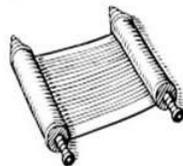


# 2018 CMTL Reader

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חרות ואחריות

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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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## From the 2018 Women's Winter Break Beit Midrash: Issues of Kavod

January 5, 2018

*Thank you to the amazing group of young women I had the privilege to learn with in WWBM this week! Here's a taste of the Torah we learned, as part of our morning seder on issues of kavod. (Afternoon seder covered responsa on the "Heter Meah Rabbonim", and night seder covered various aggadot.)*

Mosheh Rabbeinu "hides his face" the first time G-d appears to him, because his *yir'ah* prevented him from gazing at the Divine. Is this *yir'ah* praiseworthy, or blameworthy?

The Talmud and midrashim record opinions both ways. This dispute can be framed in terms of the definition of the word *yir'ah*. *Yir'ah* can mean either "fear" or "reverence". Perhaps we see Mosheh's action as blameworthy if it was motivated by fear, but praiseworthy if it was motivated by reverence.

One might contend that in this framing there is no theological dispute; the issue is only factual, what was Mosheh Rabbeinu's motive. But it is also possible that the underlying question is whether reverence would explain Mosheh's action. One side assumes that reverence is properly expressed by hiding one's face; the other assumes that this would be highly irreverent, so Mosheh's action can only be explained on the basis of fear.

In many hierarchical societies, it is considered impertinent for people of lower social status to volitionally look their "betters" in the eyes. "Hiding one's face" is a gesture of subordination. But in the same societies, *ordering* the "inferior" to "look you in the face" can be a gesture of total domination, and refusing such an order is a gesture of independence that defies rank.

This suggests that the right to privacy is a fundamental component of social standing. "Betters" have the right to presume that "inferiors" will not violate their facial privacy; and they have the right to violate the facial privacy of "inferiors" at will.

In this light, we can understand Mosheh Rabbeinu's "hiding his face" in two very different ways. Was he trying not to look at G-d, or trying to keep G-d from seeing him? The first would be praiseworthy, the second blameworthy.

We can also suggest in a Kotzker vein that the only way to see G-d is in your own *tzelem Elokim*, so that resistance to Divine Revelation is always at core resistance to truly seeing yourself, or to seeing yourself truly.

It is also the case that absolute privacy is a negative. Living with absolute privacy means living without genuine relationship. If no one *wants* to look you in the face, ordering them to do so cannot solve this problem.

Mishlei 25:2 seems to exacerbate this tension by describing both privacy and exposure as aspects of *kavod*, or dignity/honor:

כבוד אלהים הסתר דבר

וכבוד מלכים חקר דבר

*The kavod of Elokim is the concealment of things  
but the kavod of kings is the investigation of things.*

The question is why *kavod* functions differently for G-d and Man. Alternatively, we might contend that the difference is one of emphasis or degree, and that both privacy and sharing are essential elements of all *kavod*.

A dialectical framing of this position may emerge from Tehillim 45:14:

כל כבודה בת מלך פנימה

ממשבצות זהב לבושה

*All the glory of a princess is within*

*Her raiment is greater than/from among those of embroidered gold*

Embroidered gold garments inevitable bring to mind the High Priest's resplendent uniform, and the Hebrew word *penimah* similarly alludes to the High Priest's entry "*lifnei velifnim*", into the Holy of Holies, on the Day of Atonement.

The problem is that the High Priest does **not** wear his golden clothes at that point; rather, he changes into plain white. Thus the princess represents the High Priest at a higher level than when he is wearing gold.

It is vital to recognize that in this reading the princess is not praised for *remaining* within, or for isolating herself from other people. Rather, she is praised for *achieving* the inner sanctum. In other words – the *kavod* of the princess stems from her capacity to share intimacy with G-d, not from her ability to avoid relationships with human beings.

Rav Soloveitchik argues that *kavod* is a function of self-determination. This generates his radically original position that technological progress is a religious good not because it reflects better understanding of G-d's deeds, but rather because it increases the overall dignity of the human race. Integrating his idea into the schema above we can say that on the deepest level *kavod* is about the capacity to be self-determining in relationships, in terms of both avoidance and entrance. Avoidance, however, can often be achieved by raw power. Entry requires the genuine consent of the other party.

Thus far a philosophic and Biblical analysis. Can this idea be integrated into halakhic treatments of *kavod*?

Halakhah ascribes *kavod* to a wide variety of things, ranging from individual people to informal groups to formally constituted congregations to mitzvot to Torah itself. The *kavod* of one can conflict with the *kavod* of another. Conflicts between human and Divine *kavod* seem likely to be philosophically productive.

A sugya on Yerushalmi Berakhot Chapter 3 can be understood as an extended meditation on this issue. For what purposes can a *kohen* violate the prohibition against contracting corpse-*tum'ah*? Let us take as given that they can do so for the sake of burying relatives, and for burying a corpse that would otherwise lie unburied (*meit mitzvah*). What other grounds might suffice?

Two aspects of the sugya become rapidly clear. The first is that none of the extensions are justified on the basis of Biblical prooftexts. The second is that many of the possible extension are explicitly framed as "for the sake of *kavod*", and it is possible that all of them can be understood in terms of *kavod*. In other words, there seems to be an underlying intuition that *kavod* is a ground for overriding this specific halakhah. What is less clear is whether *kavod* serves here simply as an example of a halakhic prohibition, or rather that this particular halakhah is especially susceptible to being overridden for the sake of *kavod*.

We might be able to *lomdishly* frame the issue as follows. Rabbi Soloveitchik noted that a *kohen* **must** become *tamei* at the burial of a close relative, whether this is physically necessary for the burial or not. By contrast, he **may** only become *tamei* for a *meit mitzvah* if necessary for the burial. He argues in consequence that the actions have different significance. For a *meit mitzvah*, becoming *tamei* is an accidental feature of the obligation to bury. For a relative, becoming *tamei*, in other words surrendering one's capacity to perform priestly functions in the Temple, is a necessary component of mourning.

This formulation may shed light on two issues raised in the Yerushalmi.

The first is that, on the assumption that kohanim may become *tamei* at the funerals of their teachers, can they eat meat and drink wine before the burial? In other words, can they become *tamei* only if all the

obligations of close relatives, in other words only if they regard themselves genuinely as their teacher's sons?

The second is whether, on the assumption that kohanim may become *tamei* at the funeral of a *nasi*, whether they can also become *tamei* at the funeral of a *nasi's* sister. One might think that the idea makes sense only if we extend the "member of the family" conceit even further. However, the Yerushlami explains it on the basis that "the rabbis made her the equivalent of a *meit mitzvah*".

The underlying conceptual framework here may be that there are two types of *kavod*, one which stems from specific relationships, and the other which stems from the need to give *kavod* to humanity per se. Moreover, it may be that the *kavod* of humanity per se is ultimately about the need to maintain one's own dignity – no man is an island, and the loss of *kavod* for one – especially when that loss occurs in a generic fashion, such as death – is a loss of *kavod* for all. Similarly, the *kavod* of a public figure is actually the *kavod* of their constituents. The *kavod* of a teacher, by contrast, can be understood either as honoring one's own Torah heritage, or else as a genuine recognition of the value of another.

Today – the last day of the program – we'll see whether these frameworks are helpful in the context of the mitzvah of *kibbud av vaeim*. Stay tuned, and Shabbat shalom!

## Rubashkin and the Fall of the Jedi

January 12, 2018

Fantasy trilogies have a predictable structure. The first book introduces the characters, their abilities, and the conflict; the third resolves the conflict on the basis of the characters' growth or failure to grow in understanding the extent and limits of their abilities. The middle book is mostly action scenes. As with so many other forms of human literature, the origin of the fantasy trilogy is in Torah. Parshat Vaera is that middle book.

In mediocre trilogies, the middle book could easily be replaced by an index card summary of the old silent-movie type (or scrolling text). In great trilogies, the middle book makes you realize things you had completely missed in the first book, and is essential for understanding how the resolution can occur only when the hero comes to embody the initial conflict. I suggest that great trilogies are implicit midrash, and this structure can help us recover an often-missed aspect of Sefer Shemot.

I'll lead with this: The core conflict in Shemot is not between Mitzrayim and Yisroel, or between our G-d and theirs. We understand from the beginning that only our G-d is real, and Benei Yisroel take almost no active part in the destruction of Mitzrayim. (Even in the sequel, "Hashem will fight the battle for you; your task is silence".) No – the unresolved issue is whether Benei Yisroel can **deserve** redemption, or whether G-d's love for them is unjustified nepotism.

This framing is captured by a brilliant and deeply unsettling comment of Meshekh Chokhmah.

Shemot 6:13 (for the gematriists among you, the verse that sums it all up) reads:

וידבר יקוק אל משה ואל אהרן  
ויצום אל בני ישראל ואל פרעה מלך מצרים  
להוציא את בני ישראל מארץ מצרים:

*Hashem spoke to Mosheh and Aharon*

*He commanded them toward Benei Yisroel and toward Pharaoh King of Mitzrayim  
so as to remove Benei Yisroel from the Land of Mitzrayim*

Meshekh Chokhmah comments:

ייתכן כי גם אז במצרים  
היו גדולי האומה אשר היו שרים נכבדים ואפרתים  
והם היו משעבדים את בני ישראל לעבדים,  
שמכרו המצרים להם . . .  
לכן ציוה השם יתברך

שבני ישראל גם פרעה יוציאו את בני ישראל מהשעבוד.

*It seems likely that even then in Egypt  
there were greats of the nation who were honored aristocratic authorities  
and they would enslave their fellows of Benei Yisroel  
whom the Mitzriyim sold to them . . .  
therefore Hashem may He be Blessed commanded  
that Benei Yisroel **and** Pharaoh  
remove Benei Yisroel from the enslavement.*

Mosheh and Aharon have a dual mission. They need to destroy the Mitzri power structure that has legitimated systematic oppression. At the same time, they need to reform the internal Jewish structures that legitimate oppression directly through collaboration and indirectly by undercutting the moral basis of the Jewish civil rights movement.

The verse implies that their mission to Benei Yisroel was primary. I suggest that Mosheh and Aharon were not needed for the destruction of Mitzrayim, and the subsequent Exodus. G-d could have handled

those Himself, and would have done so in order to fulfill His covenant with Avraham. But He needed Mosheh and Aharon because He hoped that the Exodus would be preceded by a moral awakening.

Meshekh Chokhmah notes that our verse is followed by a peculiarly partial genealogy that cover the tribes of Reuven, Shimon, and Levi through Mosheh and Aharon. He suggests accordingly that these were the tribes that were most guilty of enslaving their fellows. In other words: Mosheh, as a prince turned civil disobedient, represents the possibility of Egyptian teshuvah. Aharon, as the *nasi* of Levi, represents the possibility of Jewish teshuvah.

In this light we can see that the key moment of Parashat Shemot – the first book – is when Mosheh’s initial idealism is spoiled by the two Jews’ fighting, and their subsequent collaboration with Pharaoh to make him an outlaw. The core conflict is whether he is right in deciding, as he does in the moment, that there is nothing to choose between the Jews and the Egyptians, and so he is best off on the sidelines in Midyan.

Readers who expect a full resolution are sadly disappointed. The very first laws G-d gives the newly constituted Jewish nation – the preamble to whose Torah/Constitution emphasizes that G-d took them out of slavery! are about the regulation of intra-Jewish slavery. Centuries later, Yirmiyahu haNavi (Chapter 34) tells us that these *bediavad* regulations were the basis of G-d’s covenant with us, and yet we could not even keep them – and so the Beit HaMikdash is destroyed, and we are sent back into exile.

So the initial trilogy is not the end of history; we’re in the middle of at least Episode 8 by now. Chazal note that each previous Redemption has been characterized by a similar form of Divine ambivalence: does it happen because we finally deserve it, or because we’ve failed so badly that we need to be extracted lest there be no basis left for trying again?

If the pattern holds, each opening to redemption comes together with an opportunity to learn from our mistakes and to finally internalize the message that G-d loves the Jews, but he hates oppressive labor practices, and He – *k’b’yakhol* – wants these two emotions to be in harmony.

So far, I think, I’ve engaged in pure Torah interpretation; the ideas I’ve put forth can be judged on their fidelity to the text of Torah and/or to the ideas of Meshekh Chokhmah. I hope that you’ll decide they are compelling interpretation, and develop your own applications, whether or not you agree with my own following application.

Mr. Sholom Rubashkin was recently released from prison. There are compelling arguments that his sentencing was both procedurally and substantively unjust. His family both loves him and needs him, and no one’s interests were served by keeping him imprisoned. Every report that I have seen verifies that he did many good and important philanthropic deeds within his home community. It is plausible that a core goal of his business was to make kosher meat more affordable, and we should be aware that his home community includes a high percentage of families that would be challenged economically even if being Orthodox carried no financial cost.

But it is also clear that Mr. Rubashkin’s business rested on a structure that allowed for and likely depended on the exploitation of workers, especially workers who were in a land not their own. He prevented unionization; he gave workers no safe avenue to complain about bosses who extorted them or sent them into unsafe working conditions; and this despite knowingly hiring employees who were desperately vulnerable because of their immigration status.

I must make absolutely clear that I am not advocating here for either looser immigration enforcement (so illegal workers will be less vulnerable) or tighter immigration laws (so that there will be fewer undocumented workers to exploit). My political analysis is that we have here (and in Israel) a “Baptists and bootleggers” situation, in which liberals and conservatives combine to create a moral situation much

worse than either's policies could independently create (the equivalent of making whiskey easily available but only from criminals). But my political analysis has no claim to be Torah.

What I am claiming on the basis of Torah is that we should be very, very wary of celebrating a Jewish redemption that is not accompanied by a profound sensitivity to labor ethics. One of the sequels to Vaera is Yirmiyahu 34.

## Commandedness and Obligation: A Philosophic Excursion/Pilpul

January 19, 2019

*Thank you to the wonderful 2018 MWBM Fellows! This week's devar Torah is rooted in our study of the meaning of commandedness.*

The Torah's *real* beginning is in this week's parshah. This is the position Rashi apparently endorses in his opening comment to Torah. "This month shall be for you the head of months" – Exodus 12:2 contains the first *mitzvah* given to the Jewish people, and that's where Torah should begin. All the preceding narratives of genesis and exile are just background.

Rashi's radical position must be based in a deep commitment to a vision of the Torah's essential nature and purpose.

One possibility is that he understands Torah as a book of law. On this understanding, his question really is why there are any narratives in the Torah, whether before or after the first Jewish mitzvah.

A second possibility is that he understands Torah as a book about the Jewish nation, and the Jewish people are constituted as a nation by being given a collective commandment. Subsequent narratives are thus essential parts of Torah; Rashi only questions why prenational narratives or laws, such as the story of Creation or the obligation to circumcise males, are included.

"The month shall be" is the ideal first mitzvah because it is not given to all individual members of the Jewish people as individuals; rather, it is a mitzvah that is incumbent on the nation as a whole, and according to the Rav, it was implemented by the Sanhedrin in their role as the symbolic representative of the nation. Moreover, the establishment of a new calendar is historically a common method of declaring cultural independence.

Ramban famously takes with great seriousness a midrashic statement that all mitzvot are essentially applicable only in the Land of Israel; G-d obligates us to keep them while in Exile only so that they will not seem unfamiliar when we are redeemed. Possibly this means that *all* mitzvot are at core given to the nation as a whole, rather than to individuals, and therefore have meaning only when and where the Jewish people have full national existence. Law and nationhood are intertwined; Israel is constituted by the commandments, and the commandments are made possible by the existence of the nation.

However, Ramban also adopts the position that the Avot kept the mitzvot before the Torah was given – but only when they were in the Land of Israel. This suggests that mitzvot have value independent of nationhood, and also that the significance of the Land of Israel resides in something other than its being our national home.

Rav Elchanan Wasserman (Kovetz Shiurim Kiddushin 1:71) explains Ramban as follows:

Every mitzvah has two components:

a) the reason for which sake we were commanded to do this.

This reason made it proper to fulfill the mitzvah even before it was commanded, as was done by the Avot

b) once we have been commanded, we must fulfill the command of Hashem.

However, this is true only in the Land, but outside the Land there is merely a command to act in accordance with the personal obligation, because the reasons for mitzvot apply only in the Land, and therefore the Avot did not fulfill the Torah outside the Land.

Rav Wasserman contends that mitzvot have rationales, or intrinsic meaning, for all individuals. He further contends that these rationales apply only in the Land of Israel, but does not seek to explain why this is so. Here we must note that for Ramban the Land of Israel is not necessarily a physical location rather than a state of consciousness. For our purposes, the key outcome is that the fact that mitzvot are

commanded creates an obligation to fulfill them even where the rationale for the commandment does not apply. Why should this be so?

Rav Aharon Lichtenstein held that the essence of Judaism is the construction of a commander-commanded (*metzaveh-metzve/ah*) relationship between G-d and human beings. Thus mitzvot fulfill a purpose even when they have no purpose. However, Rav Lichtenstein strongly resisted Professor Yeshayahu Leibowitz's contention that mitzvot have no purpose other than establishing such a relationship. Rav Wasserman would hold like Professor Leibowitz outside the Land, and like Rav Lichtenstein inside.

Rav Lichtenstein's position further explains why mitzvot have to be commanded even inside the Land – it is the fact of commandedness that establishes the desired relationship. Following the mitzvot because they are the right thing to do, or because G-d wants you to do them, or because they are the right thing to do and G-d wants you to do the right thing, would not generate a commander-commanded relationship.

But (why) is such a relationship the ideal?

In contrast to Rav Lichtenstein, some thinkers from both the Mitnagdic and Chassidic worlds appear to present commandedness as a *bediavad*, as a necessary evil or first-step that we should aspire to transcend. In their view, the Avot did not lack anything religiously because they were not commanded. All human beings ideally would intuitively understand G-d's Will and act in accordance with it; they would have no need to be commanded.

This position seems to contradict Rabbi Chanina's maxim that "greater is one who is commanded and does (*metzve/ah veoshe/ah*) than one who is not-commanded and does".

Rabbi Chanina's maxim plays a very complex role in contemporary Orthodoxy. On the one hand, the fundamental theological divide between Orthodoxy and liberal streams of Judaism is about whether heteronomous authority can ever be justified; where Orthodoxy differs is in the profound significance it gives to *tzvui*, commandedness. On the other hand, the existence of mitzvot regarding which men but not women are commanded causes great consternation for those committed to the ontological and axiological equality of the genders, and even for those who simply believe that women have a justice-right of equal access to Heavenly rewards.

Rabbi Barukh Teomim-Frankel (18th century: Chiddushei Barukh Taam to Rosh HaShannah 28a) suggested that autonomous and heteronomous action each have unique virtues, and a Jew should aspire to achieve both. His model is Mosheh Rabbeinu, who sought to enter the Land so that he could become obligated in those mitzvot which halakhically obligatorily, or commanded, only in Israel. Rabbi Teomim-Frankel contends that Mosheh sought thereby to have it both ways – he would be voluntarily becoming commanded, and indeed, G-d responds by promising that he will in any case receive rewards parallel to those of the uncommanded Avot and of the commanded post-Sinai Jews.

This contention should yield a very different attitude toward the aspirations of some women to become obligated in *mitzvot aseh shehazman garman* than is currently regnant in much of Orthodoxy. We could debate whether those aspirations are achievable – Mosheh Rabbeinu was not allowed into Eretz Yisroel – but concede that regardless they are noble.

A different approach within Rav Lichtenstein's framework is to say that the commanded/commanded relationship should be seen holistically rather than as constituted granularly and separately by each individual commandment. The number and extent of commandments is irrelevant, so long as it is more than zero.

One problem with this approach is that it seems to suggest that a human being's relationship to G-d is not enhanced when they convert to Judaism. Why should going from "7" to "613" matter? The likely answer is that the term "mitzvah" has more than one definition, and the Torah is commanded in a different way

than the Noachide commandments. The 20th century work Shiurei Rav Shmuel to Makkot 9a even suggests that non-Jews can change their relationship to the Noachide commandments by formally accepting them as obligatory.

A potentially intriguing notion is that there are many different kinds of non-commanded relationships to mitzvot. For example, Rabbi Moshe Feinstein in Igrot Mosheh OC 2:25 suggests that while non-Jews are not **commanded** to pray, they are nonetheless **obligated** to pray. This is because prayer is an expression of belief in G-d, and belief in G-d is a necessary condition for commandedness. Therefore, the fact of being commanded about anything depends on a prior obligation to act in accordance with one's belief in G-d.

Rabbi Feinstein opens up the possibility that Jewish mitzvot as well can fulfill religious obligations even when performed by those who are not commanded.

Perhaps the practical difference between “commanded” and “obligatory” is that “commanded” actions can be significant even when performed without specific religious intent, or *kavvanat hamitzvah*, whereas obligatory actions must be performed in the consciousness that they express a core idea.

We can bring this dvar Torah full circle by suggesting that “commandedness” is needed for nation-building. Since it is aimed at interhuman relationships, it requires objective action – everyone doing the same thing – rather than religious intent. “Obligation”, by contrast, is wholly individual and aimed at human-Divine relationship, and therefore can be fulfilled only by actions undertaken with religious consciousness.

Much more can be said, and greater halakhic and philosophic rigor would be needed to say anything with confidence. But I hope this brief essay makes a plausible case that there are more ways to conceive of the relationship between Heaven and Earth than you previously thought, or dreamed of.

## Did Egyptian Daughters Die During the Plague of the Firstborn?

By Davida Kollmar, SBM 2014

January 19, 2018

As an oldest child whose father is also a firstborn, I always wondered why he had to fast on Erev Pesach for Taanit Bekhorot and I didn't. It is commonly assumed that the reason why firstborn men fast is to commemorate the fact that they were saved during Makkat Bechorot and were not killed along with the Egyptian firstborn. So does the common practice of women not to fast indicate that the firstborn Egyptian women were saved?

Shemot 11:4 and 12:29 tell us that every Mitzri בכור dies during the plague. בכור is masculine, but this by itself is not sufficient evidence, as the Torah often uses the masculine when not specifying gender.

Rav Ovadiah Yosef in Yechaveh Daat 3:25 discusses whether women should fast on Taanit Bekhorot. He quotes opinions both ways and cites Midrashic proof for both sides, beginning with the side that says women should fast:

ונראה שסוברים כדברי המדרש (שמות רבה פרשה י"ח סימן ג'):  
וַיָּךְ כָּל בְּכוֹר בְּמִצְרַיִם רֵאשִׁית אוֹנִים בִּאהֲלֵי חָם – שאפילו נקבות בכורות מתו,  
חוץ מבתיה בת פרעה, שנמצא לה פרקליט טוב, וזה הוא משה שנאמר בו וּתְרָא אוֹתוֹ כִּי טוֹב הוּא ע"כ.  
אולם מדרשים חלוקים הם בדבר, כי בשמות רבה (פרשה ט"ו סימן י"ב) איתא:  
שֶׁה תַּמִּים זָכָר – על שם שהוא הרג בכורי מצרים וחס על בכורי ישראל ע"כ.  
וכתב בחידושי הרש"ש שם:

משמע מכאן שלא נהרגו אלא בכורים זכרים ולא נקבות, וחולק המדרש הזה על הפסיקתא שאומר שגם בכורות נקבות מתו. וכן הוא בשמות רבה לקמן.

*It seems that they hold like the Midrash (Shemot Rabbah 18:3):*

And he smote every firstborn in Egypt, the first-of-their-strength in the tents of Cham – [the redundancy of firstborn and first-of-their-strength teaches] that even the firstborn women died, except for Bityah the daughter of Pharaoh, because she had a good advocate, Moshe, as it says: And she saw him, that he was good.

*But other Midrashim disagree, because in Shemot Rabbah (15:12) it says,*

An unblemished male sheep – [the Pesach sacrifice is male] because he killed the firstborn of Egypt and took pity on the firstborn of Israel.

*Rashash writes in his novellae there:*

*This implies that only male firstborns were killed and not females, and this Midrash disagrees with the Psikta that says that female firstborns also died, and also with the Shemot Rabbah below.*

In summary, some Midrashim say that the daughters were killed, and others that say they were not. Neither position cites direct or compelling evidence. Are there deeper reasons for saying that the women were killed, or that they were not?

Let us assume that each of the Ten Plagues were Middah KeNeged Middah, in some way poetic or actual justice. Makkat Bekhorot is nonetheless unique in that the reason for the plague is stated in the Torah:

### **שמות ד: כא-כג**

וַיֹּאמֶר יְקֹוֹק אֶל מֹשֶׁה בְּלִכְתָּךְ לָשׁוּב מִצְרַיִמָּה רְאֵה כָּל הַמִּצְפִּיתִים אֲשֶׁר שָׁמַתִּי בְיָדְךָ וְעָשִׂיתָם לִפְנֵי פַרְעֹה וְאָנִי אַחֲזַק אֶת לְבֹו וְלֹא יִשְׁלַח אֶת הָעָם:

וְאָמַרְתָּ אֶל פַּרְעֹה כֹּה אָמַר יְקֹוֹק בְּנֵי בְּכָרֵי יִשְׂרָאֵל:

וְאָמַר אֵלֶיךָ שִׁלַּח אֶת בְּנֵי יִשְׂרָאֵל וְתִמְאַן לְשִׁלְחוֹ הִנֵּה אֲנִי הֹרֵג אֶת בְּנֵי בְּכָרֶיךָ:

### **Shemot 4:21-23**

*Hashem said to Mosheh, When you go to return to Egypt, see all of the wonders that I put in your hands and do them before Pharaoh. I will harden his heart and he will not send out the nation.*

*And you should say to Pharaoh, "Thus said Hashem, 'My firstborn child is Israel.*

*And I say to you: Send out My child and he will serve Me! If you will refuse to send him out, behold I will kill your child, your firstborn.”*

The firstborns of Egypt are killed because Egypt oppressed the firstborns of Hashem. But what does it mean to be Hashem's firstborn? Rashi gives two explanations:

בני בכרי – לשון גדולה, כמו (תהילים פט כח) אף אני בכור אתנהו, זהו פשוטו.  
ומדרשו: כאן חתם הקב"ה על מכירת הבכורה שלקח יעקב מעשו:

My firstborn child – [firstborn] is an expression of greatness, as it says (Tehillim 89:28): “And I will make him a firstborn” (since physical birth order cannot be changed, this proves that bechor can refer to acquired greatness.) This is the Pshat.

