק הַשְׁמָר לְךָ וְשִׁמְרֵנִי מַד פָּתַח חֶכְמָה אֶת הַדְבָרִים:** mentioned, it appears not as merely another event that occurred in the desert, but rather within the context of exhortations to follow the Torah: (**Devarim 4:9-10**) אשר ראו עיניך ופָנֶיך מלביך כל ימי חייך והודיעתם לבניך ולבניכם ביום אשר עמדת לפני ה' אל-הַלְּהִיר בחרב 4:9-10). In postponing the discussion of **מתן תורה**, Moshe emphasizes that was not simply an

event with a beginning and end in historical time. It rather provides obligations continually, even to those who did not witness it.

The removal of *מעך הר סיני* from the linear sequence to highlight its moral significance dovetails with the temporal and spatial dislocations within the Torah's narration. Both serve to highlight the continual significance of the events in Moshe's speech to future generations of *Benei Yisrael* living in *Eretz Yisrael*. These early *perakim* of *Sefer Devarim* oscillate between the perspective of the *midbar* prior to the conquest and the perspective of *Eretz Yisrael* years after. They collect events and facts from different places in time and space, engendering a perspective above historical time.

What is the supra-historical message that the Torah wishes to convey to us? The same message that Moshe wishes to convey to *Benei Yisrael*: that their presence in *Eretz Yisrael* is contingent upon their observance of the Torah. It does not take Moshe long to begin recounting *chet ha-meraglim* and the *ma'apilim*, those who did not understand the total dependence of *Benei Yisrael*'s existence in *Eretz Yisrael* as a function of their obedience to the Divine Will. And to underscore this message, Moshe punctuates his account with comments and laments concerning his own inability to enter the Land. In fact, Moshe's beseeching God to allow him to enter *Eretz Yisrael* at 3:23-29, the start of *Parashat Vaetchanan*, marks the end of the historical narrative proper and the transition to discussing *מעך הר סיני*.

The asides serve to remind the Torah's readers of that space and time—future generations in *Eretz Yisrael*—whose fate depends on heeding Moshe's message. If they disobey the Torah, they will be removed from their homeland and exiled. It is thus especially appropriate that the asides, which create a sense of literary displacement and dislocation, largely discuss the displacement and dislocation of other peoples by the nations whom *Benei Yisrael* have dispossessed. Just as other peoples were dispossessed, and just as *Benei Yisrael* dispossessed others, so too may *Benei Yisrael* themselves be dispossessed: *כasher עשה ישראל לארץ ירשותו אשר נתן להם*.

May we merit this *Shabbat Chazon* and *Tisha Ba'av*, as we mourn our own displacements and dispossessions, to remember the lessons of Moshe's speech.

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## **Mah Tovu and the Transformative Power of Prayer**

July 7, 2017

By Rabbi Elliot Kaplowitz (SBM 2001)

One of the first prayers we teach our children is *Mah Tovu*. Though it is not part of the formal prayer services, it appears in the *siddur* and many have the practice of reciting this prayer whenever they enter a synagogue or Beit Midrash. The prayer opens with a *pasuk* from this week's parsha, uttered by Bilam when he tried to curse *B'nei Yisrael* but Hashem made words of praise come out of his mouth instead: "How goodly are your tents, Jacob, your dwelling places, Israel" (Bamidbar 24:5). The practice of reciting this *pasuk* when entering shul or a *Beit midrash* is based on the Gemara in Sanhedrin 105b which connects Bilam's stated words with these communal institutions. The Sforno explains that these communal institutions are described as goodly because they provide benefit not only for those who frequent them, but for the entire nation.

The earliest reference to *Mah Tovu* as a formal prayer is brought in Seder Rav Amram Gaon (9th Century). It is also mentioned in the Aruch haShulchan (OH 46:1). Interestingly, The Rema brings it in his *Darchei Moshe* commentary on the Tur (OH 6) but not in his glosses on the Shulchan Aruch.

While *Mah Tovu* is firmly entrenched in our liturgical tradition, I have always identified with the objection raised by the Maharshal (R. Shlomo Luria, 16th Century, Poland): "When I come to synagogue I begin with the verse "But as for me, in the abundance of Thy lovingkindness..." (Psalms 5:8) and skip the first verse "How goodly are thy tents" (Numbers 24:5) because Balaam said it [first] and he said it as a curse as we find in Sanhedrin 105b, and this is not its proper place" (*Shut Maharshal 64*). If, indeed, Bilam was evil, why are his words among the first that we teach our children? Why are they included in the *siddur*?

I suggest an answer to this question based on Yosef Albo's explanation of prayer in his *Sefer Ikarim*. Albo wrestles with the philosophical difficulty of how petitionary prayer can ever be effective if God is all-knowing? Hashem has already declared what the end result will be, and God's will does not change. Logically, then, our prayers should have no impact on the outcome. R. Albo explains that God's will does not change. However, the future outcome is determined for each individual as they are at that moment in time. The act of prayer has the power to transform the individual into a new person – about whom a different decree is possible. Because prayer is transformative, there is no more philosophical difficulty.

The structure and content of the *siddur* helps us to go through a transformation described by Albo. Throughout the *siddur* we utter the words of others – beginning with Bilam's words of *Mah Tovu*, the words of *Tehilim* composed by *David haMelech* that comprise the majority of *pesukei de-zimra*, the words of Moshe and *B'nei Yisrael* during *Shirat haYam*, etc. In one sense, we begin tefilah as a *rasha* (wicked person) deserving of punishment. If we internalize this sentiment, then our prayers will be more sincere and more passionate. The discomfort of beginning with the word of Bilam further helps us to be open to the transformative power of our prayer.

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