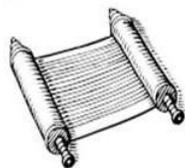


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"Taking Responsibility for Torah"

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

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Understanding the Centrality of Law in Orthodox Judaism

A shorter version was originally published in *Public Discourse*

February 8, 2019

Halakhah: The Rabbinic Conception of Law, by Chaim Saiman, provides a fascinating and deeply learned cultural anthropology of contemporary Orthodox Judaism. Saiman guides outsiders to understand the wildly outsize role that the study of Talmud, commentaries, and derivative legal codes plays in Orthodoxy, and the ways in which that study enables Orthodoxy to see itself as an organic continuation of the Talmud's religious worldview. Insiders will also benefit from seeing themselves as generous and sympathetic outsiders might see them.

But Halakhah has ambitions beyond anthropology. It seeks not only to describe the place of Talmud study in Orthodoxy, but also to make sense of that place. Saiman wants to justify the culture of yeshivot (intense Talmud academies) to insiders who find value in what they do but can't explain to themselves why, and even to aspirational insiders who find the centrality of often abstruse and impractical study off-putting.

Saiman is quick to note that the questions plaguing these perplexed or disaffected yeshiva students are not new. Many of them were asked by Jesus to the pre-Talmudic Rabbis: Why spend so much direct effort on the minutiae of which species can be tithed together, rather than on the purpose of tithing? Why analyze the syntax of oaths more than their substance?

Other such questions emerge from the nature of Talmud: Why does immediately practical law take at best equal billing with hypothetical future law, with reconstructed past law, and even with law that "never was and never will be?" Why does even the study of the law focus on its letter rather than on its spirit?

The Talmud often seems to invite these questions. For example, Saiman contrasts Grant Gilmore's bon mot "In Heaven there is no law" with a passage of Talmud (Bava Metzia 86a) which depicts God and His Heavenly court disputing an apparently trivial detail of the Biblical laws of skin lesions. Surely that passage is designed to accentuate the problem. Demonstrating that metaquestions should not be feared is a standard feature of Talmudic pedagogy; but conclusive answers are rare.

One type of response, set forth in chapters such as "Halakhah as Theology" and "Halakhah as Education," is to show how legal discussion becomes the form and vehicle for other sorts of critical conversations. Saiman provides excellent examples of Talmudic conversations that can be read as covering the same ground as Plato or Milton, transposed into a legal key. For example: Jewish law forbids "carrying" in outdoor public areas on the Sabbath, although clothing may be "worn." The Talmud (Shabbat 63a) develops conceptions of the masculine ideal, and of the Messianic future, via a discussion of whether swords are decorative for men and therefore may be "worn," or else degrading and therefore may not be "carried." Saiman also provides examples of modes of Talmud study that consciously seek to transvalue apparently legal conversations.

But these are ultimately apologetics and not the main point. The real questions are why Orthodoxy chooses this key, when the modalities of poetry and philosophy are available; and whether, for most members of the culture, study of the law in fact develops the areas of the soul that elsewhere are nurtured by poetry and philosophy.

Framing these questions as central assume a particular vision of Orthodoxy and of Talmud. Saiman acknowledges that halakhic cultures have always had poetry and philosophy outside of Talmud. In some halakhic cultures the study of medieval or modern mystical texts are as central as Talmud. Moreover, some yeshivot do emphasize the practical aspects of the law, and those who have not attended or no longer attend a yeshiva often focus their study on practical law or Bible. Finally, in many Orthodox subcultures women are excluded from just the kind of Talmud study Halakhah presents as totalizing.

None of these caveats diminish the importance and potential of Saiman's project. Here, then, is the book's beautiful thesis paragraph (p. 140):

The Rabbis assume that a niggling detail of the laws of Shabbat can engender a conversation about the ideals of manhood and even about humanity's ultimate destiny. The reverse is equally true. Assessing the ideal man, or the value of human wisdom, or the goals of a legal system, is inextricably tethered to the small matters of halakhic observance. In tying these ideas together, the Talmud imparts a claim that is alternately maddening and compelling; that the starting point for human exploration and self-actualization is that man stands commanded to live by God's Torah. The rest, as it were, is commentary.

Go and study.

Was Making the Golden Calf a Violation of Halakhah?

February 22, 2019

According to *yibadel l'chayyim* my father, my grandfather *z"l* did not sing the stanza "Tzeitkhem l'shalom" (Go in peace) on Friday nights, because he thought it was rude. My wife's family sings Tzeitkhem, but omits the stanza "Barkhuni l'shalom" (Bless me in peace) on the ground that asking angels for blessings violates Rambam's Fifth Principle of Faith. We've agreed to disagree about this.

I sometimes frame the issue this way to our confused guests: Do you worry more about interpersonal mitzvot, or rather about mitzvot between humans and G-d? About *derekh eretz*, or about *avodah zarah*? Then I justify my grandfather's position by quoting King David: "*Let us please fall at the hand of Hashem, for His mercies are numerous, and let me not fall at the hand of a person.*"

There are other options. We could sing neither stanza, and leave the angels standing there awkwardly ("In every other house they ask us to bless them?!?") until they decide on their own to leave. Or we could add the fifth stanza "Shuvkhem l'shalom" (Return in peace), which at least mitigates the rudeness.

But it turns out that our eccentric pattern of sounds and silences beautifully models for our students the ability to disagree passionately and yet respect each other's practices. (For our children, the punchline of the old Jewish joke applies: "That was the custom, to fight about it!")

The truth is, though, that I started off thinking that Deborah's objection to Barkhuni was simply wrong. After all, Yaakov Avinu denies an angel leave to go "unless you bless me," and he asks for his grandchildren to be blessed by "the angel who has redeemed me from all evil!" I discovered some years ago that the objection was reliably attributed to R. Chayyim Volozhin, but with all respect, could not understand how he justified it in light of the verses about Yaakov. The more serious theological problem with "Shalom Aleikhem," it seemed to me, is that people tend to sing not "*melekh malkhei hamelakhim*" (King who is king of all kings) but rather "*melekh malakhei hamelakhim*" (King who is messengers of the kings, or: King of the messengers of kings).

Netziv's commentary to Parshat Ki Tisa made me rethink this issue, and several others along the way.

Netziv starts from the classic question: How could the great Aharon haKohen have enabled idolatry by making the Golden Calf? He rejects out of hand the notion that Aharon was simply afraid for his life. Nor does he deploy his radical notion of *aveirah lishmah* (sinning for the sake of Heaven), according to which a violation of halakhah can sometimes be justified on consequentialist grounds. He does not cite the Midrashic claim that Aharon was surprised by the spontaneous emergence of a calf from the melted gold. Instead, Netziv argues that Aharon must have had a **correct** legal argument that justified making the Calf.

Netziv knows perfectly well that the Golden Calf becomes the archetypical *avodah zarah* in Tanakh. He does not suggest that Aharon's argument is **still** valid. But he contends that G-d extended the perimeter of the prohibition against *avodah zarah* **in reaction** to the Calf. Praying to intermediaries that can only carry out Hashem's will was originally permitted, and the desire for mediation was a legitimate expression of fear of G-d. However, the experience of the calf demonstrated that intermediaries would inevitably be taken as substitutes. Perhaps it also created the social-religious will necessary for a ban on intermediaries to be effective rather than generating a worse counterrevolution.

This prohibition comes after the Giving of the Torah via the Ten Statements

"Do not make with me elohim of silver, and elohim of gold you must not make for yourselves"

meaning that they must not make a form of silver that would make it convenient for G-d to manage Israel and relate to their prayers and needs, or a form of gold that would make it convenient for Israel to constantly ask it to receive their needs from The Holy Blessed One.

*This is not actual avodah zarah, which was prohibited to them in the Ten Statements when He said “You must not have other elohim...” as there the meaning is an overseer with power, that we would chas v’shalom believe that The Holy Blessed One transferred His management to some middlebeing, **but this prohibition, that comes after the Giving of the Torah, comes to add a ban even in a manner where the middlebeing will ask Hashem for our needs,***

and this is actually permitted, as I explained regarding the above verse “Behold I send an angel...” (23:20)

as it is only when The Holy Blessed One is as close to Israel as he actually was with Mosheh that it is forbidden to transfer our request to angels even in that manner, as opposed to when he manages us via an angel, when even though it is possible to ask Him directly, nonetheless there is no sin chas v’shalom in asking the angels to seek mercy for us from Him the Blessed...