*The Drash is: Here Hashem put his stamp of approval on the sale of the firstborn-ness that Yaakov bought from Esav.*

I suggest that Rashi's two explanations tie in to the dispute about whether the daughters were included in the plague of the firstborn.

According to his Midrashic explanation, the term בכור here is used in a technical legal sense, meaning the child who inherited land and who performed priestly services. It seems likely that women were excluded from the plague. However, according to Rashi's Pshat explanation, women would be included in the plague, because G-d referred to the entire Jewish people as His firstborn.

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## How Did the Midrash Know that Nachshon Jumped Into the Sea First?

By Rabbi David Fried, SBM 2010

January 25, 2018

The splitting of the Red Sea is a classic story we have learned since childhood. The Jewish people are trapped, the sea on one side of them, and the Egyptian army on the other. They begin to cry out to God and to Moshe. Moshe assures them that they have nothing to worry about. They should just wait calmly and God will save them (Shmot 14:10-14). God, on the other hand, is not so sure of this. Yes, God will split the sea, but first the Jewish people need to take the first step and begin travelling into it (Shmot 14:15-16). The Jewish people are uncertain and afraid. Finally, Nachshon ben Aminadav, the *nasi* of the tribe of Yehudah, has the courage to jump in. When the water is up to his neck, the sea splits, and the rest of the Jewish people follow in after him. Of course, that last part does not actually appear in the text. It is introduced first in the Mekhilta (*Beshalach Mesekhta de-Vayehi Parshah 5 s.v. Va-yavo'u benei*), and then in the Talmud Bavli (Sota 37a). One could suggest that they were recording an earlier oral tradition, but the fact that there are other opinions recorded as to the identity of the person who jumped into the sea first strongly militates against this possibility.

Nachshon, at first glance, seems like an extremely minor character. There seems to be nothing out of the ordinary about his character that would set him apart from the other *nesi'im*. What could possibly have led the Midrash to identify him as the one who jumps into the sea?

The Torah lists the tribes three times within the first two chapters of the book of Numbers. The first two relate to the taking of the census. The third is when the tribes are setting up their camp around the *Mishkan*. The first two lists are more or less in the order we would expect, roughly in age order with Reuven first. In the third list, when they are setting up camp and preparing to travel to Canaan, all of a sudden the tribe of Yehudah is in the leadership position.

Then something strange happens. The next time Nachshon is mentioned is in chapter 7, with the *korbanot* of the *nesi'im* on the day the *Mishkan* was set up. This story seems out of place, both chronologically and thematically. Exodus 40:17 states that the *Mishkan* was set up on the first day of the first month (of the second year in the desert). It is clear that it is occurring prior to the census from chapter 1 that took place “On the first day of the second month (Bemidbar 1:1).” Furthermore, the Torah recorded the various sacrifices that were brought at the inauguration of the *Mishkan* at the end of Shmot and the beginning of Vayikra. Why is the Torah suddenly returning to that topic here?

Strikingly, the order in which the *nesi'im* bring their *korbanot* is identical with the order that tribes were camped around the *Mishkan*. There does not seem to be any logical explanation for why the same order would have been in place a month earlier.

Understanding the significance of this requires looking at information we know from elsewhere in the Torah about the day the *Mishkan's* setup was completed. Recall the events of that day from the book of Vayikra. After Aharon places various sacrifices on the altar, his sons Nadav and Avihu attempt to bring an incense offering. A fire comes out of the *Mishkan* and instantaneously consumes them (Vayikra 9:22-10:2). It was supposed to be a day of happiness and celebration of Divine acceptance. Instead the day was forever marred by the death of Nadav and Avihu. They desired to bring an offering in the newly inaugurated *Mishkan*, made some mistake in the procedure, and were struck down by a miraculous fire in the presence of the entire people. The memory of that event was no doubt indelibly etched into the collective memory of the Jewish people.

Set in this context, the offerings of the *nesi'im* take on new meaning. The last people to bring an offering in the *Mishkan* do not get it exactly right and are struck down by God. God instructs Moshe to have one *nasi* bring their offering each day (Bemidbar 7:11) but does not instruct him in what order they should bring them. They must have been terrified. None of them wants to risk making a slight mistake and

winding up like Nadav and Avihu. Finally, Nachshon takes the plunge, so to speak, and volunteers to go first.

This story is virtually identical to the story the Midrash told us about Nachshon's conduct at the Red Sea. The Midrash is thus able to identify who would have had the character to be the first one to jump into the sea when everyone else is afraid. This Midrash answers our exegetical questions about Sefer Bemidbar as well. As stated above, chapter 7 seems both chronologically and thematically out of place. Based on this Midrash, we can explain that chapter 7 is a flashback to explain why Yehudah was chosen to lead the people towards Canaan back in chapter 2. It was because their leader, Nachshon ben Aminadav, had the courage and trust in God to offer the first sacrifice when everyone else was afraid, which the Midrash highlights by transposing it into the story at the Red Sea. In typical Midrashic fashion, of course, it tells us a story that depends on the analysis, and leaves it up to the reader to figure out the analytical process on their own.

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## Who Gets a Vote in Orthodoxy?

January 26, 2018

Once upon a time the financial and religious elites discovered that they had shared interests. Each of them also felt unjustly tied down by a democracy with broad suffrage, like Gulliver among the Lilliputians. So they made a deal to support a constitutional amendment that would make eligibility to vote depend on having adequate property and education.

This is not a Marxist fable, but rather a sh'eilah asked to Rabbi Menachem Mendl Krochmal in the seventeenth century. Here is the complete text of the question (Shut Tzemach Tzekek (hakadmon) #2):

*I was asked  
by a community whose practice forever has been to reach all communal decisions regarding the  
hiring/accepting of a rabbi, chazan or shamash  
on the basis of agreement of all taxpayers.  
Similarly, they chose heads and representatives of the community, and the gabbaim, and the beadles, on  
the basis of a lottery among all taxpayers.  
Now some of the dignitaries of the city wish to establish a new practice,  
that all communal matters will no longer be directed by all taxpayers great and small, as has been the  
case up until now,  
but rather at the direction of those who are distinguished because they pay a great deal in taxes, or else  
that they are distinguished in Torah.  
They wish to decide how much one must pay in taxes in order to be among those who count when  
determining whether the community has accepted a representative, or to stand as a candidate for the  
positions chosen by lot,  
or at the least to require that a person be ordained as a chaver even if he is among those who pay the  
least in taxes,  
so that people who are not bnei Torah and also pay little in taxes will be excluded from the lottery.  
They offer this rationale for their words:  
Since most communal needs involve decisions about spending money,  
how can it be proper that the opinion of the poor should be equal to that of the rich?! Also, how can it be  
proper that the opinion of an am ha'aretz should be equal to that of a chaver, if he has no advantage in  
wealth?!  
They add a further peg for their words,  
that all the great and important communities practice thus, and why should they be less than them?!  
But the poor, the masses of the people, cry out  
asking why their rights should be diminished when they pay their taxes and give their fair share,  
and even though the rich give more,  
still the little the poor give causes them more hardship than what the rich suffer by giving more.  
The poor add  
that the current practice is a continuous ancestral custom from days of yore,  
and since custom can even uproot law, how can it be permitted to alter custom?!  
Let our teacher instruct us as to whose position is legally correct.*

Rabbi Krochmal's answer begins with an idealistic defense of the poor's equality. His tag line is the concluding Mishnah of Masekhet Menachot:

*Scripture writes regarding the olah animal offering "a burnt sweet savor";  
and regarding the olah bird offering "a burnt sweet savor"  
and regarding the flour offering "a burnt sweet savor" –  
to teach you that the one who brings more and the one who brings less are equal  
so long as the person directs his intent toward Heaven.*

Rabbi Krochmal's argument lays bare the awkwardness – really the indefensibility – of the anti-democratic coalition. What sense does it make to equate financial and religious superiority? This is obviously a power play with no underlying moral consistency! Political voice should be proportional to religious sincerity, and since the relative size of one's tax bill is no measure of sincerity, there is no basis for giving the rich more political voice than the poor.

But Rabbi Krochmal is not just an idealist – he is also an honest halakhist, and a realist. As an honest halakhist, he acknowledges that there is halakhic precedent for giving those who pay more a larger voice in how the money is spent. As a realist, he acknowledges that the rich must be given some advantage in a democratic system, or else they will overturn it completely. So he devises a compromise that should be very familiar to Americans – a bicameral popular assembly, in which no legislation or appointments pass unless they command majority support among both the rich and the poor.

So much for the economic elites. But Rabbi Krochmal's rejection of their argument seems to strengthen the hands of their strange religious bedfellows – if political power should be proportional to religious sincerity, shouldn't *chaverim* have more say than *amei haaretz*?

Here is Rabbi Krochmal's response:

*As for their desire to push aside those who are not bnei Torah – this is also not proper  
The proof of this is from Chagigah 24a:  
“Which tanna takes the risk of animosity into account? Rabbi Yose, found in the following beraita ...  
Said Rav Pappa:  
Which tanna justifies our practice today of accepting testimony from amei haaretz? Rabbi Yose”  
and Rabbi Yose's rationale (in that beraita) is “so that people don't each go build private altars”.  
So it is clear that we even accept testimony from amei haaretz out of fear of animosity  
lest when they see that we are distancing them, they build altars for themselves  
All the more so in our case,  
if we go so far in distancing the amei haaretz as to not include them in communal deliberations  
certainly they will feel antagonistic toward us, and they will build altars for themselves  
and they will separate from the community,  
and as a result divisions will multiply among the Jews, G-d forbid.  
Therefore it is not proper to do this.*

One can distinguish between Rabbi Krochmal's case and the situation of American Orthodoxy today. One can outright reject his ruling. But there is a strong case that he is halakhically correct, and that his law applies directly to our facts. So the burden of proof rests on those who disregard him.

I suggest that Orthodox discourse – within our denominational community, on its margins, and with the Jewish community as a whole – would be dramatically improved if it started from two core principles of his responsum.

The first principle is that people react to being excluded by leaving and “building altars for themselves”, and that halakhic authorities have a responsibility to prevent this. A corollary is that when people are building altars for themselves all around us, we need to figure out what we're doing wrong, and change it, rather than blaming them.

The second principle is that it is legitimate and proper to bend halakhah in order to keep marginally observant people from leaving – not by justifying their nonhalakhic practices, but by treating them as full community members for other purposes, perhaps especially with regard to credibility.

I invite comments and discussions that test whether and how accepting these principles can generate positive change in our rhetoric and policies.

## Teaching Hashkofoh

February 2, 2018

What should Modern Orthodox high schools teach their students to believe, and about belief? These questions are brought into sharp relief by the data from Rabbi Dr. Zvi Grumet's recent survey of graduates. Among his key findings are large gaps between what graduates think they were taught to believe, and what they believe now; and a correlation between such gaps and declines in halakhic observance.

Rabbi Dr. Grumet deserves enormous credit for raising critical issues in a substantive and nonpolemical fashion. Now we need to have real conversations about how to teach hashkofoh.

Let us take this week's parshah as a starting point. One of my beit din colleagues often asks conversion candidates: "What happened at Sinai?" Educators should ask each other, and themselves: How would you answer this question? How would you want your children or students to answer this question? Should they all give the same answer, or even the same kind of answer? Do you want them to give the same answer at 25, or 55, as they did when they were 15 years old?

Conversion candidates who were raised Catholic often talk about being turned off by a sense that key theological questions were out of bounds (they experience Orthodoxy in all its manifestations as much more open, in ways that can astonish those of us who have always lived within Orthodoxy), and they often cite their inability to believe critical dogmas as a key impetus for leaving Catholicism. What can their experience teach us about our own pedagogy (bearing in mind that dealing with conversion in the US naturally gives one disproportionate exposure to the failure of other religious educational systems)?

One mode of theological education can be termed "catechistic". Students are taught to memorize verbal formulas, and to affirm belief in those formulas. Understanding the formulas is a secondary goal. Sometimes, especially where the formulas are consciously designed to bridge mutually exclusive positions, or to contain paradoxes, deep understanding is *davka* not a goal for many teachers and institutions.

A very different mode can be termed "inductionist". In this mode, students are not taught beliefs qua beliefs, or that belief per se is a goal. Rather, they are immersed in a way of life, and encouraged to discover what beliefs are necessary to make that way of life meaningful.

These modes can be reframed in a specifically Jewish context as "Maimonidean" or "Alboistic" approaches to the concept of *ikkarei emunah*, or root principles of faith. Maimonideans see the willingness to affirm specific propositions as a necessary (and perhaps sufficient) condition for preserving a Jew's automatic share in *Olam Haba*. Alboists think it necessary to understand which propositions must be affirmed for the structure of Torah and mitzvot to stand in this world.

Alboists can concede that some non-*ikkar* propositions are nonetheless sine qua nons for a share in *Olam Haba*, and Maimonideans can concede that some *ikkar* propositions have no reverberations whatsoever. The difference between them is not necessarily about which propositions one ought to believe. It can be about whether the purpose of education is getting students to *Olam Haba*, or rather about enabling them to live with meaning in this world. Maimonideans may also believe that the only meaning this world has is as a vestibule in which to earn *Olam Haba*, while Alboists may find it difficult to fathom how a meaningless life can deserve an infinite sequel.

While Maimonideans and Alboists can be in complete substantive agreement about what Jews should ideally believe, their differing priorities will generate substantive differences in terms of what sorts of mistakes they will tolerate educationally, and what sort of theological latitude they give students.

Let us go back to Sinai. A Maimonidean might focus on having students affirm that every letter of the Torah today is exactly the same as the text that Mosheh wrote in a scroll at G-d's dictation after descending from Sinai. Furthermore, while Mosheh was on top of the mountain, G-d taught him every

possible true interpretation of Chumash. Mosheh then taught all these interpretations to the Jewish people, creating a live and comprehensive oral tradition that continues to this day. There is nothing new in Torah, although things can be forgotten and then rediscovered.

An Alboist might focus on the goal of having students relate to the Torah as a text worth studying so intensely and rigorously that even changes in orthography deserve attention. Students should find that the study of Torah through the lens of Rabbinic literature yields interpretations that consistently resonate with their souls in ways that no other interpretations can. Students should find it necessary and rewarding to bring all aspects of their being to bear on the study of Torah, including their creativity.

I emphasize again that we are discussing strategies, not ends. It may be that only students who believe in literal Divine dictation will relate to the text with ultimate intensity and rigor; that only students who believe that all of Rabbinic tradition was included in the original Revelation will find it a uniquely meaningful mode of study; and that only students who believe that all true interpretations were already given can use their creativity to uncover G-d's intent rather than their own desires in the text.

I also need to make clear that these strategies are not opposed and incompatible. Students are unlikely to arrive at these kinds of meaningfulness purely by induction, without having their models and mentors expressly state their own beliefs. Different approaches are likely to work better with different students. It may be possible and advisable to use different modes for conveying different beliefs. Furthermore, propositions may move into and out of the Alboistic *ikkar* framework, depending on external pressures and internal plausibility structures.

And – students' plausibility structures and sensitivity to external pressures change over time, as do their intellectual and spiritual capacities – hopefully for the better, at least for a very long time. These inevitable changes have implications for both Alboistic and Maimonidean educational contexts.

In my humble opinion – a fundamental error made by many Modern Orthodox schools is that they educate their students *ba'asher hem sham* – as they are now, without sufficient thought for whether and how what they teach will age as their students grow.

For example – imagine a high school which teaches its students that the truth of Orthodox Judaism is logically demonstrable. Every teacher affirms this, and experts are brought in occasionally to demonstrate or refute specific arguments, say in the fields of geology or cosmology or cryptography. If the school is at all competent at what it does, a strong majority of its students will graduate believing what it wants them to believe, with confidence and intensity.

Some of these graduates will go on to academically strong secular colleges. In those colleges they will meet very smart people who do not find the truths of Orthodox Judaism logically demonstrable; who are unimpressed by the arguments and evidence of the high school experts; and some of whom seem to be really good people. A high percentage of these graduates will have crises of faith, and many of them will go OTD. Is that their fault for choosing secular college, or the fault of their school or developing in them only a weak and cloistered virtue?

Secular college is a bugaboo. What about high schools which teach students that the text of chumash is unquestionably and perfectly what Mosheh gave us – “kol haTorah shemetzuyah atah b'yadeinu hanetunah leMosheh Rabbeinu”, only to be devastated in yeshiva by the one-letter difference between Ashkenazic and Sefardic scrolls, or the Rav Akiva Eiger on Shabbat 5b that lists all the places where the Talmud seems to have a different text than we do? There are academic and theological explanations for each of these that are compatible with the formulation in the *ani ma'amins*, but will students be able to accept them if they feel betrayed?

Issues of historical fact are rarely the key questions. What about schools that teach their students that there is a clear answer to why bad things happen to good people, or that great Torah scholars always show

excellent character and judgment? These beliefs are likely to be falsified by experience later in life, and what will happen to their graduates then?

Most of our students will experience doubt and uncertainty at points in their lives. The *ani ma'amins* are generally aspirational rather than descriptive, or we would live in a very different world. Many or most of them will also have long or short periods in which the practice of yahadut does not consistently provide them with meaning. We need to educate in a way which will enable them to get through these periods without despair. They need beliefs that can sustain their commitment when experience doesn't, and experiences that can motivate them when belief wavers.

Bottom line: We do not necessarily want Orthodox adults to believe religiously exactly what they believed when they graduated high school. (We should not want this in any other field either.) Recognizing this should have a significant impact on the way we teach hashkofoh.

## Charity vs. Security: A Jewish Analysis of a Moral Policy Question

February 9, 2018

Does Judaism require relatively well-off people to give alms-collectors access to their homes and neighborhoods, even if this increases the risk of crime? In a recent Facebook exchange with me, Jewish social activist Aryeh Bernstein argued passionately that it does. He cited as evidence a Talmudic passage on Bava Batra 7b, and the 13th century Spanish commentary of Rabbi Meir Abulafia (Yad Ramah) thereupon.

I grew up in a dangerous neighborhood. Every apartment had multiple locks plus a security rod set into the floor; all first floor and fire escape windows were barred; even car windows and doors were kept locked and closed at all times when riding. Anything less was an invitation to robbery and violence. So Aryeh's position struck me as implausible.

But I love and respect his eagerness to bring Jewish texts to bear directly on contemporary social issues. I share his concern that zoning and safety laws are sometimes abused to protect the rich from having to realize that the poor exist. Moreover, one of the core values and virtues of halakhic Judaism is that we cannot dismiss arguments rooted in traditional texts simply because we find them implausible; we have to engage the texts ourselves. So let's read Aryeh's arguments, and then the texts, and see if his claim stands up.

Here are Aryeh's words:

*"[This] implies a position that the obligations of people with means toward people lacking means do not apply if the other people with means in the neighborhood have reason to believe that that help endangers them. In that light, how do you read Bava Batra 7b, which takes for granted that Eliyahu haNavi cut off a relationship with an otherwise pious person b/c he installed a gate-house, which, as Rashi explains, cut off poor people? And not only does it accept this story at face value, but it imbues it with enough halakhic import as to put significant oqimtot on the mishna there which normalizes construction of gatehouses, insisting that it's acceptable only if it is not actually locked and does not cut off poor people? How do you read the Yad Ramah there with regard to security concerns overriding concerns of the poor having access? [Here Aryeh inserted an excerpted version of Yad Ramah.]"*

I contend that his argument is wholly mistaken with regard to Bava Batra 7b, and that he has simply misread Yad Ramah. Let's learn them together.

Mishnah Bava Batra 7b rules that residents of a courtyard can be compelled by majority vote to pay for the construction of a gatehouse. It records a minority opinion that this is true only for those courtyards that abut a heavily trafficked space.

Majority rule applies only to improvements, and it follows the Mishnah must consider a gatehouse to be an improvement. The Talmudic editor challenges the Mishnah on the basis of a story.

*There was once a pious man who was regularly visited by Elijah.  
When he built a gatehouse, Elijah ceased to visit him.*

The challenge assumes that morally odious constructions cannot be considered improvements for the purposes of this law. Therefore, since Elijah's displeasure indicates moral censure, a gatehouse cannot be considered an improvement. Why, then, does the Mishnah consider it one?

The Talmud responds by distinguishing among gatehouses. The relevant distinctions are whether the gatehouse is built inside or outside the courtyard entrance; whether the gatehouse has a door at its entrance; whether the door has a lock; and whether the lock is on the inside or the outside. Texts and

commentators differ as to which factor or combination of factors make the gatehouse an improvement, and which make it odious.

Why would a gatehouse be odious? Rashi explains that Elijah objected because “it is a barrier to the poor, who shout but their voices are not heard”. So there is no question that the poor need to have vocal access to the courtyard. What about physical access?

Why would a gatehouse be an improvement? Rashi explains that it serves “so that the guard of the entrance can sit there in the shade and distance the public from looking into the courtyard”. In other words, the assumption throughout is that the courtyard has a guard at its entrance who will prevent outsiders from gaining entrance.

Do those outsiders include the poor? Rashi explains that a gatehouse built outside the courtyard entrance is fine, but one built inside “is a worsening, because the door of the courtyard is locked and the poor person shouts but the gatehouse within blocks his voice”. An external gatehouse is not problematic, so long as it is openable from the outside, because the poor can still shout from the courtyard entrance. This is true even though the courtyard entrance itself is locked.

In other words: No one considers allowing any outsiders physical access to the courtyard, let alone to the private dwellings that surround it. There is properly a locked door to prevent that, and also a guard. However, even if the guard sits in a gatehouse outside the courtyard so as to discourage voyeurs, he must still allow the poor to stand at the entrance and shout for alms.

A courtyard is a collection of private dwellings surrounding a shared public space. The best modern analogy is a condo apartment building, or perhaps a gated community. To satisfy Elijah, it seems that there must be an intercom system to which the poor have access. No one suggests that the owners must give the poor physical access.

Rashi’s explanatory framework seems to be almost universally accepted. The exception is Rabbi Abulafia, to whom we now turn.

Yad Ramah does not mention a guard. He also contends, in contrast to Rashi, that an internal gatehouse is never problematic. Presumably he is not worried that the internal wall will have a serious acoustic dampening effect. An external gatehouse is problematic only if it has a door that cannot be easily opened from the outside.

Here Rabbi Abulafia wonders: How is an external gatehouse which can be easily opened from the outside an improvement? If the poor can get in, can’t thieves and robbers get in along with them?!

His response is that we are discussing a case in which the courtyard itself has a door that locks from the inside.

But, he continues, if the gatehouse serves no security purpose, what use is it?!

He answers that even an openable door discourages animals and casual passers-by from entering – on other words it protects against vermin and violations of privacy.

So Rabbi Abulafia agrees with Rashi that a courtyard can physically exclude the poor; that Judaism insists only that they must be given vocal access to the rich; and even then only to their shared courtyards and not their private spaces.

I can see numerous ways to plausibly distinguish the Talmudic case from many of the cases that raised Aryeh’s ire. For example:

1. a neighborhood is not a courtyard, and nothing in the Talmud suggests that the poor can be barred from any public street
2. the weather is much more severe in the contemporary Midwest than in the ancient Middle East, so that shelter is concomitantly more necessary, and people are less likely to spend time outdoors in their courtyards.
3. The poor are generally less integrated into society than they were, and we need to compensate for that by giving them greater access.
4. Surely it matters how much risk is entailed in giving the poor how much access.

These distinctions can serve to defend his social policy position against the Jewish sources he cited. But to the extent those sources are relevant, they directly oppose his position.

## Does Judaism Recognize the Notion of Systemic Injustice?

February 7, 2018

*The Jewish Press*

Shemot 22:20-22 are consecutive verses banning *ona'ah* against specific persons.

*The ger – you (singular) must not oppress him and you must not torment him.  
Every widow and orphan you must not oppress.  
For if you oppress, yes oppress him . . .  
When he cries, yes cries to Me  
I will hear, yes hear, his cry.*

Verse 20 forbids tormenting a *ger*, while verse 21 forbids oppressing a widow or orphan, and verse 22 forbids tormenting a (male singular) pronoun. Verses 20 and 22 are addressed to a singular you; verse 21 to a plural you. Verse 20 also forbids the oppression of a *ger*.

There are fundamentally three possible approaches to these differences:

1. they are random variations for literary interest
2. each formulation is substantively different, and each nuance applies to both the *ger* and the widow/orphan.
3. each formulation is substantively different, and each applies specifically to the class of people mentioned in its own verse.

Ibn Ezra's two commentaries on Chumash, put together, offer an overall perspective. In the Short Commentary, he tells us that the *ger* – defined as a resident alien, not as a convert – is utterly vulnerable because he has no family base. Every citizen has the capacity to oppress him financially, or in his home, or to torment him by means of perjured testimony. In the Long Commentary, he notes that the widow and orphan are the domestic equivalent of *gerim*. Then he adds: "After it uses the plural to forbid oppression, it switches to the singular, because anyone who sees a person oppressing the orphan and widow without helping them, is also considered an oppressor".

We can unpack Ibn Ezra as follows.

Legal systems – even Divinely ordained legal systems – are subject to manipulation by people with power and connections.

Therefore, even those participating in such a system have the obligation to be *upstanders*, not bystanders. A system can create justice only for those wholly inside it; how those inside it relate to others will inevitably be a question of character, not of rules.

Rabbi Samson Raphael Hirsch addresses the same textual issues in a subtly but crucially different way.