This was the intention of Aharon the Righteous, which was an accidental violation of a prohibition that he had as yet no responsibility to know, but great corruption came from this...

When Yaakov demanded a blessing from the angel, he was clearly not on the level of Mosheh Rabbeinu, and the Calf had not yet happened, so his demand was legitimate. However, after the disaster of the Calf, G-d ‘built a fence around the Torah’ by forbidding us to addressing requests to intermediaries even when the ultimate addressee of our requests is clearly G-d, Who alone has the capacity to fulfill or reject them. So “Barkhuni” can be forbidden even though by singing it we follow in the footsteps of Yaakov Avinu.

Netziv does not discuss “Barkhuni’ directly, and my wife Deborah considers this defense of her position more problematic than the challenge from Yaakov. I too will cheerfully continue to sing Barkhuni rather than accept Netziv’s explanation, for both textual and theological reasons.

But having thought of this application of Netziv, I looked to see if anyone had made the argument explicitly. I looked in vain. But the search led me to discover that the issue goes back much further than I had realized. An excellent summary and analysis of the literature (relating to 32 separate piyyutim or tefillot!) can be found in an article by Rabbi Shlomo Sperber in the journal Yeshurun, Volume 3 (5757), which I found on the Otzar HaChokhmah site but is publicly available at www.beureihatefila.com.

Rabbi Sperber’s earliest source is a responsum from Rav Sherira Gaon that accepts as a matter of course that one prays to angels for some matters, and directly to G-d for others. Rav Sherira uses this to explain why, when Rav states that one must not pray for one’s needs in Aramaic, Rav Yochanan explains that angels don’t understand Aramaic. (He concludes that one need not be concerned for this in practice, but raises no theological objections). Nonetheless, such prayers are not found elsewhere in Geonic literature (with the possible exception of Siddur Rav Amram Gaon). But they are produced in a flurry in early medieval Ashkenaz, to the dismay of the Maimonideans, and the polemics develop from there.

Rabbi Sperber concludes by publishing a responsum of Rabbi Samson Raphael Hirsch that offers a valuable model for dealing with many contemporary conflicts, which so often depend on whether we are willing to read each other’s words and opinions generously.

בקשת האדם אצל המלאכים שיבקשו עבורו אצל הקב"ה הוא תופעה מצויה המובאת בחז"ל בסנהדרין מד:
"ר' יוחנן אמר: לעולם יבקש אדם רחמים שיהו הכל מאמצין את כחו",
ופירש"י "שיסייעוהו מלאכי השרת ושלא יהו מסטינים מלמעלה".
גם בשבת יב: "לעולם אל ישאל אדם צרכיו בלשון ארמי וכו' כל השואל וכו' אין מלאכי השרת נזקקין לו וכו' שאני חולה דשכינה עמו",

ופירש"י "אין המתפלל צריך שיזדקקו לו מלאכי השרת להכניס תפלתו למנים מן הפרגוד".
עכ"ז משפטים אלו ניתנים להבנה כפי נטיית הרצון.

על כל פנים לפיוט מכניסי רחמים לבטח תמצא הצדקה לפי המאמרים הללו.

Human requests for angels to request from The Holy Blessed One on their behalf is a common phenomenon that is brought down in Chazal on Sanhedrin 44b

"Rav Yochanan said: A person should always seek mercy that all bolster his strength," and Rashi explains "that the ministering angels should assist him, and not oppose him from above." Also on Shabbat 12b: "A person should never ask for his needs in Aramaic... because the ministering angels won't relate to him... but a sick person is different because the Presence is with him," and Rashi explains that "the (sick person) who prays does not need the ministering angels to relate to him

to bring his prayer within the Curtain."

Nonetheless, these statements can be understood however one wishes.

However, you can certainly find a way of justifying the piyyut "Makhnisei rachamim" on the basis of these citations.

It would be absurdly disingenuous to present Rav Hirsch as a model of theological tolerance who prized communal unity over truth. Rather, he explicitly and compellingly self-identified with the zealotry of Eliyahu/Pinchas.

Moreover, Aharon's error teaches us that compromise and unity are not supreme values. Sometimes there is no way to avoid calling out: "Whoever is for G-d – to me!" even at the cost of civil war, or of losing one's representation in the Knesset, and even when the other side has a technically defensible halakhic argument.

But like Pinchas in the Book of Joshua, who prevents civil war by accepting the claim of the Tribes in TransJordan that their altar was not idolatrous, Rav Hirsch's commitment to theological truth was tempered here by a commitment to human truth. He sought to accurately understand others' religious expressions in their own terms, and to defend them where a defense was available. Whether a person is capable of turning down opportunities to express their zealotry against fellow humans may be a useful metric of whether they are capable of making positive contributions to religious society.

The Persistence of Memory: Sacrifice, Human Sacrifice, and Amalek

March 15, 2019

The Bible has been a bestseller for thousands of years. Leviticus as a stand-alone book, though, seems to have all the appeal of *Magical Creatures and How to Slaughter Them* next to a Harry Potter collection. A little more humor, and a lot more explicit gore, and perhaps it could compete with *Pride and Prejudice and Zombies*. As best I recall, the Reader's Digest Condensed Bible simply skips from Exodus to Numbers.

All these challenges are intensified if one deals with Parshat Vayikra alone. Listen to the great medieval commentator Rabbi Yosef ibn Caspi in his *Mishnat Kesef*, believing that he is channeling Maimonides:

כבר התועדתי בפירושי זה פעמים,
ובספר הסוד ובספר במשל,
כי תכונתי חזקה בבחירת הקיצור בכל מקום.
לכן
כאשר ראיתי זאת הפרשה ורבות מהנמשכות אחריה סובבות על מעשה זבחים וקרבנות
אשר ידוע שמשרע"ה כתבו בספרו מוכרח ואנוס,
כי אין חפץ לה' בעולות וזבחים,
רק הכרח מנהג האומות כולם בזמן ההוא הביאם לזה,
לכן
די לנו בידיעת מלות אלו הספורים
ואם לא נדעם – אין זה היזק בזה,
ורב במה שנמצא בפירוש רש"י וא"ע
לכן
אניח פרשה זאת, והפרשת צו...

*I have already informed you twice in this commentary,
and also in my Sefer HaSod and Sefer HaMashal,
that my character tends strongly to choose brevity everywhere.*

Therefore,

*when I saw this Parshah and many that follow it focusing on the making of sacrifices,
which it is known that Mosheh Rabbeinu wrote in his book compelled and coerced,
because Hashem has no liking for sacrifices,
rather it was the compulsion of the universal custom of nations of the time that brought them to this,
therefore*

*it is sufficient for us to know the meaning of the words in these descriptions,
and if we don't know them – there will be no damage in this,
and more than enough can be found in the commentaries of Rashi and Ibn Ezra
therefore*

I will leave this Parshah be, and Parshat Tzav...

But Ibn Caspi's comment begs the question: why did sacrifice become a universal expression of religion?

One possibility is that sacrifice achieves atonement, and atonement is a universally recognized human need. But I have always been bothered by the connection between sacrifice and atonement. What a waste! An animal – a living thing, or at the very least a valuable natural resource – is reduced to its maximal carbon footprint. What "sweet savor" could possibly waft from these pointless barbecues? Wouldn't it be better to genuinely make amends?

Ok, I get it; atonement sacrifices are largely for commandments between man and G-d, and there really is no way to make things up to G-d. Except there is – repentance, especially repentance out of love, which for some reason in G-d's perspective transforms past sins into virtues.

You'll tell me that sacrifices lead to repentance. The death of an animal is a significant thing – it makes one think *that could've/should've been me, there but for the chessed or rachamim of G-d go I*. But

honestly, anyone who would think that way probably doesn't need a sacrifice to think that way – they'd react the same way to a dead squirrel on the sidewalk, maybe even to a pen that's run out of ink.

History/anthropology seem to show that prescribed modes of repentance inevitably lead to cost-benefit analyses – is this sin worth a goat to me, or not? The equation tends to work out badly for the goats.

I read an article this week that tried to equate philanthropy with sacrifice. It is true that the Temple accepted voluntary sacrifices. I suppose it's even likely that there was a plaque somewhere with the names of the people who gave the most and best voluntary sacrifices – perhaps we'll dig it up soon, which would seem to validate the initial investment in immortality. But I think the author was misled by the term in English. The Hebrew term *korban*, means thing which is brought closer, or that brings closer – it has nothing to do with giving something up, let alone of giving something up voluntarily for a greater purpose. The same negative applies to words such as *זבח* and *עולה*.

In his commentary to Deuteronomy 12:30-13:1, Ibn Caspi raises a much darker possibility. Here are the relevant verses, followed by his commentary:

הַשְּׁמֵר לְךָ פֶּן־תִּנְקֹשׁ אַחֲרֵיהֶם
אַחֲרֵי הַשְּׂמֵדָם מִפְּנֵיךָ
וּפֶן־תִּדְרֹשׁ לֵאלֹהֵיהֶם לֵאמֹר
אֵיכָה יַעֲבֹדוּ הַגּוֹיִם הָאֵלֶּה אֶת־אֱלֹהֵיהֶם
וְאֶעֱשֶׂה־כֵּן גַּם־אֲנִי:
לֹא־תַעֲשֶׂה כֵּן לַה' אֱ־לֵהִיךָ
כִּי כָל־תּוֹעֵבֹת ה' אֲשֶׁר שָׁנִי' א'
עָשׂוּ לֵאלֹהֵיהֶם
כִּי גַם אֶת־בְּנֵיהֶם וְאֶת־בָּנוֹתֵיהֶם
יִשְׂרְפוּ בְּאֵשׁ לֵאלֹהֵיהֶם:
אֶת־כָּל־הַדְּבָר אֲשֶׁר אֲנִי מֵצִוֶּה אֶתְכֶם אֲתוּ תִשְׁמְרוּ לַעֲשׂוֹת
לֹא־תִסְף עָלֶיךָ וְלֹא תִגְרַע מִמֶּנּוּ: פ

Guard yourself,

*lest you be ensnared after them,
after they have been destroyed from before you,
and lest you seek after their gods, saying:
"How would those nations worship their gods?
I too will do the same."*

*Do not do the same for Hashem your G-d
because all the abominations of G-d. that He hates,
they did for their g-ds
because even their son and daughters
they would burn in fire for their gods.*

*It is everything that I command you – that is what you must guard to do;
you must add nothing above it; you must subtract nothing from it.*

הנה אלו יכול משה למונעם מהזבחים לגמרי,
להיותם נעשים לאלהי העמים,
היה השם חפץ בזה
ואחר כי לא היה יכול להעתיקם משרש
והעתק הסעיפים
ככל אשר יוכל
בעבודות המגונות,
כשריפת הבנים

אם שריפתם לגמרי או שריפת עורם או שערם בהעברם,
כי על הכל יאמר שריפה בשיתוף מה

Now had Mosheh been able to completely prevent them from sacrifices,

*seeing as they were done for the gods of the nations,
Hashem would have desired this.
But since he could not remove them from the roots
he removed them from the branches –
to the extent he was able –
of the disgraceful modes of worship
such as burning children
whether completely burning them up, or burning their skin or hair by passing them through flame,
because all of them can be called burning, with some commonality*

I suggest that Ibn Caspi sees “sacrifice” anthropologically as at core the dedication of an act of violence to a god. What matters is not that the sacrifice is killed, but that you killed it, and the more significant the thing you kill, the better. All sacrifice is at core human sacrifice, not self-sacrifice.

The Torah came along and, unable to extirpate this practice directly, tried to change its meaning. Removing human sacrifice from the apex of the ritual pyramid opened up the possibility of understanding animal sacrifice as sublimating violence rather than as sanctifying it. There is always a danger that the original meaning will break through. But when violence is given no controlled religious outlet, sanctified violence often finds far more dangerous expressions.

Ibn Caspi’s understanding of the etiology of sacrifice does not mean that all those who endorse sacrifice at core endorse violence. Sublimation can be real and effective. Moreover, maybe the Canaanite meaning was not the original meaning either, but a later distortion, and the Torah restored sacrifice to its pre-Canaanite glory.

Preserving a practice while changing its meaning runs two risks: critics may accuse you endorsing its original meaning, and followers may come to adopt its original meaning.

A similar dynamic may occur with regard to the mitzvot of battling, remembering, and erasing the memory of Amalek. The urge to extirpate evil can be positive, but it can also be the inspiration for much greater evils than those it seeks to extirpate. Halakhah postpones the mitzvah to the Messianic age, noting that Yehoshua made a point to attack only combatants, and categorizing Samuel’s instructions to Saul as extralegal. This in turn drives many commentators to find ways to “spiritualize” the mitzvah and expand the category of Amalek so that it can have contemporary relevance. But this approach is subject to three kinds of misunderstandings.

1. It is often misunderstood as reflecting an ethical difficulty with the halakhah, when instead it is a reaction to the practical irrelevance of the halakhah. Sometimes it is even an ethical protest against a halakhah that seems insufficiently exercised by the persistence of evil.
2. Sometimes critics misunderstand such spiritualizing expansions as instead expanding the literal mitzvah of total war. A recent article in an online Jewish magazine got there by mistranslating the Hebrew phrase *במסירת נפש להריגה* as “prepare to kill,” rather than correctly as “accept the risk of being killed.”
3. Most dangerously, sometimes followers make the same mistakes as the critics, or worse, sometimes interpreters genuinely mean to expand the category so that the mitzvah can find practical expression. It is therefore imperative to reiterate that not only is the mitzvah eschatological, the halakhic category of Amalek cannot apply to any people who have territorial conflicts with the Jewish people, and all ethnic Biblical categories were rendered halakhically obsolete by Assyrian population transfer policies. Every attempt at giving contemporary relevance to the category Amalek must be monitored with great caution as a potential “stringency that leads to leniency.”

Shabbat shalom and Purim sameiach!

Shotgun Tabernacle? The Sifra on Philanthropy, Social Shaming, and Consequentialism

by Rabbi Shlomo Zuckier (SBM 2012)

March 22, 2019

The inauguration of the Tabernacle featured several *milu'im* offerings, which ushered in the new holy place and set the stage for all future offerings. One of these *milu'im* offerings was a *hattat*, which served “to atone” (see Lev. 8:14-15). But what sin does the *hattat* of the *millu'im* atone for?

The Sifra ad. loc. (Tzav, Mekhilta de-Millu'im 15) addresses this question:

וישחט ויקח משה את הדם... ויקדשהו לכפר עליו – כפרה זו איני יודע מהו? אלא שאמר משה: בשעה שצוה אדון העולם להתנדב בדבר המקדש, דחקו ישראל איש ואיש והביאו שלא בטובתם, תהא כפרה זו שלא יהי דבר גזול במקדש, וכן הוא אומר כי אני ה' אוהב משפט [שונא גזל בעולה].

“And he slaughtered [the hattat bull], and Moses took the blood and [placed it on the altar]... and he sanctified [the altar] to atone upon it.” -I do not know what this atonement is for!?

Rather, Moses said: At the time that the Master of the World commanded to donate for the Temple [i.e. Tabernacle], the people of Israel pressed one another [to give] and brought not of their good [will]. Let this be an atonement so that there won't be any stolen items in the Temple.

Similarly it says “For I am the Lord who loves justice, who hates stealing in a burnt offering.” (Is. 61:8)

The divine charge to “take donations” for the Tabernacle (Ex. 25:2) elicited great excitement among *Kelal Yisrael*, to the point that people pressured one another to support the all-important cause. The social pressure yielded its intended result – massive participation – but it also meant that many offered gifts to the Tabernacle despite being less than fully willing.

Targum Yonatan on this verse also worries about insincere giving:

או דילמא הישתפח ברגלי ישראל דלא הוה בלביה למיתא לעבידתא ושמע קל קרוזא ואיסקפי ואיית' בלא צבו
Maybe someone among the Israelites did not have it in his heart to donate to the project, and heard the announcement and was scared, and donated unwillingly.

Donations offered in response to pressure rather than out of true conviction may be considered stolen, at some level. Given this concern, the Sifra and Targum Yonatan explain that the sin-offering was brought to atone for the possibility that the construction of the Temple utilized stolen goods.