*"According to this it appears, that the Torah first commands the state, lest it be cruel to the ger. The state must not practice oppression toward the ger. Because of his being a ger – do not impose upon additional obligations, or yield him fewer privileges than the citizen, and do not torment him. Do not limit him in any way with regard to his doing work or making a living. From Bamidbar 22:25 and Melakhim Bet 6:32 we learn that the term "torment" refers primarily to a limitation of place, an imposition of pressure. Thus the prohibition is "Don't impose pressure on him and don't limit him".*

*"You (plural) do not oppress them" – In most states, aliens are distinguished for worse treatment, and their rights are curtailed on the basis of the law. Therefore the Torah commanded the state, as a unified entity, when in the previous verse it forbade you (singular) from oppressing the ger. On the other hand, it is difficult to find a system of laws that permits curtailing widows and orphans. However, in*

*relationships among the members of a society, such people, who lack representatives, support, and mentors – are given over to curtailing and demeaning. Therefore the Torah turns to the society first and says: “You (plural) must not oppress them” – you must not take advantage of their weakness to do evil to them; you (plural) must not cause them to feel the suffering of their situation”.*

For Rav Hirsch, in contrast to Ibn Ezra, the moral risk posed by having a legal system cover noncitizens is not that individuals will oppress the *ger* – rather, it is that the system itself will become corrupted in practice, even if its origin is Divine.

There are two ways to address Rav Hirsch’s concern.

The first is to ensure that the legal system claims no power over anyone but full citizens, or alternatively, by granting full citizenship to anyone who falls within its jurisdiction. Unfortunately or otherwise, neither of these has proven practical in history. They lead to efforts at ethnic cleansing on the one hand, and forced conversion in the other, and yield horrific immorality and cruelty with no net gain.

The second way is to be constantly alert to, and suspicious of, claims that the only way to raise up citizens is to lower non-citizens. In a sense, it means making such discrimination a constitutional matter, rather than one that can be overridden by legislative or executive whim.

None of this means that societies must allow unlimited numbers of non-citizens to immigrate; or that a society does not have the right and need to defend itself against non-citizens who reject the fundamental mores and basis of the state. The path from moral principle to moral policy is rarely straightforward. But the path from lack of moral principle to immoral policy often is straightforward.

## Drawing Near, Standing Back

By Jenna Englander, SBM 2015

March 2, 2018

Imagine a young chaplain intern in her first week on the job. She walks into the old age home where she works and she is nervous, but ready. She's ready to dig into the depths of her spiritual training and talk about pain, mortality, maybe belief in a higher power in the face of approaching death. She walks into the first room, and says "Hi, my name is Jenna, I'm a chaplain here. How are you doing today?"

"Well," responds the elderly woman from her bed, "not great. They were supposed to bring me my lunch at noon. You can see it's 12:15 and they still aren't here! They always forget. I keep pressing the button but of course no one comes."

This throws the chaplain. She's not here to talk about mealtimes, but this woman seems quite distracted and unwilling to talk about anything else. So she goes off in search of a nurse. Eventually she finds one, the desired lunch is brought, and she turns back to the woman and says: "Now, would you like to talk about how you are doing today?"

You see my mistake, yes? I didn't need to grab this woman a sandwich, and I didn't need to ask her how she was *really* feeling- within 10 seconds of walking in the door, she had told me clearly and honestly, what her primary spiritual concern was. "They were supposed to bring me my lunch and they haven't! They always forget. I keep pressing the button but of course no one comes." What this resident needed was someone to say, "It sounds like you are feeling ignored. That must be really frustrating." We can imagine the depth of connection and spiritual exploration that could have been opened up with a sentence as simple as that.

Now if ever anyone needed a good listener, it was the Jewish people in the desert. Sometimes, thank God, there is a chaplain or a friend or a mental health professional available when we need one, and we should all be makpid to seek one out when we need. But sometimes, you are wandering in the desert and there is no chaplain available. Sometimes, you get Aharon.

Aharon is dealing with a Jewish people that is feeling lost and scared without their leader. They come to him and say: "Make for us a god, because this man Moshe who brought us up from Egypt, we do not know what has happened to him." Bnei Yisrael ask for a god, and Aharon is so busy figuring out what to do about that, that he misses the depth of their next statement, he loses track of their primary concern: we don't know what has happened to Moshe.

The Rosh picks up on this. Bnei Yisrael, he says, didn't want an idol so that they could do avodah zara, chas v'shalom. As Ramban said, even an idiot would have to realize that the gold they had just taken out of their ears and made into a calf that day couldn't possibly have taken them out of Egypt. Rather, says the Rosh, they were looking for something to replace their guide, the person who connected them to God. What they really needed was for someone to say: "It sounds like you are feeling abandoned. You are far from home and do not know where your leader is. That must be terrifying."

Yeshivat Maharat requires each student to complete a chaplaincy unit. This offers us the chance to develop the fundamental, yet incredibly difficult human skill of knowing how to be present with and spiritually care for another person.

One of the tools I learned in chaplaincy training is how to listen for the patient's "primary concern," the spiritual issue that is most alive for them at the moment. The primary concern can sometimes be hard to pinpoint- it doesn't have to be defined by the patient's illness or background, so it requires an open ear and an open mind to catch it. The patient often hints at the primary concern early on in the conversation, sometimes before you are even really paying attention, and unless you commit to absolute presence from the instant you walk through the door, you might miss this critical moment. Even more confusing, the

primary concern is sometimes buried within a comment that can mistakenly be interpreted as “surface” or unimportant.

If Aharon had been a trained chaplain, he might have asked: *Why* are Bnei Yisrael so concerned about Moshe? What role does he play for them that feels so important, and makes them feel so lost and scared without him? How might he, Aharon, be able to fill that gap and help them explore inner reserves of strength and connection to God without Moshe?

And he might have asked: How did we get here? How did we get to a point where Moses is up on a mountain, and the Jewish people stand below, bowing to an idol made out of the very jewelry that should remind them of God, and of the role that God played in their escape from Egypt? Instead, they dance around the golden calf and say “This is your god, O Israel, who took you out of Egypt.”

It is a moment of ultimate disconnect, of betrayal, but I would argue that it is not a sudden break. It is the result of a process that started 12 perakim ago with the Jewish people’s inability to stand in God’s presence at Har Sinai.

וַיֵּרָא הָעָם וַיִּנְעוּ וַיַּעֲמְדוּ מֵרָחֵק:

The Jewish people experience the thunder, the lightning, the smoking mountain, they experience the presence of God, and they turn away from it.

Bnei Yisrael reject this form of direct engagement with God. It does not work for them. The Ramban says that they backed away from the mountain farther than the boundaries that Moshe had set up for them. Despite Moshe’s reassurance, they do not believe it is physically possible for them to be this close to God, to receive the Torah in such an intimate way. And yet, the Torah needs to be given! And so the Jewish people ask Moshe to be their shaliach and in his ultimate bravery, Moshe steps forward in the same moment that the people step back.

וַיַּעֲמֵד הָעָם מֵרָחֵק וּמוֹשֶׁה נִגַּשׁ אֶל־הָעֶרְפָּל אֲשֶׁר־שָׁם הָאֱלֹהִים:

In this one moment, Bnei Yisrael have fundamentally shifted the nature of revelation from direct to indirect, and in doing so they have elevated the importance of Moshe. He no longer stands at their head as God comes and speaks to everyone. Instead, he becomes the intermediary, their only point of direct connection with God. And interestingly, God seems to accept this, to adjust the system to fit the needs of the people. We see in Shemot כד that God no longer asks Bnei Yisrael to come near. In fact, God has instituted a hierarchy, a system by which the Torah can be transmitted with Moshe as a go between.

וַיִּגַּשׁ מֹשֶׁה לַבַּדֹּן אֵל הַיְיָ וְהָאֲחֵרִים לֹא יִגַּשׁוּ וְהָעָם לֹא יֵעֲלוּ עִמּוֹ:

*Moses alone will come near the Lord; the others shall not come near, nor shall the people come up with him.*

It’s a beautiful moment in a way, because God is allowing Bnei Yisrael to define their own spiritual needs. Hashem is trusting them to say what works for them and what doesn’t.

But of course, this replacement system does not work. In order to receive the Torah directly from God, Moshe the go between now needs to remove himself too far from the people. They are left alone at the foot of the mountain and they do not handle the distance from Moshe any better than they handled the closeness to God, and the result is the *cheyt haegel*.

So now what? The first tablets are broken. The Torah needs to be received anew and, just as important, Moshe needs to find a way to receive the Torah, to connect the people with God, that does not leave them feeling abandoned, or he risks another egregious mistake from the people.

Shemot טז:לג lays out a fascinating compromise. Moshe sets up the ohel moed far outside of the camp, and when God needs to speak with Moshe, Moshe makes his way out of the camp, towards the ohel:

יָקוּמוּ כָל־הָעָם וַיִּנָּצְבוּ אִישׁ פֶּתַח אֹהֶלוֹ וַהֲבִיטוּ אַחֲרַי מִשָּׁה עַד־בָּאוּ הָאֹהֶלָה׃

*Each person would rise and stand at the entrance of his tent, and gaze after Moshe until he reached the ohel*

It's brilliant- Moshe gets to connect with God, but the Jewish people never have to lose sight of him. They know where he is the entire time. This seems to give them the security they need, because when Moshe returns from his second trip up the mountain, to receive the new set of tablets, Bnei Yisrael seem to be waiting patiently for him- the fear and abandonment they felt the first time seems to have been appeased. Moshe returns and something has shifted – his face is glowing with the after effects of the closest possible encounter with God. Moshe doesn't just bring the Torah down the mountain, he brings a physical reminder of his proximity to God. He has gotten so close to God that the people are briefly afraid to approach him. Using the same verb, יגש, to approach, that was used earlier when Moshe approached God, we are told:

וַיִּירָאוּ מִקִּשְׁתׁ אֱלֹהֵינוּ׃

*Bnei Yisrael were scared to come near Moshe*

In getting too close to God, Moshe has made himself almost unapproachable to Bnei Yisrael. And yet he reassures them, and they do approach:

וְאַחֲרֵי־כֵן נִגְשׂוּ כָל־בְּנֵי יִשְׂרָאֵל וַיִּצְוֵם אֶת כָּל־אֲשֶׁר דִּבֶּר ה' אִתּוֹ בְּהַר סִינַי׃

*And after this, all the people of Israel came near and Moshe instructed them in all that Hashem had told him on Mount Sinai.*

Moshe's face is permanently aglow with the presence of God, and Bnei Yisrael come near to him in the same way that he came near to God, so that he can finally impart to them the Torah.

Somehow God and Moshe have found a way to care for Bnei Yisrael that allows them to feel connected with God while maintaining a physically and spiritually safe distance. It's the ultimate balance that a chaplain would strive for. Trust the person you are caring for to tell you what they need, to set their own limits, to define the spiritual journey for themselves. Stay with them, stay grounded enough that they can relate to you, can relate to what you are saying and the experience you are relaying. But at the same time maintain that connection to God, push them to explore those boundaries, to connect to the divine even in those difficult moments. In order to be a connecting force, we need to maintain balance.

Playing this role as a leader and connector is something that each of us is asked to do at different points in our lives. Whether as a parent, a friend, a boss, a community leader, we each will be asked to sit with people, to provide support at the same time that we pull someone towards something bigger, towards a deeper connection. May we find the systems that work for us, never forgetting to be present, to listen, and to find the spark of the divine towards which we can draw those around us.

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## Are Sacrifices Essential to Judaism?

March 20, 2018

*The Jewish Press*

In lieu of commentary to the first three parshiyot of Sefer Vayikra, the philosophic parshan Rabbi Yosef Ibn Caspi writes the following:

*I have already indicated several times in this commentary, and in my Sefer Hasod and Sefer HaMashal, that my character is to strongly prefer brevity in all cases. Therefore, when I saw that this parashah and many that follow it revolve around the making of offerings and sacrifices – which it is known that Mosheh Rabbeinu of Blessed Memory wrote in his book under necessity and coercion, because the Name has no wish for wholly burnt sacrifices and offerings, rather it was the necessity generated by the practice of nations at the time that brought them to this . . . Therefore I will let this parashah be, and Parashat Tzav, and Parashat Shemini . . .*

Ibn Caspi here is following the simplest (but I think incorrect) interpretation of Rambam's Guide to the Perplexed 3:32.

*Many things in our Torah are said in expression of the same type of management . . . For as it is not possible to go from one to the opposite extreme in one shot, therefore it would not fit the nature of humans to abandon all their habits in one shot. Now Hashem sent Mosheh Our Teacher to make us into a kingdom of priests and a holy nation through knowledge of Him may He be exalted . . . and to concentrate solely on His service . . . and the universally recognized and habitual nature of service then, as well as the general form of service in which we had been raised, was the sacrifice of various animals in the temples in which the images stood, and bowing to those images, and placing incense before them . . . Therefore His wisdom, may He be exalted, and His management, which is evident with regard to all His creations, did not require that He command us to abandon all those forms of service and utterly disfavor and eliminate them, because that would not have been something the nature of human beings, which always finds its rest in habit, could accept . . .*

On this understanding, sacrificing has no inherent religious value. This position can be seen as theologically scandalous because it makes part of Torah seem contingent. It also has difficulty accounting for Rambam's exhaustive explication of the laws of sacrifices in his Mishneh Torah.

Ibn Caspi himself may offer a more complicated rationale in his commentary to Devarim 12:31:

*“Do not do so to Hashem your G-d” – Had Mosheh been able to prevent them from sacrifices absolutely, since they were done to the gods of the nations, Hashem would have wanted this, but because he was not able to eliminate them at the root, he at least eliminated the shameful branches to the extent possible, such as the burning of children . . .*

The implication here is that sacrifice was originally a fine mode of worship. However, it was corrupted by becoming the standard form of idolatrous worship. G-d would therefore have preferred to eliminate it, just as the Torah banned the erection of *matzeivot* even though this was a legitimate mode of worship for the Avot. Instead, because a complete ban was not psychoculturally plausible for Am Yisroel, He distinguished between modes of sacrifice that are morally better or worse, and eliminated the worst.

This model raises the question of whether a further pruning might be possible in an ideal world, while still leaving the fundamental concept of sacrifice intact. Malakhi 3:4, the opening verse of the haftorah for Shabbat haGadol, is often cited as the basis for one possibility.

*“then the minchah of Yehudah and Yerushalayim will be as sweet to G-d as in days of yore and ancient years”.*

*Minchah* can refer specifically to offerings made from grain, and Rav A.Y. Kook suggested that perhaps only *minchahs* would be offered in the Third Temple; there would be no animal sacrifice. This suggestion appeals to those who find the killing of animals for religious purposes distasteful. However, *minchah* is also a generic term for gifts or offering.

Vayikra Rabbah 9:7 offers a selection based on purpose rather than object: “All sacrifices (and prayers) will be eliminated in the Coming World, except for the Thanksgiving sacrifice (and prayers)”. The simplest understanding of this is that most sacrifices seek to atone for sin, and most prayers express the desire for something we lack. In the Coming World, both sin and lack will cease, and our relationship to G-d will be framed entirely by gratitude. But one can also understand it as making the claim that sacrifice is easier to justify when it expresses gratitude than when it expresses fear.

All these approaches really beg the core question: Why is the act of sacrifice so powerful psychologically? Why do human beings naturally express themselves religiously through sacrifice, whether they are expressing fear or gratitude? In an age without a Temple, it can be difficult to relate to this question; and yet it seems to me that Ibn Caspi is correct that Sefer Vayikra can be meaningful only if we address it.

## Halakhic Discourse and Modern Sensibilities: A Dvar Torah l'ilui nishmat Rabbi Ozer Glickman z"l

March 23, 2018

*The internet is full this week with well-deserved and often insightful tributes to Rabbi Ozer Glickman, who passed away this week. I have been hesitant to add my own thoughts and memories, because*

- 1. so many knew him longer and better than I did*
- 2. it might seem self-serving, as our conversations were mostly about how awesome my programs and my family were, and how he hoped to be helpful (many people's conversations with him were of that sort)*
- 3. some of what he said was confidential in ways that may still apply*

*Some of the hespedim have tinges of claiming him for one or another camp, and that seems to me an ethical violation which I would prefer to avoid. Some of them I think reflect a persona that he deliberately created and enjoyed inhabiting, but that was sometimes mistaken for the whole person. Others are very sincere but not quite right, and yet in ways that reflect his successes as a teacher and mentor.*

*Yet these don't seem to be sufficient reasons for total silence. So here are a few words of my own, and perhaps I'll try something more developed in time.*

- 1. It might be helpful to think of his role in YU, on Facebook, and in the community as that of Mashgiach, rather than of Rosh Yeshiva. I thought it was very appropriate that Rabbi Blau spoke at the levayah.*
- 2. He said to me very recently: I sent you students, and they thrived. That's really all I need to know.*
- 3. He was a pragmatist who dreamed.*
- 4. בתוך עמי אנכי יושב*

*The best tribute, I hope, will be a dvar Torah that he would have enjoyed. I hope to have several more specifically dedicated to his memory fairly soon.*

Berakhot 58a records a blessing that raises ethical hackles in modernity. In translation it seems harmless: "Who diversifies *haberiyyot* (referring either to human beings, or to all beings)". But when should one make this blessing? Unless we make it on everyone and everything, we are setting a norm, and diverse becomes a code word for "different" and "other". In fact, the context, example, and commentators all make clear that we are dealing with an instance of "just as we bless over the good, we bless over the bad". We make the blessing over differences that we perceive as deformities.

Several – perhaps all – of those differences are matters of color; black, red, and white. The term for "black" is *kushi*, which literally means from *Kush*/Ethiopia, but in both classical and modern Hebrew often has insulting racial overtones.

However, those connotations have no place in the Talmud here. This list is parallel to a list on Berakhot 45b that applies to both humans and animals, and clearly are seen as variants within a single breeding community. Rashi, basing himself on the parallel, goes out of his way to ensure that these are not understood as references to race. *Kushi* means "very black"; *gichor* means "very red"; and *lavkan* means "excessively white". We can argue about whether the shift from "very" to "excessively" favors whiteness as normal (so long as it's not excessive), or stigmatizes it (one can be excessively white even if one isn't *verywhite*).

But Rashi's position requires a frame of reference. In a Caucasian culture, all people of African descent are "very black". So inevitably, a position developed that one makes the blessing whenever one sees anyone of African descent.

In the 17th century, Rabbi Yakov Hagiz (Shu"t Halakhot Ketanot 240) found a radical way back to Rashi. He pointed out that the blessing was clearly intended to cover unusual cases – so how could one explain the existence of a whole continent of people who are “very black”? Should they all go around making blessings whenever they meet?

One might answer that the blessing simply becomes *passee* in such circumstances. Technically, perhaps, one should make it only if one has not seen a similar person in the past thirty days. But this loses the initial connotation of deformity, unless one wishes to argue that halakhah sees all such categories as socially constructed.

Rabbi Hagiz takes a different approach. Parents want children to look like themselves. A black child born to white parents is a deformity. He's not clear on how to react to a white child born to black parents, as apparently some differences are good. That is, he has not made it all the way back to Rashi, where only unusual coloration is relevant.

We can only speculate as to how Rav Hagiz's position might have been altered by access to Mendelian genetic theory.

Rabbi Hagiz's position is adopted by Kaf HaChayyim (h/t Rabbi Chuck Davidson), and then as at least an option by most of the myriad contemporary blessing manuals found on Otzar HaChokhmah.

These are the halakhic facts facing a contemporary Jew. With them in hand, what do we do?

There are blessings on seeing friends for the first time in thirty days, or a year. These blessings have fallen into desuetude among Ashkenazim. Why? I suggest because the risk of social awkwardness is great. The berakhah is only for friends. What if we meet, and I make the berakhah, and you refuse to answer amen on the ground that my berakhah was *levatalah*, because we are mere acquaintances?

By the same token, I think it is hard to justify making berakhot over people that now impose a sense of inferiority and deformity on them, or an unwanted sense of difference.

There have been cultures for better or for worse in which such blessings would be the best some kinds of “different” people could expect, and perhaps would even create the context for needed pity and kindness. But one person cannot treat another as purely a *cheftzah shel mitzvah*, as an object rather than as a subject, as a means rather than as an end.

One response is simply to let the berakhah fall away.

Another response is to reinterpret the Berakhah as a celebration of inclusiveness and rejection of “othering”. There is nothing in the language of the blessing to prevent this, and there are certainly aggadic resources to root such a concept in Jewish tradition. “Just as their faces are different from one another, so too their souls”. The narrative of the “ugly man” (Ta'anit 20a) warns us against judging people by their faces, and Rabbi Yehoshua as well was surpassingly ugly (Ta'anit 7a). Should we have made the berakhah over them? How would they have reacted?

A third response is to find a technical solution.

Berakhot 58a also quotes a beraita with a different list of *cheftzot* for this mitzvah: One who sees a *pil*, *kefof*, or *kof* recites “Who diversifies the *beriyot*.” Now a *pil* is fairly clearly an elephant; and a *kof* is a monkey or ape. (Rashi here says a *kefof* is a vulture; there are other identifications, and many commentators did not have it a part of the list in their text of the Talmud.) Why are these specific animals chosen? Rashi says that each of them has facial features that resemble the human. On that logic, some argue that only specific species of elephant or monkey can be objects of this berakhah. Most *poskim*, however, argue that the berakhah can be made on any animal that seems odd to us, and there are various stories of great rabbis going to the zoo for the purpose of making the berakhah. These generate a new

question: If one sees two different odd species, does one make a separate berakhah on each? What if one sees them on consecutive days?

One can combine the positions so as to yield the result that a person who goes to the zoo once a month will never need to make a berakhah over a person.

None of these options, or the ethical issues, show up in the aforementioned halakhic blessing manuals.

Nor do any of them discuss the added discomfort of making the same blessing over human beings and animals. If one follows Rashi, one can argue that at least there is a visual connection. Some commentators note midrashim, likely rooted in the facial similarity, in which people who sin are turned into *kofim* and *pilim*, and perhaps even hold that those species are all descendants of degenerated humans.

A recent article on YNET, unfortunately picked up by Newsweek, highlights the difficulties of even discussing these issues. The same beraita also mentions a blessing over beautiful trees. In discussing that blessing, Rabbi Yitzchak Yosef naturally turned to “Who diversifies” for an analogy. Having cited it, he clarified that he follows Rabbi Hagiz’s position that the blessing is made only over children born looking very different than their parents, and not, for example, over dark-skinned Americans of African descent. This led to the accusation that he was using the word *kushi* as a racial epithet about African-Americans. To further illustrate this point, taking an example from the next beraita, and perhaps even offering a creative interpretation of it, he said that one would make the berakhah over human children who looked like *kofim*, regardless of their parentage. This led to the accusation that he had compared African-Americans to monkeys.

Rabbi Yosef’s office responded that he had simply quoted the Talmud. This is not quite true – the Talmud makes no mention of African-Americans, and Rabbi Yosef would have been much wiser not to mention them in the same lecture as the word *kushim*, let alone in the same sentence. The same applies a fortiori to *kofim*.

SBM alum Yair Rosenberg [wrote in the Washington Post](#) this week that a public bigoted statement by a communal leader often reflects a deeper cultural problem – leaders would not make such statements if they expected communal pushback. I prefer to believe the most innocent interpretation of Rav Yosef’s words – that he was explaining why the beraita’s term *kushim* did **not** refer to Africans – and to censure him for cultural obtuseness rather than bigotry. (Please note that this is based on the audio; the transcriptions I have seen are inaccurate.)

But that the most guilty interpretation was easily believed within the Orthodox community, and not even seen as surprising, means that we have little moral faith in our leadership on this issue. The absence of any moral conversation around the berakhah in our halakhic handbooks unfortunately justifies that lack of faith.

Torah leaders need to understand how deeply corrosive this lack of faith is to the religious health of our community, and especially of our youth. It is taken as compelling evidence that Torah scholarship at best fails to enhance moral sensitivity, and at worst diminishes it, when great talmidei chakhamim are simply and pointlessly obtuse to ethical norms that saturate the surrounding secular culture. This is definitional *chillul Hashem*. Let us do our best to change it.

## Drunkards vs. Angels: Of Yetzer Anthropology and Sachar Agnosticism

By Rabbi Shlomo Zuckier, SBM 2012

April 26, 2018

We may be accustomed to the idea that great religious individuals face greater spiritual challenges than their coreligionists. As the oft-quoted line goes: ‘the greater the person, the greater their evil inclination’: *kol hagadol me-havero, yitzro gadol heimenu* (bSuk 52a).

Or, as is expressed in longer form there:

כדררש רבי יהודה: לעתיד לבא מביאו הקדוש ברוך הוא ליצר הרע ושוחטו בפני הצדיקים ובפני הרשעים. צדיקים נדמה להם כהר גבוה, ורשעים נדמה להם כחוט השערה. הללו בוכין, והללו בוכין. צדיקים בוכין ואומרים: היאך יכולנו לכבוש הר גבוה כזה! ורשעים בוכין ואומרים: היאך לא יכולנו לכבוש את חוט השערה הזה!

*Rabbi Yehuda lectured: In the future, Hashem will take the yetzer hara and slaughter him in the presence of both the tzaddikim and the reshaim. To the tzaddikim he will appear like a high mountain and to the reshaim he will appear like a thin hair. Both, however, will cry. The tzaddikim will cry “How could we have overpowered such a high mountain?” and the reshaim will cry: “How could we not have subdued such a thin hair?”*

Although this phenomenology is certainly well-represented in traditional Jewish literature, I believe that we can identify an alternative account, really an opposite account, that appears in a *midrash* commenting on our *parsha*.