This fascinating Midrash and commentary highlights two important points, both in the sin it identifies in this scenario and in its broader ramifications.

First, the Sifra assumes that a donation made under pressure may be regarded as ill-gotten gains, requiring atonement. This position clearly assumes the importance of acting based on the proper motivation, even in carrying out good deeds. But it goes a step further, as well. The Sifra argues that, when people are forced into actions on the basis of censure, rather than on the basis of understanding the value of these actions, something is fundamentally amiss. In such cases, people's very agency is being taken from them – along with their money! – as they are pushed to do things absent their fully willing participation.

This critique can be expanded to scenarios where social pressure and censure are effective in getting people to say, or even believe, certain propositions. Using social pressure or censure to force someone's hand demeans and even *dehumanizes* them; it removes their agency and makes them objects rather than subjects. This is true of any approach that shames those it disagrees with, rather than educating them.

Coercion, of the softer or harder varieties, is sometimes necessary. But it always has a cost, and there is a point at which forcing someone else to do *mitzvot* becomes an act of theft.

The Sifra offers this teaching specifically regarding the *Mishkan*, a context crucial to fully appreciating its message. When defending their use of unsavory methods, people often offer the cliché that “it’s for a good cause,” or other arguments using the ends to justify the means. People often assume that, the more important the cause, the less important the means; arriving at the proper outcome is paramount, and the process must take a backseat.

The Sifra argues precisely the opposite position: unsuitable methods actually become *more* problematic as the purpose rises in eminence. Extracting charitable donations through social pressure might not be ideal, but no *hattat* is required to atone for doing so. The Temple has loftier standards – the stakes are much higher! God *hates* stealing in His offerings, and thus even this less obvious sin of coercing donations must be rectified.

The *Mishkan* is also the centerpiece of religious society. When building a religious world, one absolutely must take into account ethical concerns about the nature of the process. Whenever religious leaders invoke the importance of their enterprise – “We’re building Israeli society!” “We’re building the community’s *shul*!” “We’re ensuring the next generation remains affiliated!” – as justifying ethically dubious steps, the Sifra thunders: “Who are you serving? God!? God hates stealing in an *olah*! God abhors ethical compromises in building religious institutions! If you dare to lower your ethical standards on account of a religious goal, God will take notice and you will bear your sin.”

As we build our personal and public religious worlds, we ought to think very carefully about these two messages. Are we acting freely or in response to pressure? Are we inspiring people to do the right thing, or are we forcing their hand? What compromises or ethical shortcuts are we taking, and to what degree do those choices of means that undermine our goals? God demands no less.

Shabbat Shalom!

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Where There's a Priestly Will, Is There a Halakhic Way?

April 5, 2019

Texts cannot defend themselves against interpreters who do not love them. And love is not enough. Only a relationship characterized by loyalty, integrity, and rigor can grant texts any degree of actual influence and genuine independence.

Rabbinic interpretation of Vayikra 13:2-3 seems to eviscerate the text. The Rabbis appear to seize legal powers that the text plainly grants to kohanim. They then apparently extend those powers in explicit defiance of the conditions set out in the text.

Jews who understand Chazal this way usually grant themselves the same unconstrained authority over texts that they assign to Chazal. They see Judaism as a government of people, not of texts. (One might describe them as believers in *daas Torah*, who differ from extremist *charedim* with regard to ends but not means.)

It is vital to see whether this understanding of the Rabbinic project meets our own standards of loyalty, integrity, and rigor. Were Chazal constrained by their relationship with the text of Torah, or not? Can we honestly describe ourselves as constrained by the same relationship?

Vayikra 13:2 says that if a person develops one of three types of skin lesions, which develops into a *nega tzaraat*, then

וְהוּבֵא אֶל-אֶהֱרֹן הַכֹּהֵן
אוֹ אֶל-אֶחָד מִבָּנָיו הַכֹּהֲנִים:
וְרָאָה הַכֹּהֵן אֶת-הַנִּגַּע בְּעוֹר-הַבָּשָׂר
וְשֵׁעַר בְּנִגַּע הַפֶּרַח לָבָן
וּמִרְאָה הַנִּגַּע עֲמֹק מִעוֹר בָּשָׂרוֹ
נִגַּע צָרְעַת הוּא
וְרָאָהוּ הַכֹּהֵן וְטִמָּא אֹתוֹ:
*He is brought to Aharon the kohen
or to one of his sons the kohanim
The kohen sees the nega in the skin of the flesh
and the hair of the nega has turned white,
and the appearance of the nega is deeper than the skin of the flesh,
This is a nega tzaraat
The kohen sees it
and the kohen declares it tamei.*

As Seforno perceptively points out, the subject of this law is the kohen; the person with the *nega* is the object. That is why the Torah describes the person as being **brought** to the kohen, rather than as **coming** to him. Many commentators and halakhists conclude that the person can even be brought to the kohen involuntarily.

Does the kohen/subject have agency? Can the kohen look away and not see the *nega* if he wishes, or evaluate the entire person rather than just the *nega*? Must the kohen follow the Torah's prescription as to what sorts of *nega* becomes *tamei* and which not, or the decision be based on what the kohen "sees" as pastorally better for the person with the *nega*?

Mishnah Moed Katan 7a records a dispute between Rabbi Meir and "the Sages," identified by the Talmud as Rabbi Yose, as to whether a kohen should examine a *nega* during a festival. Both parties agree that in principle the *kohen* should do whatever will maximize joy during the festival, i.e. examine the *nega* if and only if the result will be the anxiety-relieving declaration of *tahor*.

But how can that be done with integrity? Rabbi Meir says that the legal consequences of *tum'ah* here are not triggered by the objective condition, but rather by the kohen's declaration. Therefore, the *kohen* should be silent if the only honest word he can speak is *tamei*, and let the joy of the festival continue unabated. Rabbi Yose, however, holds that one cannot seek a declaration of *tahor* without opening up the genuine possibility of a declaration of *tamei*. Therefore, better for the *kohen* to refuse to examine any potential *nega* during the festival, lest he be forced to declare it *tamei*, even though this leaves many people's festival joy diminished by the fear that they will be declared *tamei* immediately following the festival.

But is it really legitimate to adopt a “don't ask don't tell” policy regarding *negaim*? Don't all the standard mitzvah-lists count “carrying out the laws of *negaim*” as a duty?!

Talmud Moed Kattan 7b doubles down on yes.

למימרא דבכהן תליא מילתא!?
 אין, והתניא (בניחותא)
 – וביום הראות בו –
 יש יום שאתה רואה בו, ויש יום שאי אתה רואה בו.
 מכאן אמרו:
 חתן שנולד בו נגע –
 נותנין לו שבעה ימי המשתה, לו ולביתו ולכסותו.
 וכן ברגל, נותנין לו שבעת ימי הרגל,
 דברי רבי יהודה;
 רבי אומר:
 אינו צריך,
 הרי הוא אומר
 – וצוה הכהן ופנו את הבית –
 אם ממתנינים לו לדבר הרשות – כל שכן לדבר מצוה.
Do you mean to say that it depends on the kohen?!
Yes, and a beraita says accordingly:
 And on the day that there is seen in it (*Vayikra 13:14*) –
There is a day that you examine it, and a day that you don't examine it,
On this basis they said:
A bridegroom who develops a nega –
we give him the seven days of feasting – to him, to his house, and to his clothes.
Similarly, on a festival we give him the seven days of the festival
in the opinion of Rabbi Yehudah;
Rebbe said:
This (source) is unnecessary
Vayikra 14:36 says (regarding house-tzaraat)
 The kohen commands, and they empty the house [before the kohen comes to examine the *nega*] –
if one delays (examination) so that the person can do something optional (saving his property),
then certainly one can do so for the sake of something that is a mitzvah (such as marriage- or
festival-joy).

At this sugya's end, at least according to Rebbe and perhaps according to all opinions, it appears that the Rabbis interpreted the Torah as giving kohanim the **discretion** to refuse to implement the *halakhah* of *nega* when they saw it as competing with a more important value. A very similar move can be found in a beraita on Berakhot 19b which gives the Rabbis discretion to overrule the obligation to return lost objects because “sometimes you must look away, and sometimes you must not.” They choose to exercise that discretion in situations where the finder would think it beneath their dignity to recover their own identical object.

The formulation of this discretion may be vital. A rule can be suspended for the sake of a conflicting value, but only if the value of the rule is genuinely maintained, if it is not universally suspended. There is metahalakhah, but it must not drown halakhah. The Torah almost never tells us explicitly how to choose among laws when they conflict, or between laws and values. Halakhah sometimes codifies the hierarchy purely abstractly, and sometimes adopts a more granular approach.

Another interpretive move rips the power of *nega*-discretion away from the kohanim. Sifra, the Midrash Halakhah on Vayikra, points out that “*one of his sons the kohanim*” is redundant – aren’t all of Aharon’s sons kohanim, and aren’t all kohanim Aharon’s sons? It appears to conclude that all Israelites are permitted to examine a *nega*; a kohen is needed to declare the judgement, but need have no part in making it.

Mishnah Negaim 3:1 similarly presents the *nega-examination* as a sort of Kabuki theater:

הכל כשרים לראות את הנגעים, אלא שהטומאה והטהרה בידי כהן:
 אומרים לו: אמור 'טמא!' והוא אומר: 'טמא!' אמור 'טהור!' והוא אומר: 'טהור!'
All are fit to examine negaim, but tum'ah and taharah are in the hands of the kohen:
They tell him: Say 'Tamei' and he says 'Tamei!'; Say 'Tahor!' and he says 'Tahor!'

Suddenly, the kohen is a puppet, with no agency at all. His only role is to say what he is told to say by the authorities, whom it seems reasonable to identify with the rabbis.

The situation grows more complicated when we turn to Talmud Arakhin 3a.

הכל כשרין לראות את הנגעים –
 לאתויי מאי?
 לאתויי שאינו בקי בהן ובשמותיהן.
 והאמר מר: אינו בקי בהן ובשמותיהן – אינו רואה את הנגעים.?!
 אמר רבינא:
 לא קשיא: הא דמסברי ליה וסבר, הא דמסברי ליה ולא סבר.
 “*All are fit to examine negaim*” –
 to include whom?
 To include one who is not expert in them and their categories.
 But a Master said: One who is not expert in them and their categories must not examine negaim. !?
 Said Ravina:
 There is no difficulty: This is where he can understand it when explained, this is when he can't.

Why would a puppet need to understand what he is saying? The simplest reading, that of Rosh but probably not of Rambam, is that the kohen is not actually a puppet. What the rabbis tell him to say has to make sense to him, or he simply won't do it.

Rav Yaakov Emden (Sheilat Yaavetz 1:138, opposed by Beit Yitzchak YD1:55) argues that the kohen's discretion was always limited to cases where there was genuine doubt. If the kohen refuses to examine a *nega* that is obviously *tamei*, the declaration when it is actually examined takes effect retroactively. In his vision, one can imagine that the role of the experts is to tell the kohen **whether or not he has discretion**.

Moreover, most halakhists rule that the kohen cannot make his declaration unless he is actually looking at the *nega*. This means that the Rabbis' apparently radical transformation of *one of his sons the kohanim* into “all are valid for examining *negaim*” is, in the end, not radical at all, and could easily be accomplished without any textual reinterpretation whatsoever. The ruling cannot be made unless the *nega* has been brought to a kohen, and the kohen's determination has to abide by the rules. What the Rabbis have done is to

1. acknowledge that this rule can often conflict with halakhic obligations of joy, or with reasonable human expectations of economic stability.

2. formulate discretionary features that can diminish such conflicts, yet without changing any of the rule's elements; and
3. ensure that this discretion cannot be exercised by either the kohen or themselves without accountability.

This seems to me a potentially generalizable description of much Rabbinic work, and compatible with a loving relationship characterized by loyalty, integrity, and rigor.

Moreover, it seems to me a reasonable and useful starting point for evaluating present halakhic programs. Much work would of course have to be done defining terms such as discretion, preservation, and accountability, and many others. In the end it is a text, and as such cannot defend itself against interpreters who do not love it. But perhaps some will.

Shabbat Shalom!

Should Moral Intuition and Halakhah Always Agree?

May 3, 2019

Dear Rabbi Klapper:

I identify as a passionate Modern Orthodox Jew, but there are things about the theory and practice of halakhah that bother me morally. I've usually found ways to deal with these conflicts without violating normative halakhah in any way. Sometimes that makes me feel proud of my willingness and ability to put ego aside and submit to G-d. But sometimes it just makes me feel yucky. Sometimes I feel that I really won't be able to live with myself if I carry this halakhah out in practice, and I understand why it would be impossible for someone else to live the way I do.

Here's the thing.

I believe that halakhah is the best method we have of transforming G-d's will, as expressed in Torah, into specific instructions.

I believe that the Written Torah is the word of G-d, and that Chazal and the Rishonim and Acharonim were collectively the authentic bearers of the Oral Torah.

Should I feel religiously inadequate because I have these conflicts, or because it's not obvious to me that I should always follow the halakhah no matter what? Should I just ask a great Torah scholar and let them make these decisions for me?

In great perplexity,

Yosef Alceuta Judahson

Dear Yosef:

I was greatly impressed and heartened by your letter. These are the sorts of perplexities we should welcome nowadays. Even in communities that try to isolate themselves, people are under so much pressure from the changing moral perspectives of the world around us – progressing and regressing, but always changing – that it is almost impossible for conformists to develop authentic values deeply rooted in Torah, rather than grafting a veneer of Torah rhetoric onto a political or social program grown from very different roots. A spirit of rebellion and stubborn moral independence is a religious necessity in our day. Probably it always was.

Nevertheless, when one's moral sense conflicts with practical halacha, it is usually shallow or arrogant to think that the choice is either/or. The first things any sensible person considers is that they might have missed a way of reconciling the two, or that there might be a way of ensuring that the conflict has no practical expression, or that they have either the morality or else the halakhah wrong.

Each of these modes of resolution can themselves be done shallowly and arrogantly. You are right to bristle at people who tell you that there is obviously no conflict, and that your perplexity is unjustified.

I'm also not claiming that there's never an either/or. Sometimes there is. I'm only claiming that **usually** there are other choices, and that it's responsible to explore the other possibilities first.

But we need to address an underlying issue before we grapple with the questions you raise directly. How should we feel about feeling conflicted? I began by saying that we should welcome these sorts of perplexities – why?

My sense is that conversation about conflicts between halakhah and ethics focuses on two positions.

The first, sometimes called “Akeidah Orthodoxy,” sees these conflicts as *nisyonot*, as theological tests. Following one of Kierkegaard’s interpretations, which has important Jewish antecedents and echos, they argue that the message of the Akeidah is that sacrificing one’s independent notion of the good to G-d is a supreme religious act. We should celebrate such opportunities, while at the same time recognizing how excruciatingly difficult they can be.

The second position is that conflicts between ethics and halakhah always reflect a failure to understand halakhah properly. Principles such as “all her ways are *noam*=pleasantness” are assigned axiomatic and a priori meaning. They are fixed and certain points on the basis of which every halakhah must be evaluated, rather than as part of an iterative process in which our understanding of “pleasantness” is also influenced by its compatibility with halakhah.

Akeidah Orthodoxy holds little appeal for me. I much prefer to read the *akeidah* teaching Avraham that his moral intuition was reliable.

But this doesn’t mean that all human moral intuitions are reliable, or that Avraham “failed the test” by not insisting on following his moral intuition over G-d’s command. The first claim seems ridiculous to me, and is why I don’t find *noam* theology attractive either. It’s also hard to read the Torah as fundamentally critical of Avraham’s performance. I think we can learn from the Akeidah that human moral intuition is valuable, and we should do our best to develop it, without succumbing to moral megalomania.

We also don’t have the direct access to G-d that Avraham did, so our chance of misunderstanding what He wants is much greater. And Rashi suggests that even Avraham mistook His intent, which never included Yitzchak actually being killed! So a clash between moral intuition and halakhah should certainly send us to recheck with great thoroughness whether we have the halakhah right.

If we grant that we might have one or both of the values and the halakhah wrong, how are we to make decisions? If we don’t endorse “akeidah theology,” is there a reason to prefer halakhah over intuition?