Vayikra Rabbah 24:8, commenting on the opening charge of *kedoshim tihyu* – “be holy” (Lev. 19:1), offers the following parable:

רבי אבין אמר תרתין רבי אבין אמר משל למלך שהיה לו מרתף של יין והושיב בו המלך שומרים מהם נזירים ומהם שכורים לעת ערב בא ליתן שכרם נתן לשכורים שני חלקים ולנזירים חלק אחד אמרו לו אדונינו המלך לא כלנו שמרנו כאחד מפני מה אתה נותן לאלו שני חלקים ולנו חלק אחד אמר להם המלך אלו שכורים הן ודרכן לשתות יין ולפיכך אני נותן לאלו ב' חלקים ולכם חלק אחד כך העליונים לפי שאין יצה"ר מצוי בהם קדושה אחת שנאמר (דניאל ד) ובמאמר קדישין שאלתא אבל התחתונים לפי שיצר הרע שולט בהם הלואי בשתי קדושות יעמדו הה"ד דבר אל כל עדת בני ישראל וכתוב והתקדשתם והייתם קדושים

*Rabbi Avin said: [The sanctity noted in the biblical statement “be holy” is] double. Rabbi Avin said, “A parable: A king had a cellar full of wine and he hired watchmen, some of them nazirites and some of them drunkards. At the end of the day he came to pay them, and he paid the drunkards twice as much as the nazirites. They said to him: “Master King, didn’t we all watch equally? Why are you giving them twice as much as us?” The King said to them: “These are drunkards and it is their way drink wine, and therefore I am giving them twice as much as you.” So too for the [angels] above (elyonim), since the evil inclination is not found with them, they have one degree of sanctity, as it says “And with the word of the holy ones is a question” (Dan. 4:14). But the [humans] below (tahtonim), because the evil inclination rules within them, hopefully they will withstand [to their religious challenges and receive] two counts of holiness. This is what it says: “Speak to the entire congregation of the Israelites [and say to them “be holy”] (Lev. 19:1), and it says “And you shall sanctify yourselves and be holy” (Lev. 20:7).*

Now, the application of this parable is ostensibly speaking of angels in comparison to humans, where the former receive a single reward of holiness and the latter a double reward of holiness for following the divine command. Although the discrepant holiness level is attested in the verses, it reflects a distinctly odd understanding of reward. If sanctity is conceptualized as a reward for following the divine will, as the parable establishes, why should angels receive one at all? They lack any free will (as angels do in the Jewish view), merely following the divine command as automatons. What did they do to deserve a reward? Angels are utterly unlike the nazirite who guards the cellar, who – first of all, may very well have an appetite for wine, albeit a suppressed one, and who furthermore is still willfully providing a service by guarding the cellar instead of undertaking other activities. By contrast, angels, appointed on high for a particular task, have no alternative option and thus no opportunity cost in following the divine will, so

why should they receive a reward? Additionally, at risk of entering angelic theology, what would it even mean for an angel to receive a reward? Aren't angels non-physical beings, exempted from any need and removed from any pleasure? What would an angelic reward even look like?

I would suggest that, although this Midrash is explicitly formulated as about angels, it can be also understood as relating to different types of people. We might countenance reading *elyonim* as those who are seen as a religiously successful elite, and the *tahtonim* as run of the mill religionists, who make up the bulk of *kol adat benei yisrael*, “the entirety of the Jewish people,” attested in our verse. From this perspective, the parable fits very well: some have greater challenges and some have lesser challenges in following the Torah; those facing the greater challenges – often those seen as “less religiously elite” – are rewarded in greater proportion for the *mitzvot* they do fulfill.

[For those unwilling to go out on a limb with this reading of the Midrash, it is still possible to accept the principle that at times those who are the most religiously successful face fewer challenges along the way than those who fail to achieve such success. It can be inferred from Rav Dessler's *nekudat ha-behira* and other concepts less tied to our *parsha*.]

While one might question this interpretation, given its divergence from the Talmudic principle above, I am not sure that the two truly conflict; it is possible to reconcile these apparent contradiction in one of several ways. One might argue that different types of people track along these two phenomenological anthropologies of the *yetzer*. Maimonides in the sixth of his *Shemonah Perakim* entertains the question of whether the greater *tzaddik* is one who struggles and overcomes their *yetzer* or one who has faces no challenge from their inclinations, and presumably different types of *resha'im* also exist reflect a differential *yetzer* quotient. Some *tzaddikim* struggle to achieve spiritual greatness while others have it easy; similarly, some don't live up to religious challenges as well because they are crushed by overwhelming challenges of the *yetzer* while others remove themselves from Torah with less of a struggle.

Alternatively, one might say that one's experience depends on the prohibition at hand. Some *yetzarim* are subdued when their beckon is ignored, while others strengthen by virtue of neglect. Human experience more broadly bears itself out – certain natural urges such as hunger intensify if ignored and weaken when attended to, while certain routines like having a cup of coffee in the morning intensify the more it is attended to and atrophy when ignored. Different forms of the *yetzer hara* might similarly react dichotomously to being suppressed, with some growing and others diminishing.

However one resolves this apparent contradiction, our Midrashic reading, and the alternative it offers to the standard Talmudic account, holds an important moral lesson. The *mishnah* in *Avot* 2:1 tells us *הוי זהיר* *הוי זהיר* *במצוה קלה כבחמורה שאין אתה יודע מתן שכרן של מצות*, “Be careful with a minor commandment as with a severe one, because you do not truly know the reward for particular commandments.” In a similar vein, we can never know the degree of someone else's challenge to follow any particular Halakha, or even Halakha overall. With our Midrashic principle teaching that reward correlates to the size of the challenge and *yetzer*, we can never know the reward a particular Jew receives for keeping Torah to whatever extent they succeed.

Korah was wrong when he said we are all automatically and equally holy; holiness is a function of merit, based on the degree to which one strives to follow the Torah. At the same time, we are each vouchsafed *kedusha* and reward – even a double reward! – if we keep the Torah. The magnitude of that reward, who has overcome great challenges and who has it easy, God only knows.

Keeping this in mind, we should all merit to optimize our battle of the wills and focus our energies on our own religious growth and supporting our fellow coreligionists, rather than on deigning to judge the success of others.

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## The Use of Halakhic Materials in Discussions of Public Ethics

June 1, 2018

I was saddened to read of the petirah of Dr. Rabbi Baruch Brody z”l, father of Rabbi Shlomo Brody (SBM 2001) and medical ethicist extraordinaire. Dr. Brody’s collection Taking Issue was a source of enormous consolation to me during my mother aleha hashalom’s illness, and his work continues to influence my thinking. The following dvar Torah is in dialogue with the final essay in that collection, “The Use of Halakhic Materials in Discussions of Medical Ethics”.

Dr. Baruch Brody distinguished three ways to use halakhic materials in discussions of medical ethics. I suggest that medical ethics is a particular example of public ethics, or ethical issues that need to be decided communally rather than by autonomous individuals. The three ways are:

- 1) as a source of ideas which can be defended independently of their origin
- 2) as a basis for mandating certain forms of behavior for members of the Jewish faith who are perceived as bound by Jewish law
- 3) as the basis for claims about the Jewish view about disputed topics in public ethics.

Dr. Brody sees the first way as nonproblematic. If an idea can be defended without reference to its origin in halakhah, of course it has a place in public discourse. Academics should footnote appropriately. But so far as public discourse is concerned, the same idea often occurs in many different traditions, and we should be indifferent as to which tradition suggested the idea to any particular person.

I suggest that footnotes matter in public discourse as well. Claims that a position is well-rooted in a particular tradition make it more appealing to people who identify with that tradition, and to others who deeply respect that tradition, in the same way that attributing a position to a person will add or detract to its appeal depending on that person’s public image.

This is not a bad thing. I do not concede that public moral discourse ought to be completely denatured, and that all arguments about public ethics must plausibly claim to have been immaculately conceived. I do accept that particularist religious arguments are generally out of bounds if they cannot be defended on universal grounds. But I’m not sure that we need to defend them exclusively on universal grounds.

This being so, it is important to recognize that one can draw ideas out of the halakhic corpus and then use them to reach conclusions that halakhah in practice rejects, or has never contemplated. These must be footnoted differently than ideas which emerge from the halakhah as an overall and practiced system. The distinction may be parallel to one suggested by Rav Aharon Lichenstein zt”l between ideas that emerge out of the substantive content of a halakhist’s work, and ideas that are under the authority of that halakhist.

Halakhah tends to be much more fully developed with regard to Jews than nonJews. Therefore, one can often claim the authority of Halakhah when one seeks to mandate certain forms of behavior for Jews (#2 above). However, a claim that this behavior is mandatory for an integrated Jewish-nonJewish society will be much less likely to have such formal authority. Instead, it will generally be a projection of how Halakhah might or should develop if it were given authority.

This brings us to the central point of Dr. Brody’s article. It is common for Jewish books on medical ethics to extrapolate from the Halakhah to public ethics. But the Halakhah may apply only to Jews! “Authors who use this material for the third use distinguished above may then incorrectly conclude that obligations which are supposed to fall only upon the Jewish people fall upon all people.” So one must be very cautious in moving from Halakhah to public ethics.

Dr. Brody humbly gives an example from his own work which he sees as instantiating that fallacy. The question he addressed was whether a married man could undergo gender reassignment surgery over his (female) wife's objection. Among the arguments he made was that under secular law as it then (1981) stood, gender reassignment would automatically terminate the marriage, and that Jewish law had opposed such unilateral termination since Rabbeinu Gershom forbade it in the 11th century. (Note: The argument also assumed a "fault" framework for divorce; contemporary secular "no fault" divorce law in principle allows either party to terminate the relationship unilaterally, without needing recourse to radical surgery or identity shifts. In practice, [the New York Times recently published as article on secular agunot, who remain married because their abusive husbands have disappeared and they cannot serve divorce papers on them.](#))

Dr. Brody contends that applying the Cherem d'Rabbeinu Gershom was an error, because it applied only to Jews (perhaps only to Ashkenazim). It cannot serve as the basis for a claim that Judaism or Jewish law oppose unilateral divorce outside the context of the Jewish community. The Torah may permit either spouse in a Noachide marriage to end the relationship unilaterally, and Rabbeinu Gershom's decree would have done nothing to change that.

I'm not certain the application was an error. It seems to me that we can distinguish between conclusions that within the Halakhah are justified on particularist grounds, and those that even within Halakhah are justified on universal grounds. If the halakhic tradition understands the Cherem to be motivated by an ethical sensibility, then it would be legitimate to bring that ethical sensibility to the public discourse. One could not quite argue that it was "under the authority" of Halakhah, but once could go further than "this idea was suggested to me by" Halakhah. But I acknowledge that the halakhic process is usually murky as to whether a particular principle can be justified without a particularist appeal, and laws can move over time from one category to the other ("chokification" and "mishpatification").

I think there may be another and more serious methodological problem.

Let's assume that in many cases we can figure out the halakhah for Jews, and the halakhah for nonJews. Dr. Brody suggests that where they diverge, we are stuck, and Halakhah has no role in public discourse.

I think we need to push the question a little further. Why are we stuck? After all, we might argue in many such cases that the law for Noachides rests on universal principles, whereas the law for Jews rests on particularist grounds. If that is so, our public ethics position should follow Noachide law, with a standard argument that the law should allow a religious conscience objection. In other cases, we might argue that the law for Jews represents the ethical ideal, and Noachide law is a concession to the reality of most societies. Our public ethics position would then follow the halakhah-for-Jews in any society ethically advanced enough to make it a live option.

Both these models assume that the Halakhah for integrated societies must fundamentally be either the halakhah for Jews, or else Noachide Law. But perhaps this binary is incorrect, and the Halakhah for an integrated society would be entirely different.

As an analogy: In the realm of Shabbat, halakhah as-it-stands is utterly different for Jews and nonJews. We think of the two societies as intersecting for Shabbat purposes mostly in the realm of "amirah lenokhri", of what Jews can and can't have nonJews do for them on Shabbat. But what if we tried to think of what Shabbat would be like in an integrated society, where the issues are not just *melakhah* but also labor laws, time for family and reflection, and the like? Should the soccer stadiums and/or the malls and/or the corporate law firms be open, or closed? Could such a society have a shared public Shabbat even if Jews were privately forbidden to do *melakhah* and nonJews were privately obligated to do at least one *melakhah*?

## Masterpiece Cakeshop and the Spies

June 8, 2018

Mosheh gives the spies a *tactical* brief. He wants them to tell him *how* best to conquer Canaan. The spies instead present a *strategic* evaluation. They tell the people *whether* it would be best to try to conquer Canaan.

From a leadership theory perspective, there is room for blame all around. Administrators need to know their personnel well. They should not be surprised when independent and creative subordinates exceed their brief. Trusted subordinates should try their best not to surprise the administrators who trust them, so the spies should have warned Mosheh Rabbeinu what they would be saying. All this is wholly independent of the religious or practical correctness of the spies' strategic conclusion.

The breakdown in the chain of command means that the dispute between the spies is presented to outsiders unmediated (as raw intelligence), and perhaps in a context of unmoderated direct democracy. In such contexts (and many others), rhetoric, defined as the capacity to make the stronger argument appear weaker, and the weaker argument appear stronger, is generally more powerful than objective truth. Rule-bound democracies create the expectation that each presentation will be countered. The audience knows enough not to act until it has at least the illusion of having heard all plausible positions defended. Here the proposal to return to Egypt is made before Calev and Yehoshua have said a word.

Mosheh and Aharon respond by (silently) falling on their faces in front of “all *k'hal adat Yisroel*”. It is not clear whether their gesture is directly to the people, or rather whether they are assuming an attitude of prayer. Yehoshua and Calev now speak, also to “all *k'hal adat Yisroel*”, and try to counter rhetoric with rhetoric. The response, in verse 14:10, is:

*all the edah spoke to pelt them with stones; but the Glory of Hashem appeared in the Tent of Meeting to all B'nei Yisroel.*

It is challenging throughout Chumash to determine with any precision what is meant by the various terms for aggregations of Jews *kehal*, *edah*, *kehal adat*, *Yisroel*, *bnei Yisroel*, etc. But careful readers cannot help noticing that three different such terms show up here. Mosheh, Aharon, and all 12 spies speak to “*k'hal adat Yisroel*”; “all the *edah*” speaks about stoning; and the Glory of Hashem appears to “all *Bnei Yisroel*”. Presumably these refer to separate groups, and we should at least try to identify them.

Once we undertake that task, we have to take note that in 13:26 the spies appear to report separately to “Mosheh, Aharon, and all *k'hal adat Yisroel*” and to “all the *edah*”. In 14:1, it is “all the *edah*” that raises its voices”, while it is the “*am*” that cries. “All *Bnei Yisroel*” complain to Mosheh and Aharon, but it is “all the *edah*” that expresses the complaint verbally. In 14:4., the plan to return to Egypt – possibly after appointing a new leader, depending on how one translates *שש נתנה ראש* – is spoken about “one man to his brother”, i.e. within a group.

One clue to unravelling all this, I suggest, is the term *lirgom otam ba'avanim*. As used in the rest of Chumash, this does not seem to refer to mob killing, but rather to a form of judicial execution.

If we accept this, it follows that the *edah* is a judicial body with capital jurisdiction, aka a Sanhedrin. This reading is strengthened by the inclusion in chapter 15 – apparently entirely out of context – of a sacrifice brought by the *edah* = Sanhedrin when it errs. Presumably the decision to execute Yehoshua and Calev was an error.

Our image of one aspect of the episode of the spies therefore has to change. The final step of the sin is not mob violence, but rather the politicization of the judicial system. There is hope for human agency until that point. G-d finds it necessary to intervene only when the Sanhedrin decides to execute those who oppose the newly minted popular will.

The episode of the spies of course has eternal religious significance. I want to suggest here that it also has very immediate political lessons to teach about the role of the judicial system. Specifically, I want to talk about the Masterpiece Cakeshop ruling of the Supreme Court. Let me be clear upfront that I think the lessons go both ways, and that poskim can and should learn from that ruling.

Masterpiece Cakeshop tested whether religious opposition to homosexual behavior could be legally stigmatized in the same way as racism, antisemitism, and misogyny.

Justice Kennedy's opinion rested largely on the undisputed fact that an earlier person with authority over the case had condemned as "despicable" the use of religious arguments to refuse to provide a cake for a same-sex wedding. This meant, he said, that the earlier hearing had been tainted by obvious and legally unacceptable hostility to the baker's religion.

I doubt that the same argument would have been found convincing if the issue had been refusal to bake a cake for a mixed-race wedding. Moreover, Justice Kennedy's opinion fudges in that it leaves open the possibility that this kind of official animus toward a religious position was out of bounds only because it took place before Colorado had legalized same-sex marriage, in other words before homosexuality had been fully assimilated into prior civil rights paradigms.

I do not want to address the religious substance of the issue in depth here. Suffice it to say that there are Orthodox Jews who believe very strongly that the halakhic prohibitions in this regard are rationally defensible and socially essential, while others believe as strongly that it is purely a *chok* that cannot be justified on any ground other than obedience to Divine Will. Those in the former category have every reason to maintain a fighting retreat, and hold out the hope of regaining lost political ground. Those in the latter category have no real basis for carving out any but the narrowest legal protections for their religious needs.

I do want to argue that we should recognize as a society that moral changes which occur with sweeping rapidity are risky – that's why we have a Constitution – and therefore where possible, people who stick to their suddenly unpopular moral positions should be protected. In that regard, to the extent possible, even if we feel compelled to enact our current beliefs into law – and often we should feel the moral compulsion to do that – we should try our best to leave the courts as neutral arbiters of that law, rather than turning them into further vehicles of popular moral expression.

I am sure that the Sanhedrin saw it very differently. From their perspective, the people had now been subjected for a year (or perhaps several hundred years) to ceaseless propaganda demanding the conquest of Canaan. The spies' rhetoric provided a brief and fragile opportunity to overcome that propaganda, and it was essential to solidify that opportunity as rapidly and irreversibly as possible.

The spies were terribly wrong, and the Sanhedrin was wrong to accept their position. But I wonder whether G-d would have found it necessary to intervene had they been willing to let Yehoshua and Calev have their say, without resorting to the threat of judicial violence. Allowing the law to stigmatize moral dissent undermines the social contract which allows people with differing opinions to constitute and accept a common authority.

## Shakespeare's Korach - And Chazal's

June 12, 2018

*The Jewish Press*

Women oppose all the great sins of the Wilderness. The Golden Calf? Husbands had to take wives' earrings by force. The Spies? Bnot Tzlapchad were steadfast in their faith that the Land would be given to us. Korach? Well, therein lies a tale.

The opening verse of our Parshah features four ringleaders: Korach ben Yitzchak ben Kehat ben Levi, Datan and Aviram bnei Eliav; and On ben Pelet, the latter three all bnei Reuven. Korach, Datan, and Aviram all come to supernaturally bad ends. On ben Pelet simply disappears. Where did he go?

The Talmud on Sanhedrin 109b fills this gap in the narrative.

*Said Rav: On ben Pelet was saved by his wife.*

*She said to him: What difference does it make to you? If this one is the master, you are the student, and if that one is the master, you are the student!*

*He said to her: What should I do? I was part of the conspiracy, and I swore to them!*

*She said: I know that the entire community is holy, as Scripture says "for the entire community is holy".*

*She said: Sit, and I will save you.*

*She gave him wine and got him drunk and put him to bed.*

*She sat at the doorway and let her hair down. (In a parallel version her daughter joins her.) Everyone who came saw her and turned around.*

*Eventually the rest were swallowed up by the earth.*

My favorite element of this story is Mrs. On's inversion of Korach's slogan as the basis of her plan to undermine him. "For the entire community is holy" means to her that "No man in the community would consider staying in the same space as a woman that he considers undressed." And she is correct at least as far as Korach's leadership cadre is concerned. They all flee at the sight of her, and so On is never summoned to join them.

How should we feel about On's survival? He does not have the courage to stand up to his friends. His wife's successful derecruitment argument to him is grounded purely in self-interest. He is unwilling to break his word, feels no compunction about evading his commitments. For all we know, *he* would have fetched Korach if their roles were reversed, even if Mrs. Korach were standing in the doorway in dishabille. In short, he is no hero. Is there a moral to be drawn from his survival?

The same Talmudic passage make Mrs. Korach's ambition the true driver of the rebellion.

*Korach's wife said to him: See what Mosheh is doing! He himself is king, he made his brother High Priest, he made his nephews Vice Kohanim! If you bring terumah – he says it goes to the kohen; if they bring maaser, that you get – he says give one tenth to a kohen.*

*Moreover, he shaves your hair and tosses you like dung! His jealous eye was always on your hair.*

*He said to her: But he also shaved himself!?*

*She said to him: Since it is all done to magnify him, he said "Let my soul die among the Phillistines".*

*Moreover – he said to you to make (one string of tkhelet). If you think that tkhelet is considered valuable/a mitzvah – then take a tkhelet cloaks and cover your whole yeshiva!*

Once again hair is at the center of the story. Lady MacKorach wants her husband's hair to be on display. She is deeply cynical about populist gestures. In her view, a leader who shares his followers' sacrifices for the cause is not being egalitarian, because they are sacrificing for his glory, while he is acting to reinforce his own preeminence. Korach tries to defend Moshe, but she dismisses him with a clever Biblical citation.

So Korach, the idealistic populist leader turns out to be a front for a clever woman who is cynical about populists. (Perhaps she keeps in the background because she genuinely cares about modesty.) His fault

lies not in his stars, but in his spouse. Yet the power of his rhetoric – “All the community is holy, and Hashem is within them!” – and the drama of his death make him a permanent symbol paradoxically of both excessive levelling and of divisiveness.

It is often claimed that Chazal’s narrative expansions consistently seek to whitewash the righteous and blacken the wicked. Here we have a decisive counterexample – one of many – in which midrash instead add layers of moral complexity.

If a clear moral is nonetheless necessary, here is my formulation. We are not judged as hypothetical Robinson Crusoes, as the people we would be if we lived on a desert island. Rather, we are judged by who we are as socially embedded beings, as we exist in relationship with others. May we all be blessed with relationships that encourage and enable us to be our best selves.

# May the Humra Di'R. Zeira be Relaxed in Cases of Halakhic Infertility?

June 18, 2018

Lindenbaum Center for Halakhic Studies

## Introduction

“Halakhic infertility” occurs when observance of *hilkhot niddah* results in a woman ovulating only during the days that wife and husband are forbidden to be physically intimate. These situations result from post-biblical stringencies that lengthen the time of prohibition.

This article discusses whether a couple may cease observing one such stringency, the *humra di'R. Zeira*<sup>1</sup> (hereafter: *humra*<sup>2</sup>), while they try to become pregnant. The discussion is *li'halakhah vi'lo li'maaseh*, that is to say, it seeks to clarify the law but does not provide direct authority for action. Such authority must come from a competent *halakhist* who is convinced by my arguments and evidence.

My reticence to rule *li'maasah* has three causes. The first is that *hilkhot niddah* have become a specialty area in *halakhah*, and my overall knowledge of the subject is inadequate. The second is that *halakhic* infertility may be dramatically over-diagnosed. I have been told by rabbis, physicians, and *yoatzot halakhah* that a woman's ovulation schedule is much less rigid and more susceptible to non-medical intervention than was previously thought, to the point that lenient *psak* might rarely if ever be necessary.<sup>3</sup> The third is that R. Moshe Feinstein, in two *teshuvot* on this issue, writes that he has rationales for leniency but that he is unwilling to share them even in a private letter, let alone publish them. Presumably R. Moshe was concerned that his rationales or precedent would be used too broadly if publicized.<sup>4</sup>

However, more than 50 years have passed since R. Moshe wrote those *teshuvot*. A combination of Orthodox social change and of progress in the technology of fertility may have swung the pendulum far enough that we should now be equally concerned that people will rule and act strictly in cases where stringency is inappropriate. Yet it would be pollyannaish to deny that there is no risk of improper leniency. Some 21st century writers have even used the issue of *halakhic* infertility to argue for removing all post-biblical *niddah* stringencies.

Writing *li'halakhah vi'lo li'maaseh* seems a reasonable middle ground. I hope this article will be useful to *poskim* who specialize in *hilkhot niddah*, to couples dealing with the practical and religious challenges posed by the possibility of *halakhic* infertility, and to anyone dealing with the broader issues of *halakhah* that arise in the course of this discussion. I pray that I have not erred and that my writing will not cause others to err.

## History

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<sup>1</sup> The standard account of the difference between *takkanat Rabbi* (henceforth: *takkanah*) and *humra di'R. Zeira* is as follows: The *takkanah* requires women who bleed for fewer than three days to keep six clean days before resuming sexual intimacy, and women who bleed for three or more days to keep seven clean days. The *humra* requires women to wait seven clean days after any uterine bleeding. Consequently, arguments for relaxing the *humra* apply only to the small number of women who bleed for one or two days and can conceive on the seventh day after the onset of bleeding.

<sup>2</sup> The term *humra* can refer to both rabbinic laws and to customs, and each of those categories comes in many variations. An argument for relaxing one stringency has no necessary implications regarding any other.

<sup>3</sup> See in this regard the groundbreaking reports by *Yoatzot Halakhah* Drs. Tovah Ganzel and Deena Zimmerman, *Akirut Hilkhaitit: Ivhun Vi'tipul Hilkhaiti Refui, Assia* 84-85 (2009) pp. 63-82. Please note also that some contemporary *halakhic* figures contend that there are few, if any, cases where relaxing this *humra* is sufficient to resolve *halakhic* infertility. See also fn. 52.

<sup>4</sup> I demonstrate below that while R. Moshe writes in these responsa that the *humra* may not be relaxed in practice, he permitted its relaxation when responding to private questions.

In the late 19th century, R. Yaakov Katz, *Av Beit Din* of Anad, sent a summary of a case and his proposed response to several colleagues with a request for comments. The case involved a childless couple who had received considered and confident medical assurances that the wife could become pregnant if they had intercourse during the three days following her menstruation. The explanation given by the doctors does not seem compatible with contemporary science. It is not clear whether R. Katz thought this was a once-in-a-millennium case or rather a regularly occurring phenomenon. So far as I can tell, this is the first reported case of (alleged) *halakhic* infertility, and the only reported case until the late 1940s.

Responses to R. Katz may be found in *Shut Hinukh Beit Yitzhak* (EH 6) and *Shut Neta Sorek* (YD 53).<sup>5</sup> Each author reports that R. Katz sought to permit the couple to have intercourse based on the argument that the positive mitzvah of *pru u'rvu* should override the prohibition of sexual intercourse during rabbinically mandated *shivah nekiyim*. *Neta Sorek* raises doubts about R. Katz's arguments but is unwilling to deal with the case practically. *Hinukh Beit Yitzhak* challenges R. Katz's claim that there is no potential *di'oraita* violation, as well as his reliance on the medical opinion. Neither *Hinukh Beit Yitzhak* nor *Neta Sorek* relates to the specifics of the case, and neither relates specifically to the *humra* as distinct from the *takkanah*.

In the mid-20th century, advances in the scientific understanding of human reproduction led to a new recognition of the effects of *hilkhot niddah* on reproduction. It turned out that *hilkhot niddah*, as practiced, generally bring husbands and wives together at the ideal time for reproduction. It also became clear that *hilkhot niddah*, as practiced, prevent a small percentage of women from conceiving because their seven clean days extend past their time of fertility.