I suggest that there is. Specifically in times of great moral ferment, when it is obvious that even the most strongly and broadly held human intuitions (whether correct or incorrect) are often the product of socially contingent factors, one of the attractions and advantages of halakhah is that it provides an Archimedean point for values, a fixed polestar we can follow when everything else seems mutable, fleeting, and invented. Halakhah – in its imperfection – is a desperately necessary bulwark against relativism and nihilism. Moreover, a moral tradition that has stood the test of time is much more likely to be correct overall than the creation of any particular society – *kal vachomer ben beno shel kal vachomer* when that tradition as a whole is authentically rooted in and nourished by the word of G-d.

In such times, the absence of conflict between one’s moral intuition and halakhah is disturbing. It seems to indicate not that we have been *עושה רצונו כרצונו*, but rather that we have been *עושה רצונו רצונו* – that we have not subordinated our will to His, but rather attributed our will to Him.

This doesn’t mean that we should look to manufacture such conflicts by pretending that we have two opposing certainties when really we have none. But I want to argue for a middle ground. We should find such clashes comforting rather than disturbing.

Why? Because if you value both halakhah and moral intuition, and you recognize that both of them are inevitably unreliable, you realize that you must be doing them one or wrong if they never conflict. Different imperfect epistemologies cannot honestly yield identical results.

All of this is very abstract, and I hope serves as the introduction to many profoundly challenging conversations about specific issues that raise these sorts of conflict for you. But I owe you at least the beginnings of direct responses to the questions in your last paragraph.

You are not inadequate because your moral intuition is not in perfect accord with the halakhah as you understand it. *Aderabbah* – I would worry if that were not the case.

Your understanding of what the halakhah is should not always take precedence over your moral intuition. First of all, you might have the halakhah wrong. Second, there are (rare) cases in which halakhah recognizes its own limits.

Asking a Torah scholar to make the decision for you is not a reliably safe way out. Torah scholars are also fallible. You may not have the privilege of access to a genuinely great Torah scholar whose moral intuition resonates with yours and yet gives you confidence that it has much deeper roots in our tradition. The greatest Torah scholars will in any case often refuse to make these decisions for you, but instead seek to add depth and breadth to your decisionmaking process. But – you should make every effort to bring such scholars into your life.

The introduction to *Shiurei Daat* contends that Judaism recognizes three necessary and legitimate epistemologies: knowledge of the Torah, of the world, and of one's own soul. When these come into conflict, the reason is a lack of balance, that we know one of them more deeply than the others. I find this a very useful and powerful framework for thinking about the kinds of perplexities you face. I hope that you'll respond to them by seeking to deepen your knowledge of all three areas.

Bivrahah,

Aryeh Klapper

Can Halakhah Be a Desecration of Hashem's Name?

May 17, 2019

וּשְׁמִרְתֶּם מִצְוֹתַי וְעִשִּׂיתֶם אֹתָם
אֲנִי ה' :
וְלֹא תַחֲלִילוּ אֶת־שֵׁם קִדְשִׁי וְנִקְדַּשְׁתִּי בְּתוֹךְ בְּנֵי יִשְׂרָאֵל
אֲנִי ה' מִקְדָּשְׁכֶם :
הַמּוֹצִיא אֶתְכֶם מֵאֶרֶץ מִצְרַיִם לִהְיוֹת לָכֶם לֵאלֹהִים
אֲנִי ה' :

You must guard my commandments, and you must do them

I am Hashem;

And you must not desecrate My Holy Name, and I will be sanctified within Bnei Yisroel

I am Hashem Who sanctified you;

Who took you out of the Land of Mitzrayim in order to be G-d for you

I am Hashem

Vayikra 22:31-33 can be read as a single Divine sentence, punctuated by self-identifying statements. We must keep His mitzvot, in order not to desecrate His Name, because He took us out of Egypt. On this reading, desecration and sanctification of His Name are merely functions of the other commandments, and have no independent substantive meaning. We sanctify by observing halakhah, and desecrate by violating halakhah. Similarly, the Exodus from Egypt is invoked only to ground G-d's authority, and to explain why the status of His Name can be tied to Jewish observance of the mitzvot. Furthermore, the phrase "within Bnei Yisroel" suggests that observance of Halakhah is a purely parochial concern.

The Halakhic tradition itself adopts a much broader and more nuanced understanding of the categories *Kiddush Hashem* and *Chillul Hashem*. Here are some of the variations the tradition introduces:

- 1) Under certain circumstances, there is an obligation of Kiddush Hashem to die rather than violate halakhah, even though generally the obligation to preserve life overrides halakhah.
- 2) For some purposes, Chillul Hashem is focused on Jews, and the obligation die requires a quorum of Jews (women count to this *minyan* according to most). For other purposes, the audience for Chillul and Kiddush Hashem specifically is nonJews. It is even possible to argue that the essential audience is always nonJews, and that a quorum is required because nonJews are more affected by Jews' willingness or unwillingness to sin in front of their coreligionists.
- 3) Kiddush and Chillul Hashem can be associated not only with halakhah but with Jewish identity, universal ethics, and display of proper character. (See for example Rambam Hilkhoh Yesodei HaTorah 5:11.) Public explicit denial of G-d's authority by Jews desecrates His Name, but so does paying tradesmen late even though you have the funds, or being quarrelsome, or standing by the letter of the law even when that violates its spirit.

Broadening the scope of Chillul Hashem beyond halakhah untethers verse 32 from verse 31. This is especially important according to the Midrash Lekach Tov, which sees *ushmartem mitzvotay* as a commandment to observe mitzvot without regard to whether one finds them rationally appealing. "These are my commandments, and you have no permission to challenge them = להרהר אחריהם."

By contrast, Yerushalmi Bava Kamma 4:3 suggests that sometimes the halakhah itself can be a *chillul Hashem*.

מעשה
ששילח המלכות שני איסטרטיוטות ללמוד תורה מרבן גמליאל
ולמדו ממנו מקרא משנה תלמוד הלכות ואגדות
ובסוף אמרו לו
כל תורתכם נאה ומשובחת

חוץ משני דברים הללו
שאתם אומרים
בת ישראל לא תיילד לעכו"ם אבל עכו"ם מיילדת לבת ישראל
בת ישראל לא תניק בנה של עכו"ם אבל עכו"ם מניקה לבת ישראל ברשותה
גזילו של ישראל אסור ושל עכו"ם מותר.
באותו שעה גזר רבן גמליאל על גזילות עכו"ם שיהא אסור מפני חילול השם...:

A true story:

*The (Roman) Empire sent two officials to learn Torah from Rabban Gamliel
They learned from him Mishnah, Talmud, Halakhah and Aggadot.*

At the end they said to him:

*All your Torah is pleasant and praiseworthy
other than these two things
that you say*

*a Jewess must not midwife an idolatress, but an idolatress may midwife a Jewess
a Jewess mustn't nurse the child of an idolatress, but an idolatress may nurse the child of a Jewess
in her space*

*An object robbed from a Jew is forbidden, but an object robbed from a Gentile is permitted
At that very time Rabban Gamliel decreed regarding the robbed objects of idolaters that they should be
prohibited because of Chillul Hashem...*

One aspect of this text seems impenetrably mysterious. The Romans refer to 'two things,' but in the excerpt above there are three, and the ellipses conceals a fourth. Nonetheless, it seems fair to say that Rabban Gamliel responded to one of the Romans' complaints by altering the halakhah, but not to all of them. If Rabban Gamliel is reacting to the Roman perception, why the difference?

Yet both in reason and in text it cannot be that Rabban Gamliel stands for the proposition that the proper reaction to an outsider's moral critique of halakhah is always to change the offending law. There must be a basis for distinction. Indeed, it might be accurate to say that sometimes Gentile objections to Halakhah *trigger* the obligation to die *al kiddush Hashem* rather than transgress the law, while in other circumstances the proper reaction is to change the law. Surely the difference in outcomes is not arbitrary!

The simplest explanation is that it depends on whether, when confronted by the critique, we decide that we agree with it. The mere fact that outsiders dislike our laws cannot compel change; but fear of showing weakness cannot prevent change in the face of moral critique.

The question then is why Rabban Gamliel found the Romans' critique compelling in one case but not in the others.

One possibility is that the Romans' other critiques were grounded in reciprocity rather than in objective right or wrong. They would have accepted a rule that required every nation to midwife or nurse its own mothers and babies, but they objected to allowing it only one way. Rabban Gamliel was not moved by pure claims of discrimination. If either result could be justified intrinsically, he was fine with having the results be asymmetrical between Jews and Gentiles.

This approach seems in stark contrast to Meiri, who claims that halakhah's asymmetries are intended to mirror or compensate for discrimination against Jews in Gentile legal systems, and therefore do not apply to citizens of systems that give Jews equal rights. Note however that Meiri is commenting on the Bavli, which does not bring the midwifery and nursing cases.

Another possibility is that Rabban Gamliel thought the laws about midwifery and nursing were not intended to discriminate against Gentiles, but rather to avoid dangerous liability. The best of obstetric and pediatric care cannot prevent all deaths, and the deaths of Gentile mothers and babes under the most skilled and conscientious Jewish practitioners might have triggered pogroms. Allowing Jews to fence goods stolen from Gentiles, by contrast, had no aim but profit.

Yet a third possibility is that Rabban Gamliel saw *chillul Hashem* as a valid reason to prohibit what halakhah would otherwise permit, but not to permit what halakhah would otherwise forbid.

It is striking regardless that Rabban Gamliel reacted not to a critique of actual Jewish practice, but rather to a critique of the law per se. This suggests that the underlying issue of *chillul Hashem* is not so much the way that Jews are perceived by the world outside them, but rather by how Torah is perceived.

Yet it is also plainly the case that Torah cannot fold its hand in the face of moral censure or opprobrium. It seems reasonable to claim that those who enact laws against Judaism often find our laws immoral. Yet if they try to enforce their biases, we are likely to become obligated to become martyrs for the law as-is rather than change the law under pressure.

It is also striking that Rabban Gamliel did not claim that the Romans had misunderstood the law, or engage in other sorts of apologetics. He chose instead to explicitly override the law that irked them.

What seems to me the upshot here is that the Yerushalmi at least does not rule moral critiques of the halakhah out of bounds, and that we should be open to accepting moral critiques from any source. We should not claim that such critiques necessarily stem from a narrow vision and lack of broader halakhic context; rather, sometimes it is precisely the broad context that generates the sense that this particular law doesn't fit well.

Openness to moral critique must not be either the result or the cause of a lack of overall moral confidence in the system. These are very legitimate concerns. But shutting ourselves off from moral critique carries equally serious risks. Our unwillingness to entertain and respond to moral criticism can cause others to lose their overall confidence in the system.

Why the Free Bird Sings

May 24, 2019

The caged bird sings
with a fearful trill
of things unknown
but longed for still
and his tune is heard
on the distant hill
for the caged bird
sings of freedom

Maya Angelou, "I Know Why the Caged Bird Sings"

I know a bird
that sings when free,
but when caged
by you or me
it ceases to eat
and refuses to live.

Avraham Ibn Ezra, Commentary to Vayikra 25:10, as freely translated by Aryeh Klapper

The inscription on the Liberty Bell reads "Proclaim liberty throughout all the land unto all the inhabitants thereof." This excerpt (from the King James translation of Vayikra 25:10) makes several interesting translational choices. For example, why "throughout all the land," when the Hebrew is בארץ, merely "in the land?" Why "the inhabitants thereof," rather than merely "inhabitants thereof," when the Hebrew יושביה has no definite article? These choices can seem odd even in English, and many internet sites quoting the Bell accidentally remove the first "all" and the second "the." These imprecisions matter because they license us to challenge the core translation: Is the Hebrew דרור/*d'ror* properly translated as "liberty?"

A translation can have any of three sources: tradition, parallel uses, and context. In the case of *d'ror*, the parallel in Yirmiyah 34:8-9 seems to make the meaning crystal clear.

הַדְּבַר אֲשֶׁר-הָיָה אֶל-יְרֵמְיָהוּ מֵאֵת ה'ֹ
אֲחֵרִי כִּרְתֵּי הַמֶּלֶךְ צִדְקִיָּהוּ בְּרִיֹת אֶת-כָּל-הָעָם אֲשֶׁר בְּיְרוּשָׁלַם
לֵקְרָא לָהֶם דְּרוֹר:
לְשַׁלַּח אִישׁ אֶת-עַבְדּוֹ וְאִישׁ אֶת-שִׁפְחָתוֹ
הָעִבְרִי וְהָעִבְרִיָּה
הַכְּפֻשִׁים
לְבַלְתִּי עֲבָד-בָּם
בְּיְהוּדֵי אֶחְיָהוּ אִישׁ:

*The matter which came to Yirmiyahu from Hashem
after Tzidkiyahu cut a covenant with all the populace that was in Yerushalayim
to proclaim to them d'ror
to send forth each man his manslave and his maidslave
the Hebrew and the Hebrewess
free
to not work them as slaves
a Jew, his brother man.*

It seems undeniable that a *d'ror*-proclamation sets slaves free. When the Jews fail to abide by the proclamation, G-d frames their coming destruction as poetic justice, declaring that He will grant His servants of destruction freedom to destroy:

אַתֶּם לֹא־שָׁמַעְתֶּם אֵלַי לְקַרְא דְרֹר
 אִישׁ לְאָחִיו וְאִישׁ לְרֵעֵהוּ
 הִגֵּנִי קַרְא לְכֶם דְרֹר נְאֻם־ה'
 אֶל־הַחֶרֶב אֶל־הַדָּבָר וְאֶל־הַרְעָב
You did not heed me, to proclaim a דרור
Each man to his brother, and each man to his fellow
Behold I am proclaiming a d'ror regarding you, says Hashem,
to the sword and the plague and the famine

Yeshayahu 61:1 similarly reads

לְקַרְא לְשִׁבּוּיִם דְרֹר
To proclaim d'ror regarding captives.

So *d'ror* plainly can refer to liberation from a previous state of constraint. Likely the King James chose “liberty” rather than “freedom” because the connotation of liberty at that time was “freedom from,” whereas freedom would be more likely understood as “freedom to.”

However, these are not the only Biblical contexts in which the word *d'ror* appears.

For example, Shemot 30:23 refers to “myrrh *d'ror*.” Most commentators assume that the meaning in this context must be derived from the contexts we have already seen. Thus R. Avraham ben HaRambam writes:

שם הטוהר והחרות
a term for purity/freedom (from impurities)

while BDB translates *d'ror* as “liquid” on the basis of “flowing; free run, liberty.” Only Rashbam seems to take this instance as reflecting a different meaning entirely: חשוב, significant. I’m not sure that I’m understanding Rashbam correctly, though, and he may also see social significance as rooted in the capacity to resist others’ attempts to constrain you.

D'ror also appears twice in contexts where the intended referent seems to be a type or species of bird.

כְּצִפּוֹר לְנוֹד כְּדְרֹר לְעוֹף
Like a bird to wander; like a d'ror to fly (Mishlei 26:2)

גַּם־צִפּוֹרוֹ מְצָאָהּ בַּיֵּת וְדְרֹרוֹ קָן לָהּ
Also the bird found a home, and the d'ror a nest for itself (Tehillim 84:4)

One might see these uses as stemming from a different root entirely. BDB, for example, simply identifies the species as “swallow.” Ibn Ezra to Mishlei 26:2 seems to adopt this approach:

טעם שמות העופות והבהמות אשר פרשו הראשונים
 הם כחלומות בלי פתרון
 והזכיר הצפור והדרור
 כי הם דרות בבתיים עם בני אדם
 וצריכין לנוד מהרה ממקו' למקום מפני העוברים והשבים
The rationales that my predecessors gave for the species-names of birds and animals
are like dreams that have no interpretation
it mentions the tzippor and the d'ror here
because they live in houses together with human beings
 and they need to flit rapidly from place to place because of the passers-by

Here Ibn Ezra denies that the species-name *d'ror* has any discoverable etymology, or that the species has any relevant characteristic that distinguishes it from the *tzippor*. He does however identify it as a bird that lives in a space it shares with human beings.