This new understanding quickly made its way into *halakhic* discourse. In a 1950 responsum,<sup>6</sup> R. Moshe Feinstein reports that he had been asked more than 20 times in the preceding several years whether the seven clean days could be waived when they interfered with fertility. He notes that R. Yosef Eliyahu Henkin had also received such questions.

Alternative Reproductive Technology (ART) was essentially nonexistent at that time. The only way these women could conceive, absent *halakhic* dispensations, was artificial insemination. Rabbinic literature had long discussed cases of accidental impregnation without sexual intercourse, but deliberate artificial insemination in humans was almost unknown until after the 1930s. When the issue of *halakhic* infertility arose, the *halakhah* was not clear:

- 1) Whether a child conceived through artificial insemination was *halakhically* related to the biological father;
- 2) Whether a child conceived through artificial insemination satisfied the father's obligation in *pru u'rvu*;
- 3) Whether a child conceived through artificially inseminating a woman during the time she is *niddah* is considered a "ben/bat *niddah*" who incurs some form of stigma;
- 4) Whether a male is permitted to deliberately self-stimulate and ejaculate outside his wife's body for the purpose of collecting the sperm for use in artificial insemination.

In the decades since, the *halakhic* consensus in most communities has tended to permit (d) and deny all stigma in (c). No stable consensus has emerged regarding (a) and (b).<sup>7</sup>

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<sup>5</sup> These sources were collected by R. Ovadiah Yosef *zt"l* in *Taharat Ha'bayit* 1:6:6.

<sup>6</sup> *Igrot Moshe*, YD 1:93.

<sup>7</sup> Many other modes of alternative reproduction (ART) have since been developed, such as IVF. Most of them raise the same *halakhic* issues as artificial insemination and, in addition, are more invasive and riskier. Consequently, they have little impact on the question framed in this article.

In the late 20th century, methods were developed for chemically manipulating the menstrual cycle. Such methods may allow women with *halakhic* infertility to become pregnant through intercourse without any relaxation of standard *niddah* practices such as the *humra*. These methods pose none of the *halakhic* issues associated with artificial insemination: they do not involve ejaculation outside the woman's body and they cast no shadow on paternity. Many doctors and rabbis began recommending such treatments in cases where *halakhic* infertility was suspected.

### Halakhic Approaches

There are four approaches to *halakhic* infertility:

- 1) Treating it like infertility that has a purely physical cause. Theoretically, *halakhah* requires a husband who has not fulfilled *pru u'rvu* to divorce his wife. In practice, we allow the couple to remain together and remain childless, if they prefer that to divorcing.
- 2) Using artificial insemination (or other ART means) to impregnate the woman with her husband's sperm.
- 3) Using hormones to alter the woman's cycle so that she ovulates later.
- 4) Finding mechanisms within *halakhah*, such as relaxing the *humra*, that enable the couple to have children naturally.<sup>8</sup>

### Parameters of the Discussion

Competent *poskim* dealing with a case of *halakhic* infertility will suggest methods of shortening the period of separation required by *hilkhot niddah* without touching upon the *humra*. There are also significant disputes as to the scope of the *humra*. This article addresses situations in which the *humra* would certainly be violated, and in which all other purely *halakhic* methods to resolve the infertility have been exhausted.

### Analysis: Rishonim

A clear statement of the case against relaxing the *humra* in response to *halakhic* infertility is found in the work of my dear friend and distinguished colleague, R. Chaim Jachter. He writes:

Waiving the *chumra* deRabbi Zeira would enable women who ovulate early to conceive. Without *chumra* deRabbi Zeira, they could immerse seven days after beginning to see blood, in accordance with the laws of a Biblical *niddah*. However, virtually all *halachic* authorities have forbidden this solution. Rav Yosef Dov Soloveitchik (as reported by Rav Aharon Lichtenstein and Rav Yosef Adler), Rav Ovadia Yosef (*Taharat Habayit* 1:1:6) and Rav Shlomo Zalman Auerbach (*Teshuvot Minchat Shlomo* 2:70:1:3), all cite the *Ramban's* aforementioned comments as proof that we may never waive the requirement for the seven clean days, even when it interferes with conception.<sup>9</sup>

R. Jachter adds the following in a footnote:

The *Meiri* adopts a similar approach in his commentary to *Berachot* (31a, s.v. *nimtza*). The *Shach* (*Yoreh Deah* 183:4) also writes, "*Chazal* always required the counting of the seven clean days."<sup>10</sup>

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<sup>8</sup> The availability of technological solutions may reduce the moral pressure on *poskim* to find *halakhic* solutions. For example: If one rules that the mitzvah of *pru u'rvu* is fulfilled via artificial insemination, one may use method (2) to resolve both the practical and *halakhic* aspects of *halakhic* infertility. *Poskim* may therefore agree that the *humra* does not apply when it would result in a compelled divorce or childlessness, but nonetheless refuse to be lenient in cases of *halakhic* infertility because they are confident that their positions will not yield these results.

<sup>9</sup> R. Chaim Jachter, *Gray Matter: Discourses in the Complex Halachic Issues of Today*, vol. 2 (Yashar Books: New York, 2006) p. 98.

<sup>10</sup> *Ibid*, p. 96, fn. 4.

To my knowledge, this is a comprehensive collection of the pre-20th century sources cited by subsequent authorities as the basis for stringency.

As the earliest such source, *Ramban* seems a good starting point for our analysis. Here is R. Jachter's translation of the relevant passage, in accordance with its use by R. Auerbach:

This stringency that Jewish women have adopted was approved by *Chazal*, and they accorded it the status of *halachah p'sukah* in all locales. Therefore, **it is never permitted to be lenient in this matter.**(my emphasis)<sup>11</sup>

I contend that this translation is imprecise and misleading. *Ramban* does not oppose leniency in cases of *halakhic* infertility. The last sentence should read: "It is never permitted to be **frivolously** lenient in this matter."

Here is *Ramban* in the original Hebrew:<sup>12</sup>

חומר זה שנהגו בנות ישראל הוכשרה בעיני החכמים ועשו אותה כהלכה פסוקה בכל מקום. לפיכך אסור לאדם להקל בה ראשו לעולם

The bolded term "*kalut rosh*" always means "lightheadedness" or "frivolity", not mere leniency. Leniency in response to infertility does not involve treating the *humra* frivolously or lightheadedly.<sup>13</sup>

Second, even if we understand *Ramban* to be forbidding ordinary leniency, he means only that the *humra* may not be treated **more** leniently than other rabbinic laws, not that it may not be relaxed under any circumstances whatsoever. Rabbinic laws are often overruled or waived when they conflict with other *halakhic* rule or values. Such circumstances are not "leniencies" at all, rather, ordinary determinations of law. For example, *Ramban* is not claiming that a person should permit themselves to die rather than violate the *humra*.

Third, anyone bringing evidence from *Ramban's* language must concede that ordinary rabbinic laws would be relaxed in response to *halakhic* infertility. *Ramban* cannot be forbidding leniency in specific response to *halakhic* infertility, as the phenomenon had not yet been discovered. Even if *Ramban* intended to designate a special status for this rabbinic law, there is no evidence that it would extend to the banning leniency in the extreme case of *halakhic* infertility, which involves enormous human suffering and prevents the fulfillment of the biblical obligation of procreation.

A close reading of *Ramban's* sources in the Talmud, Talmudic commentators and *Rambam* demonstrates each of my contentions. The *humra* is mentioned in the Talmud on *Berakhot* 31a, *Niddah* 66a and *Megillah* 28b. On *Niddah* 66a, Rava teaches that a woman who labors for two days and miscarries on the third must wait seven clean days. Rav Pappa challenges the need for Rava's ruling, stating that it is simply

<sup>11</sup> Ibid, p. 96.

<sup>12</sup> *Hilkhot Niddah Li'ramban* 1:19.

<sup>13</sup> For a clear indication of this usage of *kalut rosh* in a *halakhic* context, see *Meiri, Taanit* 30b:

אף על פי שהרבה דברים התרנו בזה מכל ההלכה אין לו לאדם להקל ראשו בכך וכל המחמיר על עצמו ומרבה באבלות הרי זה משובח.

For an explicit contrast of *li'hakel* and *li'hakel rosho*, see *Mishmeret Ha'bayit al Torat Ha'bayit* 7:7:

אמר הכותב: דעתא שבישתא לא צילתא קא חזינא הכא אם ראה דברי גדולי ישראל אשר בית ישראל נכון עליהם איך מלאו לבו להקל בהם שאסרו הם ועוד שהקל ראשו לומר שהדברים שכתב דברים ברורים להתיר מה שהם בעיני הגדולים דברים אסורים.

Note that medieval *halakhic* literature is filled with reports of various attempts at treating the *humra* differently and more leniently than biblically mandated *niddah* rules permitting touching, early immersion, etc. Most of these attempts are supported by some *rishonim*. There is no evidence in these discussions of a position that the *humra* should be treated more stringently than other rabbinic laws. See *Kovetz Shitot Kamai, Niddah* 66a.

an application of the *humra*. Rava responds that his ruling is *halakhah*, whereas the *humra* is only a *minhag*. He adds that because the *humra* is only a *minhag*, it applies only where it is already practiced; one cannot make logical arguments to extend it further, even if the extension fits perfectly with its rationale.

Most *rishonim* understand Rava's response to mean that the *humra* had not been adopted in all locations. Since in some locations women did not have a *minhag* of waiting seven clean days after laboring for two days and miscarrying on the third, new legislation was necessary for those locations. Other *rishonim* understand Rava's response to mean that this type of miscarriage would logically be subject to the *humra*, but women had not extended their *minhag* to that case, therefore, legislation was necessary to mandate seven clean days in the case of a woman who labors for two days and miscarries on the third.

On *Berakhot* 31a and *Megillah* 28b, the Talmud cites the following rule: "One may not rise to pray immediately after adjudicating or after a *halakhic* discussion, only after learning a *halakhah pesukah*." The *humra* is then cited as an example of a *halakhah pesukah*.

*Berakhot* 31a cites two other examples of *halakhah pesukah*: 1. One may evade agricultural taxes by bringing grains into the house before winnowing; 2. One is biblically forbidden to derive benefit from blood drawn from a sacrificial animal. There is no obvious commonality to these rules. *Rashi* defines a *halakhah pesukah* as a *halakhah* that does not require analysis and learning and, therefore, will not be a distraction if prayer immediately follows.<sup>14</sup> Others explain that a *halakhah pesukah* is not subject to dispute. Neither explanation provides any support for a contention that the standard for relaxing a *halakhah pesukah* is different than that for relaxing any other Rabbinic law.

*Berakhot* 31a continues by citing a ruling that one should not rise to pray when engaged in idle conversation, play or frivolity (*sihah, sehok, kalut rosh*). The discussion on *Megillah* 28b is preceded by a rule that forbids *kalut rosh* in a synagogue. In each of these contexts it is obvious that *kalut rosh* means lightheadedness or frivolity, not leniency. *Ramban's* use of the term is likely influenced by those contexts.

Nonetheless, one might try to argue that *Ramban's* use of the term *li'olam* (ever) creates an absolute ban on leniency. However, *Ramban* almost certainly adopts *li'olam* on the basis of *Rambam's* codification of our *sugyot*:<sup>15</sup>

ועוד החמירו בנות ישראל על עצמן חומרא יתירה על זה, ונהגו כולם בכ"מ שיש ישראל שכל בת ישראל שרואה דם, אפילו לא ראתה אלא טיפה כחרדל בלבד ופסק הדם סופרת לה ז' ימים נקיים...

וכל הדברים האלו חומרא יתירה שנהגו בה בנות ישראל מימי חכמי הגמרא ואין לסור ממנה לעולם...

*The daughters of Israel imposed yet an additional stringency on themselves, and they all, everywhere that Jews are found, adopted the custom that any daughter of Israel who sees blood, even if she saw nothing but a drop like a mustard seed and the blood ceased – she counts for herself seven clean days... All of these matters are an additional stringency that the daughters of Israel practiced from the days of the Sages of the gemara and one must not stray from it ever (li'olam)...*

In *Rambam's* context, the clear meaning is that unlike an ordinary *minhag*, this particular *minhag* may not be uprooted either through public non-adherence or by Rabbinic direction. *Rambam's* statement has no relationship to the question of under what circumstances it may be overridden by a different *halakhah*; and neither does *Ramban's*.<sup>16</sup>

<sup>14</sup> *Rashi, Berakhot* 31a s.v. *halakhah pesukah*.

<sup>15</sup> *Hilkhot Issurei Biah* 11:4,9. For the full context see *Hilkhot Issurei Biah* 11:4-10.

<sup>16</sup> *Ritva, Niddah* 66a follows *Ramban* but has *li'hakel bah* without *rosho*:

שאלו היתה ראייה מרובה, היה אפשר לומר שראוי הוא לחוש בדרך רחוק שמא שלש ראיות היו בשלשה ימים ונצטרפו בפרזודור בימי זיבה. אבל עכשיו שהיא כחרדל, אף חששא זו אינה כאן. אלא שבנות ישראל קדושות רצו להחמיר ולעשות עצמן כסותרת כדי להשוות כל ראיותיהן ולישב על כולן שבעה נקיים. וכוין

We now turn to *Meiri*:<sup>17</sup>

אלא שכוונתי לכתוב בה כלל קצר לידע ענין חומרתן מצד שזהו המנהג שנהגו בה היום בכל מקומות ישראל מפני שחומרא זו, אף על פי שבנות ישראל הן הן שהחמירו, וחששות רחוקות הביאום לכך, קבלוה חכמים מהם, וקיימו את דבריהם, ועשאוה כהלכה פסוקה שאין עליה תשובה, והוא הענין שקראוה בכאן הלכה פסוקה.

*My intention is to write a brief general account of their stringency since this is a custom that today is practiced in all Jewish communities.*

*This stringency, even though it was the daughters of Israel who were stringent, and even though they were brought to do so by unlikely concerns, the Sages accepted it from them, and upheld their words, and they made this like a halakhah pesukah to which there is no refutation.*

*This is why they call it here a halakhah pesukah.*

*Meiri* defines a *halakhah pesukah* as a rule that is accepted as *halakhah* without debate. He says nothing about giving a *halakhah pesukah* special standing when it conflicts with other laws or *halakhic* values.<sup>18</sup>

Turning to *Shakh*:<sup>19</sup>

שבעה נקיים – היינו מדרבנן,  
אבל מדאורייתא א"צ לישיב ז' נקיים אלא זבה גדולה.  
אלא שכדי שלא תבא לידי טעות, החמירו חז"ל והצריכו לעולם ז' נקיים...

*Seven clean days – This is a rabbinic law.*

*Di'oraita (biblically), only a zavah gedolah (who has three consecutive days of uterine bleeding not due to her menstrual period) needs to sit seven clean days.*

*But so that she not come to error, Hazal were stringent and always required seven clean days.*

The key word here is *li'olam* (always). We have explained the meaning of *li'olam* in *Rambam and Ramban*; *Shakh* most likely follows them. Alternatively, one might argue that *Shakh* means that *Hazal* required seven clean days for all types of bleeding.

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דעבדה ר' זירא שמעתא, ובפרק אין עומדין (ברכות ל"א א') מנו לה להלכה פסוקה, למדנו כי חכמים קבלו מהם כן ועשו אותה תקנה ופשט איסוריה בכל העולם ואין כח לבטלה ולא להקל בה כלל.

In context, it is clear that *li'hakel* is parallel to *li'vatel* – to make a structural change in the *takkanah* that creates a leniency or to adopt a lenient position against the standard rules of *psak*. It does not reject treating it as an ordinary *di'rabanan* which is subject to being overridden or suspended when it conflicts with other *halakhot* or values. For parallel usages see *Ritva to Rosh HaShannah 19b* and *Megillah 5b*:

ראש השנה (י"ט): ומה שאנו נוהגין להתענות בו אינו אלא לדברי שמואל דסבר לפניו מותרין, (וכיון) [ואף] דשמואל ור"י הלכה כר"י, הכא הלכה כשמואל, דכיון דקיי"ל במגלת תענית כדברי האומר בטלה – הרי דעת החכמים להקל בה, ומדבריהם נלמוד להקל ג"כ בחנוכה ופורים ולפסוק כדברי שמואל להקל דאמר לפניו ולאחריהם מותרין, וכ"כ הרב אלברצילוני והוא הנכון בעיני.

מגילה (ה'): והנכון – דרבי היה רוצה לעקור תשעה באב כגון י"ז בתמוז, דשורת הדין אין הפרש ביניהם בגזירת נביאים, [ושלא] כדברי הראשונים ז"ל [שרצה לעוקרו] שלא להתענות בו כלל, [אלא רצה לעוקרו לבטל ממנו רחיצה וסיכה וכולהו דיני] דחומרי דתענית, וחכמים לא הוודו לו בזה, לפי שהוכפלו בו צרות ואין ראוי לנו להקל בו אף על פי שאפשר כן מגזירת נביאים ברצו, אלא שישאל חסידים לא רצו להקל בו מטעם זה, ולפיכך היו שלוחים יוצאים בו, משא"כ בשאר תעניות, וזה טעם קצת רבותי והוא טעם נכון וברור.

<sup>17</sup> *Beit Ha'behirah, Berakhot 31a.*

<sup>18</sup> For an explicit example of *Meiri's* lenient position with regard to a law he described as *halakhah pesukah*, see his commentary to *Shabbat 151b*:

זהו ביאור המשנה וכלה הלכה פסוקה היא, ומ"מ חוכך אני להקל עכשיו שנוהגים לטלטלו על ידי ככר לאמץ את עיניו.

<sup>19</sup> *Shakh, YD 183:4.*

In sum, these sources provide no indication that the *humra* should be treated as stronger than an ordinary *di'rabanan* when it conflicts with other *halakhot* or *halakhic* values.<sup>20</sup> Moreover, none of these texts relates directly to the issue of whether the *humra* may be relaxed in cases of *halakhic* infertility, which was not recognized before the late 19th-early 20th century. None of these authorities was aware of any cases in which the *humra* led to permanent infertility and the possibility of compelled divorce. Unless we have evidence that they contemplated cases of equivalent seriousness, there's no reason to assume that their statements against leniency were intended to extend to such cases.<sup>21</sup>

## 20th Century

R. Jachter cites three Torah giants of the 20th century as holding the “absolutist” position that the *humra* may not be relaxed under any circumstances: R. Ovadiah Yosef, R. Shlomo Zalman Auerbach and R. Yosef Dov Soloveitchik. R. Moshe Feinstein's name is conspicuously absent from R. Jachter's list. I will begin by examining R. Moshe's position, and then address the other three.

### R. Moshe Feinstein

R. Moshe addressed the issue of *halakhic* infertility in a 1950 responsum:<sup>22</sup>

באיסור שהצריכו ז' נקיים לנדה במקום פו"ר.  
ט' ניסן תש"י.  
מע"כ ידידי הרב הגאון המפורסם מהר"ר חיים אלעזרי שליט"א הגאב"ד דקענטאן, אהי"א.  
הנה ידע ידידי כתר"ה  
ששאלה זו כבר היא על הפרק יותר משתי שנים, וכבר באו אלי יותר מעשרים וגם חותנו דכתר"ה בא אלי זה יותר משנה  
להתיישב בזה, וגם אצל הגרי"א הענקין שליט"א היו שאלות אלו, ועדין אנחנו מדחים מלהשיב כי קשה מאד מאד להקל בדבר  
שהחמירו בו טובא, אף שנתחדש עתה בשנים אלו שנוגע זה לכמה אנשים למצוה רבה דפו"ר  
ולכן למעשה אין להתיר ויראה לדחות הדבר לשואלו.  
...עכ"פ מטעם שכתב כתר"ה אין להתיר. והטעמים שיש לי – לא ברור לעשות מעשה מפני שאנו מדמין.  
ואם נתראה נדבר בזה, כי בכתב אינני רוצה לכתוב אותם.  
ידידו מוקירו, משה פיינשטיין  
*Regarding the prohibition of lifting 7 nekiim when pru u'rvu is adversely affected*  
9 Nissan 1950  
*From R. Hayim Eliezri, Canton, Ohio*  
*My honored and learned friend knows*  
*that this question has been on the agenda for more than two years*  
*and I have already received more than twenty such inquiries. Your father in-law also came to me more*  
*than a year ago to try to resolve this.*  
*Ha'gaon R. Yosef Eliyahu Henkin has also received these questions but we are still hesitant to reply,*  
*because it is very, very difficult to be lenient in a matter about which they have been exceptionally strict,*  
*even though it is newly acknowledged these years that it affects a number of people with regard to the*  
*great mitzvah of pru u'rvu.*  
*Even though I have rationales that would permit,*  
*in practice, one may not permit,*  
*and it seems that one should push the matter back to the questioner...*  
*Regardless, one may not permit on the basis of your Honor's rationales. As for the rationales I have, it is*  
*not clear that we should act because we have a speculation. If we see each other, we can discuss this,*  
*because I don't want to write them.*

<sup>20</sup> For a similar conclusion regarding the *rishonim*, see R. Shaul David Botschko, *Ha'kalah Bi'akarut Hilkhathit Li'or Shitat Ha'rav Kook, Tzohar* 42 (5778), p. 167-168. My thanks to *yedidi*, Dov Weinstein, for the reference.

<sup>21</sup> See for example R. A. Y. Kook, *Shut Da'at Kohen* 84, who is in principle prepared to override the *humra* in a case of *pikuah nefesh*.

<sup>22</sup> *Igrot Moshe, YD* 1:93.

This responsum is uncharacteristically ambivalent and ambiguous. R. Moshe begins by noting that the issue was first raised two years previously, and in that time has generated an extraordinary number of queries. He states that he has rationales for being permissive (it is not clear whether this refers only to the *humra* or to the *takkanah* as well), but that he is hesitant because the *humra* (and *takkanah*) are generally treated with great stringency. He is at the same time fully aware that the *humra* and *takkanah* have never been discussed previously in the context of fertility issues. In the end, R. Moshe does not provide his grounds for leniency, and indicates that he would not act on them. But his conclusion is opaque: his correspondent should “push the matter back to the questioner.”

R. Moshe wrote similarly in a 1961 responsum permitting the use of artificial insemination in cases of *halakhic* infertility:<sup>23</sup>

בא"א לה להתעבר אלא בזילוף זרע הבעל למעיה קודם שישלמו ז' נקיים  
כ' מנחם אב תשכ"א.

מע"כ ידידי הרב הגאון מוהר"ר יעקב הכהן זעלצער שליט"א הרב דקה"י עדת ישרון ביאהאנגעסבורג.  
הנה בדבר האשה אשר לפי דברי הרופאים מומחים היא מוכשרת לקבל הריון רק ביום השמיני ויום התשיעי מתחלת וסתה.  
וכתב כתר"ה שבדבר זליפת זרע הבעל לבטנה יש שמתירין אחרי עבור י"ז נקיים קודם הוסת ותצא מספק זבה ואחר ז' ימים  
מהתחלת הוסת אם תפסוק מדמיה תטבול כדין נדה מדאורייתא ואח"כ יעשו זליפת הזרע לבטנה. ומחמת שיש שאסורין רוצה  
כתר"ה לידע דעת' העניה.

והנה אם הנידון הוא דרך תשיש להתיר בשביל פו"ר לעשות כדינא דאורייתא לא כחומרת ר' זירא שיושבות ז' נקיים, אף שישי  
מקום לדון בזה, מ"מ למעשה אין להתיר  
ואין רצוני לדבר בזה ע"י הכתב

ורק אם יזמין השי"ת שנתראה איזה פעם נדבר בזה לברור הדבר ולא למעשה.

אבל כפי המשמע הוי הנידון לזלף זרע הבעל...

*Regarding a married woman who can only become pregnant through artificial insemination with her husband's sperm before 7 nekiim have finished*

20 Av 1961

*From R. Yaakov Seltzer, Johannesburg*

*Regarding a woman who according to expert doctors is capable of becoming pregnant only on the 8th and 9th days from the beginning of her period.*

*Your Honor wrote regarding artificial insemination using the husband's sperm that some permit it after the passage of 17 clean days from the beginning of her period, so that she is no longer a possible zavah.*

*She may immerse seven days after the beginning of her next period, in accordance with the law for a niddah di'oraita. After that they may do the artificial insemination.*

*Since there are those who forbid, Your Honor wishes to know my humble opinion.*

*Now if the question is whether to permit ordinary intercourse for the sake of pru u'rvu in accordance with the di'oraita law, and not in accordance with the humra of R. Zeira that requires seven clean days, although there is room to discuss this, nonetheless in practice one should not permit.*

*I do not wish to speak of this via writing, rather if Hashem arranges that we see each other at some point, we will speak about this to clarify the matter, but not li'maaseh.*

*But it sounds like the issue under discussion is artificial insemination of the husband's sperm...*

Here again, R. Moshe's mentions that he has rationales for leniency and states that he is unprepared to discuss them in writing, let alone use them to rule leniently. Moreover, it seems that R. Moshe raises the issue of relaxing the *humra* even though his correspondent never considered it.

R. Moshe's tantalizing hints were long accompanied by rumors that he was willing to be lenient in specific cases. I was able to confirm that this was so. Mr. Carmi Schwartz<sup>24</sup> told me in a phone conversation that his *havruta* asked this *she'eilah* directly to R. Moshe in 1969. After verifying the diagnosis, R. Moshe

<sup>23</sup> *Igrot Moshe, EH 2:18.*

<sup>24</sup> Mr. Schwartz is a longtime *osek bitzarchei tzibbur be'emunah* and father of R. Ezra Schwartz – *ashrei yoladto!* My thanks to the wonderful R. Michael Zylberman for putting me on the trail of this invaluable testimony.

permitted the couple to observe *hilkhot niddah* in accordance with *di'oraita* law in order to become pregnant.

## R. Ovadiah Yosef

R. Ovadiah Yosef's position appears in *Taharat Ha'bayit* (1:6:6). *Taharat HaBayit* is written as a code with extensive footnotes. The code is very carefully nuanced:

לפיכך אשה שנישאה זו שנים רבות ולא נפקדה, והרופאים אומרים שזהו בגלל שהזמן שהאשה ראויה להתעבר בו חל בתוך ימי שבעה נקיים, ולכן מיעצים לה להקדים טבילתה ולהזדווג עם בעלה בתוך שבעה נקיים, אסור לה לשמוע להם ולהקל בחומרא זו שנקבעה אצל רבותינו כהלכה פסוקה, אלא יעשו שאלת חכם כיצד לנהוג.

*Therefore, a woman who has been married for many years without becoming pregnant, and the doctors tell her that this is because her fertile time falls out during the seven clean days, and therefore, they advise her to move up her immersion and be intimate with her husband during the seven clean days; it is forbidden for her to obey them and to be lenient about this humra that was fixed by our Sages as a halakhah pesukah. Instead, they should formally ask a hakham what to do.*

R. Ovadiah rules that a woman who is diagnosed with halakhic infertility is forbidden to listen to her doctors' advice to act leniently regarding the humra. Rather, the couple must ask a hakham. R. Yosef does not indicate what the hakham might tell them. It seems possible that the hakham would require them to try other options first but would relax the humra if those other methods failed.

In the footnotes, R. Ovadiah surveys the literature with his always remarkable breadth and clarity. He begins by citing *Ramban*, *Ritva* and *Meiri* and contrasts them with the position taken by R. Dovid of Navaredok in *Galya Masekhet*:<sup>25</sup>

לכן החומרא של בנות ישראל שהחמירו מעצמן לספור שבעה נקיים, שלא נעשה על ידי תיקון חכמים בבית דין הגדול או בוועד החכמים, וגם בזמן חז"ל לא נתפשט מנהג זה בכל המקומות, כמבואר בנדה דהיא דאחמור אחמור היכא דלא אחמור לא אחמור.

**בקל נפטרים מחומרא זו, ובכל ענין ובכל מקום שיש איזה צד לצדד הקל, יש להקל.**

*Therefore, the stringency of the daughters of Israel that they imposed on themselves to count seven clean days, this was not done through a decree of the Sages in a beit din or at an assembly of sages. Even in the time of Hazal, the custom did not spread to all places, as explained in Niddah: "Where they are stringent – they impose the stringency; where they are not stringent – they don't impose stringency."*

***We can be easily exempted from this stringency; in every matter and situation where there is any basis for leniency, one should be lenient.***

R. Ovadiah notes that *Galya Masekhet* does not cite *Ramban* and *Meiri*, both of whom state that the *humra* was made into a *di'rabanan* by the Sages. R. Ovadiah appears to rule on the basis of those *rishonim* that one may not relax the leniency even for the mitzvah of *pru u'rvu*, although he indicates in a parenthesis that the position of *Galya Masekhet* should not be disregarded. He cites R. Uziel, R. Moshe Feinstein, and R. Shlomo Zalman as agreeing with the stringent position.

The remainder of the footnote includes:

1. A discussion, based on *Hinukh Beit Yitzhak*, whether a man may divorce his infertile wife against her will nowadays, despite the *herem* of Rabbeinu Gershom. R. Ovadiah concludes this part of the discussion by referring to his own *teshuvah* recommending artificial insemination in these cases as a means of fulfilling *pru u'rvu*.
2. A discussion of whether the *humra* protects against the possibility of violating a *di'oraita*. He concludes that according to the position of *Rashi* and *Ramban*, whom the *halakhah* follows, it does not have any *di'oraita*

<sup>25</sup> *Galya Masekhet*, YD 4.

3. A further discussion based on R. Katz of Anad, *Hinukh Beit Yitzhak* and *Neta Sorek* whether the *humra* may be relaxed for the sake of *pru u'rvu*. He concludes that he sees no basis for doing so. He cites a roster of other figures as agreeing with him, including R. Auerbach and R. Feinstein.
4. A discussion whether one may relax the *humra* in specific cases by introducing another *safek*. He concludes that one may.

Section (d) makes it clear that R. Ovadiah consider the *humra* at most an ordinary *di'rabannan*. He is willing to relax it in specific cases, and on the basis of standard rules such as *safek di'rabanan lekula* (in which we rule leniently in cases of rabbinic law when there is a doubt).

Why then is R. Ovadiah's default position to rule strictly in a standard case of *halakhic* infertility? I suggest that he sees the initial acceptance of the *humra* as a clear choice to impose a stringency even though it inhibits *pru u'rvu*, and he does not wish to rule against the original intent of the Sages. Instead, for the purpose of the husband fulfilling *pru u'rvu*, R. Ovadiah is willing to countenance divorce against the wife's will. Finally, he sees artificial insemination as a perfectly acceptable solution. In other words, R. Ovadiah does not see *halakhic* infertility as a situation of near-*iggun*,<sup>26</sup> and he does not address a case in which the couple wishes to stay together even if that means they will remain childless.

A hint as to what R. Ovadiah would say if these parameters were changed may be found in his apparent endorsement of R. Yitzchak Liebes' *Shut Beit Avi* 3:128. R. Liebes discusses the case of a woman who is becoming a *ba'alat teshuvah* while married to a nonobservant man. The husband is willing to observe *niddah di'oraita*, but is not ready for full observance of *niddah di'rabbanan*. R. Liebes' analysis explores whether the woman may remain married and accede to this partial observance in order not to discourage her husband from becoming more observant. R. Liebes concludes that she may, as the alternative is tantamount to *motzi'in ishah mi'tahat ba'alalah*, in other words, forcing an otherwise successful marriage to end in divorce. Moreover, R. Liebes takes as a given, based on the Talmud, that *bi'issur di'rabbanan ein motzi'in ishah mi'tahat ba'alalah* – one never imposes a rabbinic prohibition at the cost of ending an otherwise successful marriage. His uncertainty, in this case, is only because the *di'rabbanan* is violated by choice.

It seems clear that R. Liebes would take the same lenient position in any case that is defined as *motzi'in ishah mi'tahat ba'alalah*. R. Ovadiah's apparent endorsement of R. Liebes' responsum suggests that he would agree. In other words, he rules stringently only because he believes that *halakhic* infertility is not considered a case of *motzi'in ishah mi'tahat ba'alalah*.

### **R. Yosef Dov Soloveitchik**

R. Jachter's reporting of R. Soloveitchik's position based on conversations he had with R. Aharon Lichtenstein *zt"l* and R. Yosef Adler *yb"l*. I have confirmed with R. Adler that R. Soloveitchik did not share a rationale for his position, and that he was not ruling in an actual case.

R. Saul Berman told me that he brought an actual case to R. Soloveitchik in 1975. R. Soloveitchik's custom when students brought cases to him was to hear their presentation, ask them which way they wanted to rule and then to give one of three responses: "No", "I agree", or "You can *pasken* that way." R. Berman told R. Soloveitchik that he wanted to rule leniently, and received the third response: "You can *pasken* that way".

### **R. Shlomo Zalman Auerbach**

R. Shlomo Zalman was against any relaxation of the *humra*. He proposed a technological solution to *halakhic* infertility and other circumstances in which observance of *hilkhot niddah* could lead to divorce.

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<sup>26</sup> Unlike R. Moshe, who sees the possibility that the wife will be divorced against her will as tantamount to making her an *agunah*, a woman chained to a dead marriage. See below for R. Moshe's position.

That solution<sup>27</sup> did not gain the support of his colleagues, and I have received conflicting opinions from doctors as to whether it is practically feasible.<sup>28</sup> Regardless, there is no evidence that he softened his position about the *humra* after his solution failed to gain traction.<sup>29</sup>

R. Shlomo Zalman writes:<sup>30</sup>

אבל כיון דמה שאמר ר' זירא: בנות ישראל החמירו על עצמן שאפילו רואות טפת דם כחרדל יושבות עליה ז' נקיים. אמרו עלה  
בגמ' ברכות ל"א ע"א שהיא הלכה פסוקה,  
פשוט הוא דא"א כלל להקל

גם במקום צער גדול ואף גם בכה"ג דאיכא נמי מצוה רבה פו"ר ושבת שגם האשה חייבת בה, ואפילו במקום שיש חשש של  
הוצאת אשה מבעלה, אי אפשר כלל להקל לעבור על הלכה פסוקה זו.

*But because of R. Zeira's statement: "The daughters of Israel imposed a stringency on themselves that even if they see a drop of blood like a mustard seed they sit for it seven clean days." Regarding this, they said in Berakhot 31a that this is a halakhah pesukah, it is obvious that it is utterly impossible to be lenient even when this causes great suffering, and even where there is also the great mitzvah of pru u'rvu and shevet in which women are also obligated, and even when there is concern that this would cause an otherwise successful marriage to end, it is utterly impossible to be lenient and allow transgression of this halakhah pesukah.*

R. Shlomo Zalman's absolutist position rests on two claims:

- 1) No one had ever ruled that one could relax the *humra* for any reason.
- 2) We have another example of a rabbinic *niddah* prohibition that was enforced even when the consequence was compelling a couple to separate. *Maharsham* enforces the prohibition on intercourse when there is a presumption, based on past experience, that a woman will see blood following intercourse.<sup>31</sup>

In his discussion of *Maharsham's* responsum, R. Shlomo Zalman concedes that *Maharsham's* case is different than *halakhic* infertility. In *Maharsham's* case, there is a real chance of violating a *di'oraita*, and the dispensation, by definition, would have to apply to the couple's every act of intercourse throughout their marriage. In the case of *halakhic* infertility, by contrast, R. Shlomo Zalman concedes (although not everyone agrees) that there is no genuine risk of a biblical violation, and the dispensation applies only until the wife becomes pregnant.

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<sup>27</sup> The solution, known as *shfoferet*, involved the insertion of a tube that conducts uterine blood through the cervix to outside the woman's body without bodily contact.

<sup>28</sup> However, see R. Meir Nehorai and Dr. Chana Adler-Leizerovich, *Shimush Bi'pitaron Hilkhati Kayam avur Ee Peryon al Reka Hilkhati: Hatza'ah Li'takanat Nashim Bi'inyanei Niddah, Tehumin* 34. My thanks to R. Jachter for referring me to their article.

<sup>29</sup> See below for evidence that such questions may have been directed away from him.

<sup>30</sup> *Shut Minhag Shlomo* 2:72.

<sup>31</sup> *Teshuvot Maharsham* 1:7.

*Maharsham* himself mentions these distinctions.<sup>32</sup> Furthermore, he cites *Tosafot Ketubot* 51b<sup>33</sup> as proof that *di'rabanans* are generally waived in order to avoid compelling a divorce, and acknowledges that the general rule in *halakhah* is that a couple whose marriage involves a *di'rabanan* violation need not divorce.

Nonetheless, R. Shlomo Zalman cites *Maharsham* as evidence for an intuitive claim that some rabbinic laws are not waived regardless of consequences. He offers two further examples:<sup>34</sup>

מ"מ בנד"ד נלענ"ד, דכמו שאין להתיר טבילת נדה במים שאובין פסולין רק מדרבנן, או לטבול עם חציצה של מיעוט המקפיד  
דחוצץ רק מדרבנן, דודאי אסור גם בכה"ג דאי אפשר כלל בענין אחר ואיכא צערא טובא, ה"נ גם כאן.  
*Regardless, in our case, it seems to my impoverished intellect, that just as one may not permit a niddah to immerse in mayim sheuvin (drawn water), which are only invalid di'rabanan, or to immerse with a hatzazah shel miut ha'makpid (something on a minority of her body that she would prefer it be removed) which interposes only di'rabanan; as these are certainly forbidden even in cases where there is no alternative and there is great suffering, so too here.*

It is generally difficult to evaluate the truth of an intuition. But in this case, we can suggest that a case R. Shlomo Zalman brings to support his intuition actually disproves it. *Shut Shevet Ha'levi* 2:95 rules, with good reason, that we waive *miut ha'makpid* when there is no alternative.<sup>35</sup>

### Summary of 20th century Poskim

There is no public record of any 20th century *posek* relaxing the *humra*. However, there is also no record of any such figure, aside from R. Shlomo Zalman, maintaining the *humra* where the *halakhic* alternative is ending a marriage that the couple wishes to maintain. There is a private record of R. Moshe Feinstein ruling leniently and that is certainly a plausible reading of his *teshuvot*. There is also no compelling evidence that anyone other than R. Shlomo Zalman ever held that the *humra di'R. Zeira* is an absolute rule that may not be waived under any circumstances.<sup>36</sup>

<sup>32</sup> *Teshuvot Maharsham* 1:7:

בד"ה והנה בגוף וכו' הבאתי מתשו' רע"א סי' ס' דבתרי דרבנן כדאי היחיד לסמוך עליו. ושוב ראיתי בתשו' שיבת ציון סי' ל"ו וסי' ל"ז שכתב בפשיטות דבתרי דרבנן אין להוציא אשה מבעלה. ועיני תוספות כתובות נ"א סוע"ב בד"ה אונס וכו' דאי מדרבנן לא היו מוציאין אותה מבעלה על כ"ע ע"ש. ומוכח דגם בחד דרבנן הוי כן.

<sup>33</sup> *Tosafot Ketubot* 51b s.v. *ones di'shari rahamana heiki mishkakhata la*:

אף על גב דאבוא דשמואל חיישינן קאמר משמע ליה דמדאורייתא קאמר דאי מדרבנן לא הוי מוציאין אותה מבעלה על כן.

<sup>34</sup> *Shut Minhat Shlomo* 2:72.

<sup>35</sup> *Shut Shevet Ha'levi* 2:95. The case involved a woman who could not allow the insides of her ears to get wet.

ולענ"ד לחלק בסברא שאין ענין רואה מ"ת דומה לנ"ד, דודאי במקום שגזרו חז"ל שיפוש ממנה מחמת וסתות דרבנן או מחמת רואה דם מ"ת, דהגזירה היא מחמת הרחקה שעלולה לראות באותו זמן ובאמצע תשמיש – והרי רגליים לדבר שכבר רגילה לראות בזמן ההוא ובאופן זה, והיא גזירה מציאותית – דודאי לא נוכל להתיר גזרת חכמים גם בא"כ כה"ג דמה הועילו בזה אם תתיר להם דרבנן, והם יכשלו עי"ז בחמור ממנו בדאורייתא, דתראה דם מחמת תשמיש דגזירת חכמים היא להצילו מחמור ממנו.

אבל בגזירה דידן כגון מיעוט המקפיד שהיא גזירה בפנ"ע אטו רוב המקפיד, ואם נשפוט בדעת חכמינו גזרי הגזירה דמקום סכנה וא"א לטבול לא גזרו גזירתם ונשארה טבילה זו טבילה גמורה כמו שהיתה קודם הגזירה ואין בה חשש כלל מפגיעה באסור תורה בהא ובכה"ג דודאי דברי הגאון אמרי יושר וחלקת יואב מסתברים שבמקום עיגונא דאיתתא לא גזרו גזירתם והיא טובלת טבילה גמורה כדעת חכמים. קן נראה בעיניו נכון בסברא אם כ"ת יסכים עמדי.

<sup>36</sup> In a responsum for the Schlesinger Institute ([www.medethics.org.il](http://www.medethics.org.il)), R. Mordechai Halpern notes that he raised this issue with R. Yisroel Zev Gustman and was surprised to be referred to R. Yosef Shalom Elyashiv rather than to R. Shlomo Zalman, whom he describes as closer personally and geographically to R. Gustman. But when R. Shlomo Zalman's treatment of the issue was published, he understood why. It seems likely then that R. Gustman and R. Elyashiv also disagreed with R. Auerbach.

Others have argued that R. Gustman in his published *shiurim* defends the position of *Galya Masekhet* to some extent; this does not seem to me a compelling *halakhic* argument. R. Yaakov Love told me that he recalls R. Gustman spending a week focused on the

Rather, earlier precedents as well as 20th century *psak* indicate that the *humra* may be relaxed when necessary to achieve a sufficiently important end. The question is whether relaxing the *humra* in a case of *halakhic* infertility is considered “necessary” for achieving a “sufficiently important end.”

### Grounds for Relaxing the Humra

*Galya Masekhet* contended that the *humra* may be pushed aside more easily than an ordinary *di'rabanan*. While his position is a very plausible outcome based on the Talmud, many *rishonim* clearly disagree. R. Katz of Anad argued that the *humra* should be relaxed whenever it interfered with fulfillment of *pru u'rvu*. His argument was rejected, and I think correctly so, both for technical reasons and because the *humra* by definition always interferes with *pru u'rvu* to some extent. However, there are no precedents for enforcing the *humra* at the cost of separating an otherwise happily married couple, i.e., at the cost of compelling a divorce (*motzi'in ishah mi'tahat ba'alalah*) and the general rule is that *di'rabanan* prohibitions are relaxed to avoid that cost. If *halakhic* infertility is considered an equivalent case, there are sufficient grounds for leniency.

R. Moshe Feinstein offered strong grounds for considering *halakhic* infertility an equivalent case.<sup>37</sup> The *halakhah* is that a couple who has been married for ten years without children must divorce so that the husband can fulfill his obligation of *pru u'rvu*. Moreover, *halakhic* infertility will prevent a woman from conceiving with any partner. This means that she cannot have children even if she remarries and it has serious implications for her ability to remarry. Therefore, the *halakhah* regards cases of *halakhic* infertility as ones in which we would rule that a divorce could be compelled (*motzi ishah mi'baalah*) and, consequently, similar to *iggun*.<sup>38</sup> It follows that the *humra* may be relaxed in such cases.

One might still argue that relaxing the *humra* is permitted only when the practical consequences of *halakhic* infertility cannot be mitigated in any other way. An argument for relaxing the *humra* must demonstrate that these alternative fertility methods are *halakhically* irrelevant.

### Grounds for relaxing the humra despite the availability of hormonal therapy

Disregarding the option of hormonal therapy is justified because *halakhah* does not mandate the use of medical means to avoid *halakhic* difficulties. For example, there is near-universal agreement that one is not required to use an IV drip in order to fast on Yom Kippur. Similarly, R. Moshe Feinstein, in ruling that a woman need not have her labor induced in order to avoid possible *hillul Shabbat*, states emphatically:<sup>39</sup>

לא חייבה תורה לבקש תחבולות נגד הטבע כדי שלא יבא לחלול שבת אף אם היה זה מותר

*The Torah did not obligate her to engage in stratagems against nature so that she not come to perform acts that (would ordinarily) profane Shabbat, even if those actions will be permitted when she performs them.*

In other words, medical treatment is *halakhically* mandated only to treat illness or injury, and *halakhic* infertility is neither illness nor injury. R. Moshe rules that one may avoid a medical procedure even when doing so may lead one to (legitimately) violate a *di'oraita*; avoiding hormonal treatments in our case will lead only to (legitimate) violations of a *di'rabanan*.

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issue. He believes that his teacher would have ruled like *Galya Masekhet* had he been compelled to *psaken* on the issue. R. Halpern's testimony suggests that R. Gustman chose, on the basis of his own research, not to refer such questions to R. Shlomo Zalman.

<sup>37</sup> *Igrot Moshe YD 2:84*.

<sup>38</sup> R. Moshe maintains that this is the case even though, practically, we have allowed husbands to remain married to infertile wives. His position is based on both the theoretical necessity and the practical likelihood of divorce.

<sup>39</sup> *Igrot Moshe YD 2:74*.

R. Moshe Sternbuch<sup>40</sup> makes a claim in his discussion of IVs on Yom Kippur that my teacher R. J. David Bleich<sup>41</sup> suggests is parallel to R. Moshe's argument about inducing labor. R. Sternbuch argues that our preference for minimizing violations applies only to the way of accomplishing something, not to its nature. When one is permitted to eat on Yom Kippur, one may eat normal food by normal means, even if the same result could be achieved via an intravenous drip.

It seems possible that R. Feinstein's formulation of "stratagems against nature" (*tahbulot neged ha'teva*) may be combined with R. Sternbuch's argument to allow for the broader claim that *halakhic* calculations take into account only possibilities that are part of "normal life."<sup>42</sup> That claim provides an additional basis for leaving the possibility of artificial insemination out of the *halakhic* calculus regarding the *humra*.

Finally, I think it is clear that *poskim* would not require hormonal therapy if they considered it risky. Some women claim that the use of hormones to alter a woman's cycle carry long-term health risks and may have painful side effects as well.<sup>43</sup> However, this is not the current medical consensus.<sup>44</sup>

Should risk assessment be the responsibility of the person asking the *halakhic* question or of the person answering it? My general position is that *poskim* may not impose their understanding of the facts unless a *shoel* or *sho'let* specifically and explicitly gives them that authority. Therefore, if the woman asking the *she'eilah* **reasonably** believes that a particular treatment option carries particular risks, the job of her *posek* is to either answer the question within the framework of her belief or else refuse to answer.<sup>45</sup>

R. Moshe Feinstein's discussion of intravenous feeding on Yom Kippur explains why concerns regarding hormone therapy can be considered reasonable even against medical consensus:<sup>46</sup>

הנה יש לחוש על כל דבר שאינו כפי הטבע שיקלקל לאיזה דבר, ולא שייר לסמוך על הרופאים בזה שאין לידע זה בברור אלא בהשערה בעלמא ובמשך הזמן אפשר שיראו מה שנתקלקל מזה וכן אירע בכמה דברים שבמשך זמן גדול נודעו הרופאים שאיכא גם היזק והפסד להגוף ממה שנתנו לו לרפאותו יש להחולה לחוש לזה ואם יכול לאכול אין לעשות לו אינטער ווינטעס.

*One may be concerned that anything unnatural will cause some harm to the body. It is inappropriate to rely on doctors in this regard since these matters cannot be clearly known, only estimated, and over time, it's possible that they will see what the harm is. This has happened with several matters, that, in the course of a long time, doctors became aware that something they used to heal also caused bodily damage and loss. The patient should be concerned about this.  
If the patient can eat, they should not feed him/her intravenously.*

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<sup>40</sup> *Moadim U'zmanim* 1:60.

<sup>41</sup> R. J. David Bleich, *Contemporary Halakhic Problems*, Vol. 3, (New York: Ktav, 2013) p. 139

<sup>42</sup> I learned the concept of "normal life" as a guiding *halakhic* principle from R. Aharon Lichtenstein *zt"l* in his *shiurim* on *Bava Kamma* at the Gruss Center in 1990-91. R. Lichtenstein pointed that it seemed that oxen did so much damage that the Torah should have imposed the same level of liability on their owners as we do for the owners of dogs and snakes, and required them to watch their oxen personally at all times to avoid liability. The reason it didn't is that owning an ox was part of normal life, and we could not impose onerous restrictions on doing so. I have used this concept elsewhere to explain the *halakhot* of *tzniut* and war.

<sup>43</sup> See e.g. the article by Nehorai and Adler-Leizerovich cited in fn. 28 above.

<sup>44</sup> I am grateful to Rabbi Jachter for referring me to prominent endocrinologist, Dr. Daniel E. Stein, and to Dr. Stein for generously taking the time to speak with me. Dr. Stein made at least two important points in this regard. First, a common method of medically delaying ovulation involves administering estrogen at levels below those used for contraception. Second, women who ovulate very early in their cycles (certainly before day ten) often have inadequate development of ovarian follicles and are, therefore, subfertile or infertile for physical as well as *halakhic* reasons. *Halakhic* leniencies would not solve their fertility issue as delaying ovulation is necessary for them regardless.

<sup>45</sup> The question of how *poskim* should respond to a *shoel* who holds unreasonable belief requires separate analysis.

<sup>46</sup> *Igrot Moshe*, *OH* 4:101:3.

It is impossible to rigorously assess the potential side effects of new treatments without longitudinal studies. Requiring such studies would delay the introduction of new treatments by at least a generation. This is not a moral option in a world where life-saving advances in medical technology are made regularly. Contemporary medical science therefore has no choice but to engage in risk-assessment by projection. Since medical risk is a relevant *halakhic* factor, *halakhists* must acknowledge these inherent uncertainties and treat concerns about side effects in such cases as reasonable.<sup>47</sup>

### **Grounds for relaxing the humra despite the availability of artificial insemination**

Arguments that would allow disregarding the option of artificial insemination include: 1) A claim that the use of artificial insemination does not a man to fulfill his obligation in *pru u'rvu*; 2) A claim that a child conceived during the seven clean days is a *ben/bat niddah*; 3) A claim that ejaculation outside marital sex, even when the goal is reproduction, is forbidden as *hotza'at zera li'vatalah*. It might be sufficient if either the couple or their *posek* accepts any one of these positions. The argument that *halakhic* calculations take into account only possibilities that are part of "normal life" provides an additional basis for leaving the possibility of artificial insemination out of the *halakhic* calculus regarding the *humra*.

We may also argue *hashkafically*<sup>48</sup> that something vital is lost when procreation is not linked to sex. That link is under enormous pressure from recent technological and social shifts. Accordingly, we should try to rule in ways that strengthen that link to the extent possible. Mandating the use of artificial insemination weakens that link. This argument has significant appeal to me.

### **Conclusion**

In 2006, the conversation about *halakhic* infertility changed radically. Dr. Daniel Rozenak proposed doing away with the *humra* (and possibly the *takkanah*) entirely on the ground of the number of infertility cases it caused.<sup>49</sup> His article drew responses from *halakhists* across the Orthodox spectrum all of whom disagreed with his suggestion. As R. Dror Berman observed, in our day, the publication of a leniency can lead to a backlash that makes issuing leniencies politically impractical. R. Bermah suggests that such leniencies regarding the *humra* are *halakhah vi'ein morin ken*, meaning, that they should never be stated publicly. This is a plausible extensions of R. Moshe's reticence.

The problem is that such a discourse of fear may end up eliminating the leniencies it seeks to protect. If leniencies may not even be discussed, no one will know to ask the questions, and eventually there will be no practical tradition that differs from the declarative. In our case, this may lead to several negative outcomes. Couples may stop observing these *halakhot*. They may lose respect for *halakhah* generally. They may remain childless. Finally, women may be encouraged to manipulate their bodies chemically. It seems clear to me that these outcomes have become actual in our day.<sup>50</sup>

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<sup>47</sup> In some cases, one might argue that the *halakhic* tradition includes a factual component. For example, in recent discussions of whether pregnant women should fast on Yom Kippur, some *poskim* have argued that the long *halakhic* tradition of requiring such women to fast demonstrates that there is no serious risk of premature labor or birth as such a risk would have been noted in previous sources. However, there can be no authoritative *masoret* about *halakhic* infertility, since the mechanisms of fertility were not well-understood, and there was no obvious relationship between observance and infertility. (See however *Shut Da'at Kohen* 84.)

<sup>48</sup> For a different *hashkafic* argument, see *Shut Hemdat Genuzah* 3:11. My thanks to *yedidi*, Dov Weinstein, for the reference.

<sup>49</sup> See reports and later articles at [www.tehora.co.il](http://www.tehora.co.il).

<sup>50</sup> On a positive note, the desire to avoid *halakhic* solutions may also have led to the discovery or rediscovery of folk remedies. In a recent newspaper article, *Makhon Puah* claims, for example, that eating an early breakfast regularly solves a significant percentage of cases. It may be that we will reach or have reached a point where medicalization is unjustifiable practically, and yet all cases in which *halakhah* is the sole cause of infertility may be resolved without touching the *humra* or *takkanah*, and without resorting to artificial insemination.

Therefore, it is necessary and valuable to establish, as a matter of principle, that *halakhah* does not impose a rabbinic stringency at the cost of a marriage, and that *halakhah* does not mandate undergoing medical treatment to resolve *halakhic* issues. I pray that my work will serve *li'hagdil Torah uli'haadirah*.

## (When) Should Halakhah Be Enforced?

August 17, 2018

America has a “wall of separation” between synagogue and state, whereas in Israel the civil courts can be called upon to enforce the orders of state-recognized Rabbinical courts (*batei din mamlakhtiyim*). This difference was brought to public attention most recently when the Israeli police arrested a Masorati rabbi for failure to obey a beit din summons (not, as many reported, for performing an unauthorized wedding; that was the subject of the summons, not the cause for the arrest). Such cases test whether Jewish, and specifically Orthodox, support for religious freedom in the U.S. is a substantive commitment or rather a pragmatic concession to the realities of life as a small religious minority.

Here are two other ways in which the depth of that commitment can be tested.

First, Israeli courts have the authority to impose sanctions such as confiscation of passports and drivers’ licenses or even imprisonment on men who refuse a beit din’s order to divorce their wives. Do we support the utilization and even strengthening of such measures, such as the recent extension of this authority to Jewish non-citizens passing through Israel?

Second, consider the opening of this week’s parshah (Devarim 16:18)

שְׁפוֹטִים וְשׁוֹטְרִים  
תָּתִין לָךְ בְּכָל-שַׁעְרֶיךָ  
אֲשֶׁר יִקְרָא אֶל-הַיָּדָיִךְ נִתְּנוּ לָךְ  
לְשֹׁטְרֶיךָ  
וְשָׁפוֹטוּ אֶת-הָעָם מִשְׁפַּט-צֶדֶק  
Shoftim and shotrim  
*you must place for yourself in all your gates  
which Hashem your G-d is giving you  
by tribe  
They will be shofet the people mishpat tzedek.*

Rashi defines the nouns *shoftim* and *shotrim* as follows:

שְׁפוֹטִים = דיינין הפוסקין את הדין.  
וְשׁוֹטְרִים = הרודים אחר מצותם במקל ורצועה עד שיקבל עליו את דין השופט  
Shoftim = *judges who decide the law*

Shotrim = *those who enforce their commands with baton and strap until they accept the judge’s ruling*

This verse seems to mandate the establishment of an executive – call them police, sheriff, or marshals – tasked with enforcing the rulings of the halakhic judiciary.

Rabbi Shmuel David Luzzatto (SHADAL; his commentary is now available online at [alhatorah.org](http://alhatorah.org)) sharply disagrees with Rashi.

אין ספק כי השוטרים אינם שליחי ב”ד הרודים במקל  
כי במצרים הרודים במקל היו נקראים נוגשים, לא שוטרים  
ולמעלה (א’, ט”ו) אמר  
“ואקח את ראשי שבטיכם אנשים חכמים וידועים ואתן אותם ראשים עליכם וגו’ ושוטרים”,  
ובדברי הימים ב’ י”ט:א  
“והנה אמריה כהן הראש וגו’ וזבדיהו הנגיד וגו’ ושוטרים הלויים לפניכם”,  
וביהושע ח:ל”ג  
“וכל ישראל זקניו ושוטרים ושופטיו”,  
והנה השופטים היו דנים במה שבין אדם לחברו, או בבוא עדים על איש שחטא,  
והשוטרים היו משגיחים על שלום המדינה וגוזרים גזרות והנהגות על העם  
*There is no doubt that the shotrim are not the agents of beit din who enforce via baton*

*because in Egypt the baton-enforcers were called nogsim, not shotrim  
and above (Devarim 1:15):*

*Moshe said: "I took the heads of your tribes, men wise and known,  
and I placed them as heads over you . . . and as shotrim",  
and in II Chronicles 19:11:*

*"Here Amaryah the Priest and Zevadyahu the nagid . . . and the Levites as shotrim before you  
and in Yehoshua 8:33:*

*"and all Israel with its z'kenim and shotrim and shoftim."*

*So the shoftim judged in interpersonal matters, or when witnesses came that a man had sinned,  
while the shotrim would oversee the peace of the state and decree decrees and practices on the people.*

Shadal may have a strong **textual** case against limiting the role of the *shotrim* to the physical enforcement of court orders. But his argument that they constituted a separate branch of government charged with issuing decrees has no textual basis at all! Rather, it seems to me, his interpretation may reflect a political conviction that the judicial and legislative powers of the state are best separated, or else he had lots of terms for leaders and needed to find something unique for each category to do.

Rashi's reading however has a strong **contextual** basis. Our verse begins by mandating the appointment of both *shoftim* and *shotrim*, and yet concludes that their single purpose is to be *shofet*. This strongly indicates that the role of the *shotrim* is subsumed with that of the *shoftim*, and that they are support personnel rather than independent actors.

However, support personnel need not be tasked with enforcement specifically. I learned from Rabbi Abraham Halbfinger of blessed memory that justice always depends on efficient administration. The best of batei din with the best of intentions, handling divorce and conversion cases with great sensitivity and deep personal attention, but with a filing system that often misplaces vital documents, will produce more and worse long-term injustices than an impersonal and callous beit din which keeps perfect records. One cannot expect *tzedek* from the best of *shoftim* unless they have the right personnel and system for keeping track of vital documents, or *shtarot*. Some of the worst problems with batei din in both America and Israel are the result of underfunding such vital background positions, and/or of underappreciating how important it is to fill those positions well.

But it is also true that justice ultimately also requires enforcement. Bad people do not do the right thing by choice when self-interest points the other way; and good people can be stubborn in their mistakes, for various reasons. A system of law that depends on entirely voluntary submission to the law and to judicial authority will end in the tyranny of bad people. This is why competent American batei din do not agree to hear financial cases unless both sides sign secularly enforceable binding arbitration agreements. Otherwise, bad people will take good people to beit din and if they win, collect, and if they lose, simply move on to secular court.

At the same time, enforcing the law when it lacks broad social support usually generates different sorts of injustices. It becomes a tool of power – whether in the hands of a minority or a majority – rather than a tool of justice.

Halakhah regarding marriage, divorce, and Jewish identity is therefore often trapped within a conflict of values. On the one hand, the fact that so many Jews reject the authority of halakhah means that efforts at enforcement are often, and often correctly, perceived as powerplays by specific subcommunities rather than as pursuits of justice. On the other hand, leaving the area completely voluntaristic leaves one spouse at the mercy of another at the moment of greatest conflict and antagonism, and leaves converts subject to the whims of particular subcommunities, bureaucrats, and individuals.

One might argue that halakhah should meet these challenges by divesting itself of all non-personal implications. This seems to me both impossible and wrong. Jewish status is inherently a communal matter; to argue for the complete separation of religion and identity is to undo the fundamentals of Judaism. I think it is also reasonable for marital status to be an issue of communal concern and

recognition. The breakdown of a common understanding of marriage may make that an untenable position in the progressive West; and yet that most American liberals still seek state recognition of a broader range of marriages, rather than advocating for the abolition of marriage as a state-cognizable category, may say something important (even for those of us who think that the time has come for the state to completely remove itself from the business of marriage, and either to treat people purely as individuals, or else to let them form economic/domestic partnerships as they wish without any notion that such partnerships entail emotional or sexual elements or commitments).

There cannot be true *mishpat tzedek* without *shotrim*. Often this means simply that our society cannot achieve true *mishpat tzedek*. Often nothing positive will be accomplished by appointing more *shotrim*, or by giving the existing *shotrim* more power. Power contributes to *tzedek* only if it is grounded in legitimate authority, and legitimate authority requires the consent of the governed.

There is no reason or basis for aspiring to have *shotrim* enforce all of halakhah on a community which rejects its authority. An immediate task for a halakhically committed community is to build moral authority for the Law in the areas where halakhah requires enforcement to produce *tzedek*. To do that, we need to demonstrate our own commitment to *tzedek* within *halakhah*. In both Israel and America, this means putting serious time, money, attention and political capital into building a *beit din* system that is highly professional and capable of building moral consensus across communities.

## Are Husbands Commanded to Make Their Wives Happy?

August 24, 2018

I had the privilege many years ago of meeting the extraordinary rosh yeshiva/novelist Rav Chaim Sabato at a family picnic/soccer game. After some goodnatured badinage (=trash talk) about the unfortunate consequences of my choosing to play in sandals, we got into a more serious conversation about my beard. I told Rav Sabato that I intended to shave on my first wedding anniversary, once the mitzvah of making my wife happy had expired. He insisted forcefully that the mitzvah applied throughout one's lifetime.

I hope that I've succeeded in living by his ruling, and it is of course a stringency that all husbands should adopt voluntarily and with gusto. But nonetheless "this too is Torah, and I need to learn". So a score and more years later, I am finally willing, albeit with trepidation, to start an in-depth look at the topic.

Devarim 24:5 reads as follows:

כִּי־יִקַּח אִישׁ אִשָּׁה חֲדָשָׁה  
לֹא יֵצֵא בְצִבָּא  
וְלֹא־יַעֲבֹר עָלָיו לְכַל־דָּבָר  
נְקִי יְהִי־הָיָה לְבֵיתוֹ שָׁנָה אֶחָת  
וְשָׂמַח אֶת־אִשְׁתּוֹ אֲשֶׁר־לָקַח:  
*When a man takes a new wife  
He does/must not go out in the army  
and it may not impose on him for any matter  
He will/must be clear to his house for one year  
and he will/must gladden his wife whom he took.*

Midrash Halakhah focuses on the apparent redundancy of concluding phrase "whom he took". Since halakhah ordinarily requires the consent of both parties for marriage, how might she have become his wife, if not via his taking her? The answer given in Mishnah Sotah 8:4 is that the extra phrase extends the obligation even to a wife via levirate marriage.

“ושמח את אשתו” – זו אשתו;  
“אשר לקח” – להביא את יבמתו  
*“he will/must gladden his wife” – this refers to his wife;  
“whom he took” – to include his levirate wife.*

This answer seems to point to another problem. Why is it necessary to include a second mention of “his wife” at all? Moreover, this redundancy seems related to the odd structure of the unit, which brings up “gladdening his wife” only after interposing a set of specific don'ts. Compare Dvarim 20:7:

וּמִי־הָאִישׁ אֲשֶׁר־אַרְשָׁהּ וְלֹא לָקַחָהּ יָלַךְ וַיָּשֶׁב לְבֵיתוֹ  
פְּנֵי־יָמוֹת בַּמִּלְחָמָה וְאִישׁ אֲחֵר יִקְחֶנָּה:  
*Any man who betrothed a woman but did not take-her-as-wife – he may/must go return to his house  
lest he die in the battle, and another man take her.*

Devarim 20:7 focuses exclusively on the man's expectations, whereas the section in our parshah mentions only the woman's expectations. (Targum 'Yonatan' translates our verse as “he must rejoice **with** his wife”, but Rashi rejects this because the text is pointed *vesimakh*, which is transitive.)

This different focus may also explain the midrash halakhah's approach to “a new wife”. A beraita on Sotah 44a explains that this means “new to him”, so that it includes widows and divorcees, and excludes only remarriage to one's own divorcee. In other contexts, such as the recitation of Sheva Berakhot, the rabbis indicate that men's emotional expectations are on average lower when they marry previously married women. Yet here, there is no difference, because such women's expectations are not lower. (Ibn Ezra

reports that “some say” that we translate “new wife” as “virgin”, but this position has no impact in halakhah.)

Presumably, we can put the “new wife” together with “the wife whom he took” to create a composite legal set of wives, namely any wives, whether freely chosen or levirate, whether or not previously married, so long as they were not previously married to this husband. Husbands of these wives are exempt from army service and clear to their houses for the year after marriage, **so that** they may gladden their wives.

The simplest reading of this is that husbands are obligated to gladden their wives so long, and only so long, as they are exempt from army service. This is the approach I had assumed, and it seems clearly taken by Rambam in Sefer HaMitzvot DO #214:

והמצוה הרי"ד היא  
שצונו להתייחד החתן עם אשתו שנה תמימה,  
שלא יסע חוץ לעיר  
ולא יצא בצבא  
ולא יעבור עליו דבר מהדברים הדומים לאלו [ל"ת שיא],  
אבל ישמח עמה עד מלוא שנה מיום בואו אליה.  
*The 214th commandment is  
that we are commanded that the groom be alone with his wife for a complete year  
meaning that he may not travel out of the city  
nor go out in the army  
nor have anything similar imposed on him [see DON'T #311]  
rather he must rejoice with her until a full year from the day he comes in to her*

However, Rav Sabato's reading is adopted by Sefer Mitzvot Katan (=SMK) #285:

לשמח את אשתו  
כדכתיב ושמח את אשתו אשר לקח,  
יש בעשה זה לאו, שנאמר ועונתה לא יגרע,  
והנה כמה גדולה המצוה הזאת שהרי פטרתו תורה מליצא בצבא,  
*To gladden his wife  
as Scripture writes: "He must gladden the wife whom he took"  
This DO has within it a DON'T, as Scripture says "and her times of intimacy must not be diminished"*

SMK reads the exemption from army service in the first year of marriage as a specific consequence of a general mitzvah to gladden one's wife that has no expiration date. The clear advantage of this reading is that it explains both the odd structure of our passage and the apparent redundancy; the last sentence is not the conclusion of the yearlong exemption from national service, but rather serves to put that exemption into the framework of a more general mitzvah. (Rav Yerucham Fishel Perlow in his Commentary to the Sefer HaMitzvot of Rav Saadia Gaon suggests that this general mitzvah may be implied here but derived directly from other verses.)

However, Netziv in Haamek Davar uses the same structure to make a radical claim in the opposite direction. He claims that the husband has the **option**, not the obligation, to use the time gained via exemption from service to gladden his wife.

“ושמח את אשתו” –  
אינו מצות עשה לשמח את אשתו כל השנה הראשונה,  
דזה אינו, ואפילו מדרבנן אינו מחויב לשמחה אלא שבוע אחד,  
וכבר עמד ע"ז בס' יראים, וכתב בזה"ל:  
חייב לשמחה בכל דבר שיודע שיש לה שמחה עכ"ל,  
ומשום שהיה קשה לומר דמצוה לשמח כל השנה בשמחת נשואין,  
מש"ה פירש "ושמח" היינו שמחה בלב במלוי רצון,  
כמו "נתתה שמחה בלבי" ועוד הרבה,

אבל האמת דפי' "ושמח את אשתו" אינו אלא רשות,  
דיכול הוא לשבת בביתו ולשמח את אשתו אף על גב שכל ישראל בצער מלחמה.

He will gladden his wife –

*This is not a DO to gladden his wife the whole first year,  
as this is not so, and even Rabbinically his is only obligated to gladden her for one week.*

*Sefer Yereim already noticed this, and therefore wrote as follows:*

*"He must gladden her with anything that he knows gives her happiness"*

*Because it was hard to say that this is commanding to gladden all year with wedding celebration,*

*Yereim explains "he will gladden" as referring to internal joy and fulfilling her wishes  
as in the verse "you have placed joy in my heart", and many others.*

*But the truth is that "he will gladden his wife" it is only a permission,  
that he is permitted to stay home and gladden his wife even though all Israel is in the suffering of battle.*

One might suspect Netziv of being antiromantic. But his next comment demonstrates the opposite:

– "אשר לקח"

טעם הוא שהזהיר הכתוב בזה,

משום דהיא חדשה לו ועדיין לא נשרשו בחיים,

ואם יסיח דעתו ממנה – יוכל להיות שינתק החבל לגמרי,

אבל בלי כפיה רשאי לצאת,

וממילא לא יצא

אם לא יהא ברור שישוב לאהבתה:

– whom he has taken

*this is the reason Scripture commands these exemptions,*

*since she is new to him, and they have not been rooted in life,*

*so that if he stops concentrating on her – possibly the cord will be completely parted.*

*But he is permitted to leave so long as there is no external compulsion,*

*and it will therefore turn out naturally that he will not leave*

*unless it is certain that he will return to her love.*

It seems to me that Netziv held that love can only flourish in freedom. Law can give us freedom from oppression, and thereby freedom to love, but law cannot make us love. Moreover, no one healthy can be made happy by someone who is compelled to fulfill their wishes, so a general mandate to gladden one's spouse would be self-defeating.

Netziv's specific halakhic position is at best a minority, and the mainstream of Jewish tradition does not fully share his idealistic romanticism. Rav Sabato had good reason for preferring SMK.

But Elul is the month of romance – Ani l'dodi v'dodi li – and therefore an excellent time for considering the power of Netziv's underlying psychological claim, in both marriage and religion.

## Should Divrei Torah Take Sides in Political Disputes?

September 7, 2018

Teachers of Torah must continually choose between timeliness and timelessness. Both options are legitimate. When the political issues of the moment are genuinely important, Torah should have something to say about them rather than shrinking off to a neutral corner. Involvement in politics is a great mitzvah when genuinely motivated by the pursuit of the straight and the good, as G-d gives us to see the straight and the good.

Yet under ordinary circumstances Torah itself must not become partisan. Legal interpretation (really all interpretation) loses its authority when it becomes subordinated to an external agenda. Even the perception of partisanship tends to greatly diminish moral influence. (I say “tends” because there is a clear exception. The most passionate partisans may dismiss the words of anyone **not** clearly identified with their political sect. But such people are often open to influence only within a very narrow range. They will turn on prophets or scholars who presume to critique the partisan line of the moment.)

I faced this issue squarely when thinking about what to write this week. So many American political issues of the moment deserve Torah treatment that writing about something else seemed an abdication of responsibility – and yet it is possible to speak Torah about them in a way that deepens the issue rather than cheapening the Torah?

Torah Jews are subject to the same political passions as everyone else. As citizens, we – scholars and salts of the earth alike – naturally become progressive and reactionary, liberal and conservative, just like everyone else. So our timely Torah is likely to be under partisan influence, even if we try to be self-aware.

My admittedly inadequate solution for this week is as follows. Ten years ago, when John Roberts was nominated for Chief Justice, I wrote an op-ed about judicial character for Edah, which was picked up by the Milwaukee Chronicle. It seems to me that it stands rereading in the context of the Kavanaugh nomination. My hope is that the explicit recognition that it was not written in response to this moment will help readers evaluate the Torah claims on their own terms, and then make their own decisions about how those claims might play out in practice today.

(Note: The printed version was superbly edited by Dr. Alan Brill to make it more accessible, but I will take this opportunity to make available a version closer to my original.)

### JUDAISM PROVIDES HELPFUL GUIDELINES FOR CHOOSING JUDGES

The prospect of an entirely reshaped U.S. Supreme Court makes it important that Americans have a serious conversation about our constitutional system. Jewish tradition can make a significant contribution to that conversation.

When Moses creates the first Jewish judiciary, God instructs him to appoint “men of strength, in awe of God, men of truth, haters of corruption” (Exodus 18:21). The first lesson Jewish tradition teaches is that judicial character is more significant than judicial politics.

Today’s nominees will likely make their most critical decisions about issues that do not yet appear on the legal horizon. What matters most is not their specific positions but their temperament and understanding of the responsibility of the court.

The purpose of a constitution is to place basic principles beyond the reach of the powerful. In a genuinely democratic society, power rests with the majority. Paradoxically, a primary purpose of democratic constitutions is fundamentally antidemocratic, to protect minorities against the tyranny of the majority. Another purpose is to prevent other sources of power, such as wealth, from usurping the powers of the

majority. Justices must understand that it is the court's responsibility to enable the constitution to play these roles.

The second lesson Jewish tradition teaches consists of a model for the long-term success of a text-ordered society. In Judaism, texts restrain power through authority, and texts gain authority because they have meanings that are discovered rather than produced by their interpreters.

When judicial rulings are perceived as reflecting judges' political opinions rather than painstaking scholarship, they lose their authority. Thus the public perception, justified or not, that *Gore v. Bush* was decided on the basis of party affiliation cost the Supreme Court tremendously.

The Talmud records similarly that the Great Sanhedrin's capacity to prevent disputes in Israel ended when its members were perceived as ruling on the basis of affiliation with the School of Hillel or the School of Shammai rather than on the basis of individual judgment.

The third lesson is that even though the Torah exhorts us to care for the poor, nevertheless it bans favoring them in legal disputes (Leviticus 19:15). This is because the rich will only concede power to the law if they see its interpreters as objective and impartial.

Over much of the latter 20th century, the federal judiciary tended to be more liberal than the electorate. Liberals accordingly sought to expand the discretion of the courts, especially with regard to constitutional interpretation. (In the early 20th century, liberal policy goals were often frustrated by the discretion of a court they saw as too conservative. Hence FDR's threat to "pack the court".)

Some of the important advances of the civil rights movement were made possible by these theories. The liberal gains, however, because they were enabled by creative but intellectually unconvincing readings of the Constitution, made the text less capable of resisting political agendas.

The fear inspired in liberals by the prospect of a conservative Supreme Court brings home the price that has been paid for those theories. If the text of the Constitution were seen as controlling, the political leanings of potential justices would have far less potential effect.

At the same time, if the Constitution had passed through the fire of the civil rights movement unaffected, if the text were not seen as genuinely responsive to the humanity of African Americans, it would be morally obsolete. But how can a text respond to changing circumstances and contemporary moral insights without losing its authority?

Jewish tradition offers a straightforward if difficult prescription — stick to the traditional meaning of a text except when urgently necessary. The Talmud celebrates legal adaptation, but maintains its received lore with almost fanatic obsession with detail.

When teaching rabbinic students, I gradually bring them to the realization that authoritative interpreters have nearly absolute power over texts, and that real creativity is possible. At the same time, I teach them that this power must be used with extreme caution. If a text can mean anything, it means nothing.

Sometimes, as for example in the face of disaster, one must reread the text and find new wine in old barrels through legitimate legal interpretation.

After the destruction of the Second Temple, the rabbis of the Talmud found creative ways to compensate for the loss of the sacrificial order; and in medieval times, rabbis found creative ways to justify commercial transactions banned by the plain meaning of the Talmud. But this creativity took place against a static traditional background.

Crucially, the rabbis were continuously aware that their capacity to innovate stemmed from their predecessors' resistance to innovation and their own usual reliance on precedent.

They realized that judicial discretion is not an easily renewable resource, but rather a capital account built up by years of judicial restraint. When they used this resource, they spent it carefully and wisely.

In other words, the rabbis understood that the authority of law, and its capacity to protect the weaker members of society, depends on a combination of judicial humility and self-confidence.

The Talmud teaches that only humble people can learn Torah properly. Yet, it saw excessive rabbinic humility in a time of crisis as causing the destruction of the Second Temple. The complex task of a judge is to be exceedingly humble without being excessively so.

At the nomination hearings of any potential Supreme Court justice, the question we should be asking is not whether he or she agrees with our political positions.

Rather, Jewish tradition teaches that we should be asking whether that individual has the humility to bow before the text and its history of authoritative interpretation, and the self-confidence and ingenuity to stand against that history when necessary to preserve the authority of the text.

## May One Wear Comfortable Shoes on Yom Kippur?

September 18, 2018

*Times of Israel*

If Halakhic creativity emerges from a method of interpretation, rather than being results-driven, it must yield stringencies as well as leniencies. It will also sometimes drive the beit midrash to align with a common practice – strict or lenient – that had previously been seen as the product of ignorance, and in other cases drive the beit midrash to reject what had previously been seen as unexceptionable behavior.

Rabbi Eliezer Melamed's discussion of the "Crocs on Yom Kippur" issue is a fascinating and useful illustration of such contemporary halakhic creativity. I have not yet studied the relevant texts sufficiently to be confident of my own interpretations. But I think it will be valuable nonetheless to present a simplified view of the issue as a standard halakhic observer might see it, and as Rabbi Melamed sees it, and hopefully our discussion will continue. (For readers not familiar with Rabbi Melamed – he is author of the popular Peninei Halakhah book series and a leading Religious Zionist posek and community leader.)

On Yoma 82a, Rabbi Yitzchak bar Nachmeni rises to his feet and declares "I saw Rabbi Yehoshua ben Levi go out wearing cork sandals on Yom Kippur". Rabbah bar Bar Channah provides corroborative evidence from Rabbi El'azar of Nineveh, and the Talmudic narrator attests that Rav Yehudah and Abbayay behaved similarly. Finally, the narrator attests that Rabbah bar Rav Huna would wrap cloth around his feet and go out.

Following this the Talmud presents a challenge from Rami bar Chama. Mishnah Shabbat 75b records a dispute between Rabbi Meir and Rabbi Yose as to whether an amputee may wear his or her wooden prosthesis in a public domain on Shabbat. The initial assumption is that the dispute depends on whether a prosthesis is or is not considered clothing; if it is not, then "wearing" it in the public domain violates the prohibition against carrying. Rami bar Chama cites a beraita which asserts that both positions agree that a wooden prosthesis may not be worn on Yom Kippur. He apparently assumes that if a prosthesis may not be worn, then cork sandals may not be worn, and perhaps one may not even wrap cloth around one's feet. All these would be violations of the prohibition against wearing shoes.

Abbayay apparently responds by distinguishing between prostheses with pads and without. Rava counters that the prohibition is only against shoes, and if a prosthesis is not a shoe, then adding pads does not change its nature. He suggests instead that Rabbi Meir and Rabbi Yose agree that a prosthesis is a shoe, and disagree on Shabbat only about whether one must be concerned that the "shoe" will fall off and then be carried. Rava's suggestion seems out of place, as it explains the beraita cited by Rami bar Chama but does not reconcile it with the testimonies that Rami bar Chama was challenging.

Halakhic decisors can deal with this conundrum in three basic ways.

- 1) They can choose to rule like the testimonies, and dismiss Rami bar Chama's beraita as an error. This yields the result that only leather shoes are prohibited, or more precisely: Only shoes are prohibited, and only items made from leather are considered shoes. (There are also good grounds external to our sugya for this contention.)
- 2) They can choose to rule like Rami bar Chama's beraita, and against all the testimonies. This yields a prohibition that extends to footwear made out of any materials. A variant of this position suggests that even the beraita would permit wrapping cloth around the feet, since in that case there is no shoe by any definition.
- 3) They can choose to reconcile the beraita and the testimonies. This results in distinguishing between leather shoes and wooden prostheses on the one hand, and cork on the other.

Our sugya provide no rationale for such a distinction. On Yebamot 103a, Rava suggests that Rabbi Meir distinguishes shoes that “protect”, such as wooden prostheses, from shoes that do not, such as “anpalya shel begged”, which seems to be the equivalent of a cloth footwrap. That sugya does not discuss cork.

(This suggestion of Rava appears to contradict his position in our sugya, and also a different position of his on Shabbat 68a.)

Rav Yosef Karo in Beit Yosef notes that all three of these positions are found in the rishonim. However, RIF and ROSH each cite the testimonies and not Rami bar Chama’s beraita, presumably meaning that they rule that only leather is forbidden. Rav Karo’s conventional heuristic is to rule in accordance with two out of three of RIF, ROSH, and Rambam, and accordingly Shulkhan Arukh OC614:2. rules that only footwear containing leather is forbidden.

But what about Rambam? Rav Karo will often cite Rambam’s minority positions as an alternate, yet in this case he rules absolutely, and Rav Moshe Isserles appears to agree.

In Hilkhhot Shevitat Asor 3:7, Rambam rules that cork and rubber sandals are permitted, and that a person may wrap cloth around his feet, because “the hardness of the ground reaches his feet and he is conscious of being unshod.” It is not clear what he means by “the hardness of the ground” (see e.g. Tzafnat Paneach), or why cork and rubber would not block this experience, or on what basis this rationale is introduced. He astonishingly fails to mention wooden prostheses one way or the other. Beit Yosef accordingly dismisses Rambam’s position as “enigmatic” and gives it no halakhic weight.

Bottom line: the conventional halakhah, in theory and in practice, is that only footwear containing leather is forbidden. A reasonable stringency would be to ban wooden clogs as well, but cork and rubber are clearly permissible, and refusing to wear them might well be spiritual arrogance (yuhara), as one would be “holier than” the various Talmudic rabbis who publicly wore them.

Enter Rav Melamed. Rav Melamed’s method involves having mitzvot make experiential sense whenever possible. A prohibition against leather shoes alone makes no experiential sense nowadays. Many if not most shoes for daily wear are not made out of leather, and many people therefore will have no sense of doing anything different on Yom Kippur – they will have no consciousness of עינוי/affliction. It is therefore unlikely that the prohibition today is limited to leather.

Rather, it must be that the prohibition – even according to RIF and ROSH – includes shoes made out of whatever materials ordinary daily shoes are regularly made from. (Rambam assumes that daily shoes are intended to prevent one’s feet from feeling the hardness of the ground.) Which materials these are may vary over time, as both manufacturing processes and social practice vary. The goal is to ensure that everyone on Yom Kippur experiences themselves as unshod.

Rav Melamed thus presents a dynamic halakhah which is sensitive and responsive to changes in technology and society. This dynamism leads, in our case, to a broad new practical stringency.

There are many ways to challenge his result.

Formally, one might argue that while he has correctly described the intent of the law, its specific content was nonetheless frozen in Talmudic times, either because it was a Rabbinic decree (as Rav Melamed suggests in a footnote) or because it was an area where the Torah was given over to Rabbinic definition (as I was taught in yeshiva).

Sociologically, one might argue that high-end dress shoes are still primarily made from leather. One might also argue that in Talmudic times many people generally walked around barefoot, and so Yom Kippur was not in that regard experientially different for them than it is for us. (One might also argue specifically regarding Crocs and other soft-soled shoes that they do not prevent feet from feeling pebbles and the like,

and therefore perhaps not all our daily shoes are “shoes” even if one accepts that the prohibition isn’t limited to leather.)

Symbolically, one might argue that the ban referred specifically to leather because Ezekiel 16:10 is understood by Talmud Yebamot 102b as connecting shoes and leather specifically (in the context of chalitzah; see e.g. Rabbeinu Manoach), or because the prohibition somehow relates to the garments G-d made for Adam and Eve (see ARI).

Experientially, one might argue that the Talmudic rabbis whom the standard halakhah follows clearly felt that the prohibition was not intended to cause actual pain, as they used all legitimate means to cushion their feet. What was needed was not a physical experience but rather a heker, a mental realization of a symbolic prohibition. Checking our shoes to ensure that they don’t contain leather – which we don’t have to do any other day of the year – suffices for that. There is no fundamental requirement to physically feel unshod. It is ok if the mitzvah-experience on Yom Kippur changes in the same way that our experience of kashrut has moved from slaughtering animals to checking for hekhsher symbols.

For all these reasons, I am still comfortable being comfortable in my Crocs on Yom Kippur. I am nonetheless attracted to Rav Melamed’s method, and think it has much to contribute, so long as its audience is willing to embrace both its stringent and its lenient implications.

## Seven Wanderers

By Matthew Kritz, SBM 2018  
September 28, 2018

*I invite to my Sukkah seven esteemed guests: Avraham, Yitzchak, Yaakov, Yosef, Moshe, Aharon, and David.*

וַיֵּצֵא אֹתוֹ הַחַי וְצֵה וַיֹּאמֶר הַבְּטֶנָּה הַשָּׂמַי' יְמֵה וּסְפֹר הַכּוֹכָבִים אִם-תּוּקֵל לְסַפֵּר אֹתָם וַיֹּאמֶר לוֹ כֹּה יִהְיֶה זְרָעֲךָ:

*Avraham our father, why do we wander?*

Break out of foolish ways of thinking, my child. Going outside your physical space is the first step to entering new mental spaces, by not being bound to the familiar. To be an iconoclast calls for stepping outside, risking being different, being ready to learn and discover. Look beyond the four walls given to you; truth is waiting for you outside. (Rashi ad. loc. Breishit Raba 42:8)

וַיֵּצֵא יַעֲקֹב לְשׁוּחַ בְּשׂוּדָה לְפָנוֹת עָרֵב וַיֵּשֶׂא עֵינָיו וַיֵּרָא וְהָנָה גְּמִלִים בְּאִים:

*Yitzchak our father, why do we wander?*

My child, how can you find G-d in the midst of the bustle of life? How can you pray when surrounded by distractions? To speak to the Almighty, you'll need to go far away, to a place where no one will find you. There, freed from the noise of the world, you will begin to hear your own breathing and your own thoughts. Alone, you will not be ashamed to pour out your heart to G-d, remembering that you and G-d are both lonely, eager to find one another. (Seforno, ad. loc.)

וַיֵּצֵא יַעֲקֹב מִבְּאֵר שֶׁבַע וַיֵּלֶךְ חֲרָנָה:

*Yaakov our father, why do we wander?*

In wandering, our trust in G-d is put to the test, my child. Whether we will return home safely, whether we will have bread to eat and clothing to wear, is in the hands of G-d. On the road, we cannot rely on familiar surroundings; our only choice is to foster within ourselves an awareness of our dependence on G-d, which, in reality, is present even when we feel self-confident. (Breishit Raba 79, Mechilta 16:20)

וַתִּתְפַּשֶּׂהוּ בְּבִגְדוֹ לֵאמֹר שְׂכִיבָה עִמִּי וַיַּעֲזֹב בְּגָדוֹ בַּיָּדָה וַיֵּנֶס וַיֵּצֵא הַחוּצָה:

*Righteous Yosef, why do we wander?*

As you wander, you will encounter worlds foreign to you, cultures that look different from your own. In wandering, you will be forced to discover within yourself a commitment to your own values, to know when you must run away. To flee from evil is the ultimate test, to be ready to leave everything behind in the name of what you believe. In wandering, you demonstrate where you refuse to go, no matter the cost; you show that your true home is not the place you are from, but the people you are from. (Sotah 36b, Ramban Breishit 39:8, Introduction to Mesilat Yesharim)

וַיְהִי אִ בְּיָמֵים הָהֵם וַיִּגְדַּל מֹשֶׁה וַיֵּצֵא אֶל-אֶחָיו וַיֵּרָא בְּסִבְלֵתָם וַיֵּרָא אִישׁ מִצְרִי מִכָּה אִישׁ-עִבְרִי מֵאֶחָיו:

*Moshe, our teacher, why do we wander?*

From within the walls of your own home, you cannot see the suffering that surrounds you. Security lays the groundwork for complacency; wandering out allows us to see what others take for granted. Wander in order to gain an outsider's perspective, to remove the mask of the normal from what is, in truth, injustice. Doing so will make you more aware of what others do not notice, be that the suffering of the innocent, or a peculiar, unburnt bush. (Midrash Tanchuma, Shemot 9)

וַיִּחְרָאֲפָהּ ה' בְּמִשְׁפָּהּ וַיֹּאמֶר הֲלֹא אֶהְיֶה אִחִיךָ הֲלֹא יָדַעְתִּי כִּי־דַבֵּר יִדְבָר הוּא וְגַם הִנֵּה־הוּא יֹצֵא לְקִרְבָּתְךָ וְרֵאךְ וְשָׂמַח בְּלִבּוֹ:

*Aharon, righteous priest, why do we wander?*

Our desires, and our responsibilities, are not always easily within reach. Those goals we truly care to accomplish, we must journey for, to show we are ready to go the distance. Some wandering is aimless, but other wandering is better termed journeying, setting our goals high and pursuing them. To take the long way is an act of love; it shows we cared enough to travel. (Midrash Agada Shemot 4:14)

וַיֹּצֵא חֹטֵר מִגִּזְעֵי יִשְׂרָאֵל וְנֹצֵר מִשְׁרָשָׁיו יִפְרָה:

*King David, why do we wander?*

Do not think that all is settled, for even as you sit in a house of cedars, the ark of the covenant remains in a tent. Keep wandering, to remember that your story is unfinished, that the exile goes on, that the Messiah has not yet come. Continue wandering, for you mustn't think you've reached your destination. There is still work to be done in the wilderness before the next generation can build a permanent home for G-d. (Midrash Agada Shemot 4:14)

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## The Kavanaugh Hearings and Torah Conversation

October 19, 2018

A rabbi recently asked a conversion candidate whether the Torah had anything to say about the Kavanaugh hearings. The question was a failure, because the candidate did not feel safe enough to express disagreement with the (wrongly) presumed political consensus of the beit din. I think the presumption needed to be undone; it was vital to show that Torah conversation and Torah communities are intended to handle and even encourage open disagreement on such questions.

The great issues of the day often become political faultlines. In a healthy society, the importance of those issues drives people to engage regularly in substantive if heated conversation across those lines. In an unhealthy society, fear of social fracturing, moral disapproval, or economic reprisal; insecurity; and sheer disregard for the opinions and character of those one disagrees with, lead people to engage only with others who are demonstrably likeminded, and to shy away from authentic disagreement.

Genesis 14:13 describes Avram as an “Ivri,” and Rabbi Yehudah (Bereishit Rabbah 48:4) understands that to mean that “The whole world was on one side=*eiver*, and he stood on the other.” In other words, a Jew is someone willing to be ostracized for the sake of moral principle. But the medieval exegete Rabbi Yosef Bekhor Shor points out that Genesis 14:13 itself locates Avram in the terebinths of his covenanted allies Aner, Eshkol, and Mamre; Avraham and Sarah had each other; and the Rabbis also describe Avraham and Sarah as making converts (“the souls which they made in Charan”). This combination of willingness to bear unpopularity for the sake of principle, while maintaining human relationships and engaging with others in the hope of convincing them, should make for a healthy society.

One test of whether it succeeds in doing so is the process of conversion itself. Do candidates see themselves as entering a vibrant conversation which values the differences they bring to Judaism? Or do they see it as too risky to express political opinions that conflict with the apparent consensus of their intended community?

What matters is that we think seriously through the lens of Torah, not that we reach a specific conclusion. We should not *pasken* politics.

I’ll go further. Thinking through the lens of Torah should almost never lead to an absolutely definitive conclusion regarding an issue about which reasonable moral people have differing intuitions. (This is also true of economics, philosophy, and political science.) Hopefully, it enables us to make better, deeper, and more authentic judgments and decisions. The Kavanaugh hearings modeled for me the breakdown of political conversation in the United States and reflected the ill health of American political society. I will take the chance here of trying to model a constructive Torah conversation about one aspect of the Kavanaugh hearings, in the hopes of contributing to the health of our community.

I found two Orthodox approaches on the web to the question of whether youthful sins can disqualify a person from public service.

The first, from a group calling itself The Coalition for Jewish Values, stated that

*we should be judged on the totality of our lives, not merely on one alleged incident, and certainly not on an incident that is unsubstantiated and unprovable,*

and

*It is immoral to besmirch someone’s name in the court of public opinion on ‘evidence’ that would not stand in a court of law.*

These propositions were taken as self-evident.

The second, by Forward columnist Avital Chizhik Goldschmidt, cites Maimonides.

*Open the Mishneh Torah, where Maimonides unpacks the biblical descriptions of a judge in great detail. Judges appointed to the Sanhedrin, he writes, must be “mighty in their observance of the mitzvot, who are very demanding of themselves, and who overcome their evil inclination until they possess no unfavorable qualities, no trace of an unpleasant reputation, even during their early manhood, they were spoken of highly.” (Hilkhos Sanhedrin 2:7, Translation by Eliyahu Touger on Chabad.org).*

*Interestingly — the teenage behavior of a judicial candidate is relevant, Maimonides says. It is telling of one’s moral character, no matter how long ago it was.*

*But perhaps what is more interesting is the fact that Maimonides does not only require a judge to be righteous, or rather, sin-less — something that may be, somewhat, measured.*

*A good “name,” “no trace of an unpleasant reputation,” as elusive as that is, is important for Maimonides. A mere stain on one’s standing, a grave rumor with substantial weight, is enough to disqualify a judicial candidate from being confirmed — probably because a bad repute alone is enough to dangerously devalue a judge in the eyes of the people he serves.*

Of these two approaches, I plainly prefer Ms. Goldschmidt’s. She provides textual evidence, and therefore makes space for disagreement. An outsider reading her article could reasonably believe that someone providing plausible counterinterpretations or alternate texts would remain part of her religious community. But I don’t mean to dismiss the CJV’s intuitions, which I think can be reconciled with traditional texts.

From a halakhic perspective, we must of course ask how broadly Maimonides’ position is shared. For example, the requirement that a judge be “*pirko naeh*” = “that his reputation be pleasant even during early manhood,” is cited by Tur (Choshen Mishpat 7), but not in Shulchan Arukh. Perhaps Shulchan Arukh thought it was implicit in his citation of the requirement that judges be *baalei shem tov* = holders of good reputations. But perhaps he thought it was going too far to require that reputation to have been established in youth.

Maimonides’ list is taken essentially verbatim from Tosefta (Sanhedrin Chapter 7, Chagigah Chapter 2). But the parallel text in the Babylonian Talmud (Sanhedrin 88b) leaves out *pirko naeh* (this remains true in all manuscripts available at [fjms.genizah.org](http://fjms.genizah.org) and in [Dikdukei Sofrim](#)).

The *pirko naeh* requirement is also brought on Taanit 16b with regard to a *yoreid lifnei hateivah*, a prayer leader. There – as opposed to regarding judges – it has generated extensive discussion in the responsa literature over the past millennium. (This can be found by searching for variants of the phrase *pirko naeh* on the Bar Ilan Responsa Project.) Decisors as early as Rav Hai Gaon struggle throughout with on the one hand a recognition that a prayer leader’s past misdeeds can legitimately diminish confidence in their capacity to effectively represent the community before G-d, and on the other hand a social need to reward penitence with acceptance, and a metaphysical claim that “where *baalei teshuvah* stand, those who have always been completely righteous cannot stand”. They distinguish between leading prayers on fast days (and perhaps Rosh HaShannah) and on other days; between holding the position of chazan and leading prayers on an ad hoc basis; between prospective appointment and removal from office; etc. All these distinctions are disputed.

Decisors similarly struggle with the standard of evidence needed to establish a genuinely bad reputation. Surely one uncorroborated report is not enough – or is it? The usual Halakhic category invoked is **דלא דלא קרע**, a rumor that will not cease. But sometimes the court feels obligated to do its best to **make** the rumor cease.

Furthermore, does *pirko naeh* require one to have **now** a reputation that one has been blameless throughout, or only to have escaped one’s youth with a perhaps mistakenly unblemished reputation? At least one case in the responsa literature appears to involve new rumors of youthful offenses in which the

accused both denies the worst claims and claims to have repented of the behavior that gave rise to the rumors of sin, as evidenced by his unblemished reputation ever since.

To summarize: Contentions made by both sides make their appearance in the halakhic tradition. Intuitions held by both sides make their appearance in the halakhic tradition.

Our community would have benefited – might still benefit – from a full scholarly analysis of these materials and a better sense of how past cases were decided. But that would still not yield binding law, as halakhah is fully cognizant that new social arrangements require precedents to be applied thoughtfully rather than mechanically.

I don't know whether such an analysis would have enabled genuinely healthy conversations in our community about the Kavanaugh nomination and hearings. Some issues may simply be too raw. Our communities of discourse may have sustained so much damage already as to be completely unable to handle an issue that pushes so many buttons so hard. Publishing this scrupulously neutral dvar Torah feels risky, as so many people seem committed to the approach that "anyone who is not the enemy of my enemy is my enemy." Yet reclaiming our capacity for this kind of conversation seems urgently necessary, for America and for Torah.

## If Sarah Imeinu Had Died in Pittsburgh

November 2, 2018

*Rabbi Barry Kornblau posted the following this week, which expressed my thoughts and feelings as well: “At this time of our need and grief, our American Jewish community is currently experiencing an outpouring of love and support from others outside our community. In addition to thanking those who offer such assistance now, we Jews must also recommit, now, to our principled tradition of extending hands and hearts of love to other communities who, in their present and future times of grief and need, will appreciate our support.”*

*This devar Torah is in large measure an expression of the same idea.*

You can learn a lot about your neighbors when it comes time to bury your dead, and also about your own place in society. But some of what you learn may be wrong. What did Avraham learn when it came time to bury Sarah? How much of what he learned was correct?

When Avraham rises from his grief, he turns to the Hittites and says:

גר ותושב אנכי עמכם

תנו לי אחזת קבר עמכם

ואקברה את מתי מלפני

*I am a ger and toshav among you  
Give me a graveholding among you  
and I will bury my dead from before me.*

The meaning of the phrase *ger and toshav* is unclear. To begin with, it may be a compound – “I am fully a *ger* and fully a *toshav*” – or else a hendiadys – “I am some hybrid of *ger* and *toshav*”. Neither *ger* nor *toshav* is clear, either, and both must be contrasted with *ezrach* and with *yoshev*. Let’s assume that a *toshav* is more firmly entrenched than a *ger*, so we’ll call a *toshav* a resident and a *ger* an alien.

Avraham uses words that seem bold in context. “Give me”, rather than ‘sell me’; “graveholding”, rather than ‘grave’; and “among you”, rather than ‘anywhere’. A straightforward way of reading this is to see Avraham as seeing to upgrade his status. Until now he has had, and sought, no permanent connection to this land and culture; creating a family plot in the local cemetery will make him a local, and perhaps a citizen.

This reading is strongly opposed by traditional commentators, for both global and local reasons. Globally, the notion of Avraham genuinely wanting integration with Hittites seems a violation of Jewish destiny, and a failure to understand the message of the Covenant Between the Pieces that the cultures of Canaan are on an irreversible downward moral and religious trajectory.

Note however that Rashbam on last week’s parashah criticizes Avraham for making a pact with the Philistines, and even suggests that the Akeidah was a punishment for making it, because it showed a lack of faith in God’s promise that his descendants would inherit the Land. Perhaps Avraham’s willingness to sacrifice Yitzchak proved his faith, but he never understood why he had been tested?

Locally, the negotiation ends, at Avraham’s insistence, in the purchase of Ephron’s cave as an entirely private burial ground. The burden of proof rests on anyone arguing that Avraham initially intended a different plot of land and/or a gift rather than a purchase.

But there seem to be real developments in the course of the negotiation. Avraham initially expresses interest only in the cave “which is at the edge of his field”, but ends up paying for Ephron’s entire field. Avraham’s last words to Ephron replace the phrase “bury from before me” with “bury there”. So there is

room to argue that Avraham initially wanted integration, but somehow feels/is rejected, and changes his goal from to mere toleration.

We might blame this on Ephron. He is the one who introduces the field. He describes the cave as “in it” rather than “on its edge.” Perhaps the community was sincere in telling Avraham that any one of them would freely give him a burial space, and perhaps the Cave was close enough to an existing cemetery to be considered an annex. But Ephron’s introduction of the field made a gift obviously too extravagant.

Or we might blame this on the Hittites as a whole. They never agreed to give Avraham his own space, only to allow him to bury Sarah in any of their own graves. Their goal was to make Avraham a permanent refugee, with no rights except by sufferance.

Alternatively, the Hittites demanded that Avraham bury Sarah in one of their graves, with no distinctiveness at all. James Loeffler recently posted a quote from Reinhold Niebuhr that sums this reading up:

*The liberal world has sought to dissolve the prejudice between Jews and Gentiles by preaching tolerance and good-will... [But there’s] a curious, partly unconscious, cultural imperialism in theories of tolerance which look forward to a complete destruction of all racial distinctions...The majority group expects to devour the minority group by way of assimilation. This is a painless death, but it is death nevertheless.*

Avraham recoiled, and chose full separation with tenuous tolerance over assimilation.

Or Hachaim, perhaps uniquely among traditional commentators, argues that Avraham was making a rights-based argument that depended on his outsider status.

ויש לך לדעת כי כל תורתנו הקדושה היא שכליית,  
ובפרט בענייני ההנהגה הארצית,  
וכמו שאנו מתנהגים בגר היושב עמנו,  
כן יתחייב שכליות יושבי הארץ להנהיג ביניהם  
להחיות אדם שהוא גר ותושב עמהם  
ולתת לו מתנת חנם.

והיא טענת אברהם גר ותושב אנכי ... תנו לי,  
ודקדק לומר גר ולא הספיק לומר תושב,

המכוון לומר שהגם שאני גר ואיני מכם, אעפ”כ הריני תושב.

*You must know that all of our holy Torah is in accord with reason,  
especially in matters of national administration,  
and (therefore) just as we practice toward the alien who resides among us,  
so too reason requires the citizens of the land to practice amongst themselves  
to sustain-the-life of a person who is an alien and resident among them  
and to give him free gifts.*

*This is (the purpose of) Avraham’s statement “I am an alien and a resident . . . give me” –  
his intent being “even though I am an alien and not one of you, nonetheless I am a resident”.*

This suggests that Avraham was right to be disappointed by every aspect of the Hittite response – their demand for assimilation and Ephron’s desire for money.

However, Or HaChaim’s justification of Avraham’s disappointment comes with a challenging corollary; that Jews, whether in their own country or as part of a composite polity, have an obligation to freely give the necessities of a dignified life – specifically including burial grounds – to noncitizens who maintain separate identities.

This was too much for some subsequent commentators. Here is the contemporary Rabbi M. Peretz in Otzar Haparshah:

והאדר”ת בספר סדר פרשיות הקשה

שלגר תושב מותר ליתן מתנת הנם בדבר שהוא להחיותו  
אבל מקום קבורה ומתנה גדולה אין היוב  
ונראה  
כשם שיש מצוה להחיותו  
כך יש מצוה ליתן לו מקום קבורה  
אלא שמקום חשוב, כמו מערת המכפלה – אין היוב ליתן במתנת חינם  
וגם אברהם לא ביקש זאת  
אלא כוונתו כיון שגר תושב אנכי עמכם – אם כן יש לי הזכות לקבל מקום קבורה בחנם  
ואם כן, אני שמוכן לשלם במחיר מלא – ראוי ליתן לי רשות לקנות אפילו מקום חשוב כמערת המכפלה  
לכן הקדים אברהם גר ותושב אנכי עמכם

*The Aderet in his book Seder HaParshiyot challenged  
that it is permitted to give a resident alien free gifts in matter that sustain-his-life,  
but there is no obligation to give him a burial place or large gifts?!*

*But it seems*

*That just as there is a mitzvah to sustain his life,  
So too there is a mitzvah to give him a burial place  
Just that significant places, such as the Double Cave, there is no obligation to give for free  
And Avraham did not seek this*

*Rather his intent was that “since I am a resident alien among you, I have the right to receive a burial  
place for free*

*Therefore, since I am prepared to pay full price, it is appropriate to give me permission to buy even a  
significant plot of land such as the Double Cave*

*That’s why Avraham began by saying “I am a resident alien among you”.*

Rabbi Peretz contends that there must be boundaries to our obligations toward people who are not part of our nation. It follows that there are boundaries on their obligations toward us. (But rights extend beyond obligations, so aliens have the right to purchase anything on the market so long as they pay full price, and we have the obligation to ensure that right.)

Not too many of our ancestors could have imagine a real-life situation in which we needed to make clear that the way Gentiles were treating us was *lifnim mishurat hadin* (beyond the letter of the law; expressing greater closeness to Hashem than required by Halakhah), lest our obligations toward Gentiles become too onerous. Not all Americans see us as neighbors, plainly, and this week we know far too well that some murderous anti-Semites live in our neighborhood. But sometimes you learn a lot from your neighbors when it comes time to bury your dead. We have a lot to live up to.