Ibn Ezra to Tehillim 84:4 takes a radically different approach:

– דרור
שם עוף מנגן
אולי נקרא כן
בעבור שאין מנהגו לנגן
כל זמן שאיננו חפשי
וזה העוף ידוע הוא בספרד
“D’ror” –
*This is the name of a songbird
Perhaps it is called thus
because its practice is not to sing
whenever it is not free
This bird is known in Spain.*

Ibn Ezra here provides an etymology for the species-name *d'ror* – the same kind of etymology he scoffed at in his comments to Mishlei 26:2! Assuming this is the same species, we now learn that its residence among human beings does not imply domestication, or at least not total domestication; the bird sings only when it is free. Its constant motion is likely for the purpose of avoiding capture.

Even more astonishingly, Ibn Ezra to Vayikra 25:10 – the Liberty Bell verse – reverses the vector of derivation.

– דרור
ידועה
והוא כמו חפשי.
– וכדרור לעוף –
עוף קטן
מנגן כשהוא ברשותו
ואם הוא ברשות אדם
לא יאכל
עד שימות.
“D’ror” –
*The meaning is known
and it is like “free.”
(as in the verse) “like a d’ror to fly”
a small bird
which sings when in its own reshut
but when in the reshut of a human being
it will not eat
to the point of dying*

Here Ibn Ezra argues that the species name is the etymology of the term “liberty,” or at the least that we derive the meaning of *d'ror* here from the species name. Why would he take that approach, which requires him to assume that the name was known via tradition, when the meaning seems clear from context here and from parallel passages?

I suggest that Ibn Ezra thought the translation of “liberty” was not a perfect fit in our context. Why? Because although Yirmiyahu uses *d'ror* to refer to freeing slaves, and Yeshayahu uses *d'ror* to refer to freeing captives, a careful look at the Jubilee law in Vayikra 25:10 reveals no explicit contextual reference at all to slavery or freedom. Rather, the unit Vayikra 25:10-13 speaks about the need for people to return

to their hereditary homesteads. Slavery may be mentioned in 25:14, but as an additional element. One can argue that people who sell their land will eventually end up enslaved, or that 25:10-13 refers to people who were sold away from their lands rather than people who sold their lands, but this is certainly not obvious.

How does Ibn Ezra resolve this? Perhaps the key is that he frames the bird's refusal to sing as about *reshut*, which can mean both "space" and "authority." The bird will sing only when it is in its own *reshut*. Similarly, even if people are not enslaved, they do not have *d'ror* unless they have a space they can call their own.

The problem is that Ibn Ezra to Mishlei 26:2 defines the *d'ror* species as one that lives in human houses, and therefore finds its space continually intruded on.

I can only suggest this. We all live within the impersonal constraints of time, space, and our own physicality. We can only dream of perfect, Divine freedom. Perhaps we can even dream of that freedom only when we are not subject to any other person's will. Until then we are constrained to imagine only freedom from, not freedom to.

The *d'ror* dreams of its own space, but its physical needs and limitations compel it to live in human abodes. So long as it is not captive – so long as it is not subject to a human will – the dream seems close enough that it can be expressed in music.

The free bird sings
with a fearful trill
of things unknown
but longed for still.
it sings of freedom.

The Little Prince and His Rose Yeshiva

June 13, 2019

“An aspiring *maggid shiur* need not know every source that everyone else knows. What matter is knowing one hundred sources that no one else knows.” A friend’s rebbe told me this years ago to help me overcome feeling inadequate for my lacking *bekiut*. To some extent he succeeded, because in principle he was right. The great shiurim of the past emerged from the capacity to notice things that other people hadn’t, not from comprehensively renouncing everything they had.

This approach carries with it a temptation to intellectual miserliness. Every time you teach one of your hundred sources, after all, if you’re any kind of effective pedagogue, other people learn them! Your students will talk to other teacher’s students, or become teachers themselves, and pretty soon it will just be one of the things that every *maggid shiur* knows.

The proper solution to this dilemma, of course, is to keep learning, so that your supply of unique sources refills faster than it is depleted. But the more shiurim you give, the harder that gets.

All this was back in the days before the Bar Ilan Responsa Project, let alone Otzar HaChokhmah, Hebrew Books, Al Hatorah, or Sefaria. The database revolution has democratized both sides of the equation. On the one hand, *bekiut* for the purposes of giving a shiur can be easily obtained by tracing a chain of citations from the Talmud, or by working backward from an article by Rabbi Bleich, a responsum of Rav Ovadiah z”l, or an entry in the Encyclopedia Talmudit (if they’ve gotten up to your letter), et al. On the other hand, just about every source in history has been indexed to standard sources, so that anyone inputting the right search string, or reading the standard anthologies, will likely meet all that was once considered unusual.

Preparing for this devar Torah, I had what you might call a “The Little Prince and His Rose” experience. I followed an interpretive thread on the parshah and realized that it gave me the chance to share with you one of my favorite esoteric (so I thought) sources. But as I no longer recalled the title of the book where had seen it quoted years ago, I typed the key phrase into Bar Ilan in the hope that it might be tagged. It turned out that the idea had come up repeatedly in the past, and of course was referenced in the Daf Al Daf anthology. My source was no longer special at all. “I thought that I was rich, with a flower that was unique in all the world; and all I had was a common rose.”

The fox comes along and teaches the little prince that “It is the time you have wasted for your rose that makes your rose so important. You are responsible, forever, for what you have tamed. You are responsible for your rose . . .” Talmud Torah is not a waste of time. But it may be that the function of a successful Torah teacher now is to present the sources he or she loves in a way that makes students and readers want to develop their own special relationship with them, so that there will be always be someone to make sure they are properly understood and have their proper place in a tradition that is now so accessible across intellectual and spiritual communities, in such breadth that, like multiculturalism, it begins by celebrating diversity and ends in homogenization.

So here we go. Bamidbar 6:14 teaches that a one who takes an oath of *nezirut* brings a sin-offering = *chatat* at the conclusion of his period of *nezirut*. The obvious question is: Why a sin offering, which is brought in the case of accidental sin? In what way have they sinned, and if they have sinned, in what way was it accidental?

The simple answer is that the Torah is talking about the special case in which the *nazir* had violated his oath by accidentally becoming *tamei meit* = acquiring corpse-impurity. But this seems difficult to fit into the verses, which seem to say that every *nazir* brings such a sacrifice.

The Talmuds accordingly cite several Tannaim as holding that every *nazir* sins per se. What is the sin? One possibility is that it is arrogance, *yohara*. The Nazir’s oath demonstrates a belief that he or she is holier than everyone else and so requires additional religious restrictions, what Rabbi Tzvi Hersh Weinreb

refers to as mistaking sanctimony for sanctity. This seems to be the reason that Shimon the Tzaddik refused to eat from any Nazirite's sacrifice (except for that of one young shepherd whose oath was taken so as to force himself to shave the hair which tempted him to narcissism).

A second position, attributed to Rabbi Elazar haKappar, holds that the sin is unnecessary teetotaling, causing one's body suffering by depriving it of the pleasures of alcohol. This position was taken to an extreme by Rabbi Shlomo Yosef Zevin in his tour de force essay "Mishpat Shylock," in which he argued that since our bodies belong to G-d, we have no authority to cause them any suffering or deprive them of any pleasure.

Rabbi Zevin's position is obviously unsustainable in Jewish tradition, as noted in Rabbi Shaul Yisraeli's rejoinder, and easily leads to absurd conclusions such as the obligation to eat dessert if one has a sweet tooth, and worse. It rests on the false assumption that ownership is absolute, so that any limits on our rights to our bodies demonstrates that we are not owners. But Halakhah, and most legal systems, limit the rights of property owners significantly, and the prohibition of *bal tashchit* applies to all our possessions. We may own our bodies as much as we own anything.

Nevertheless, Rabbi Elazar haKappar's position is given halakhic weight, and is among the sources the Talmud cites for a prohibition against self-wounding (although it seems more likely an aggadic derivative thereof). But in what sense then is the sin of the *nazir* accidental?

A third possibility leads us to my rose. A beraita on Nedarim 10a reads:

רבי יהודה אומר:
חסידיהם הראשונים היו מתאיין להביא קרבן חטאת,
לפי שאין הקדוש ברוך הוא מביא תקלה על ידיהם,
מה היו עושין?
עומדין ומתנדבין נזירות למקום,
כדי שיתחייב קרבן חטאת למקום;
Rabbi Yehudah says:
The First Pietists were desirous of bringing a sin-offering
because the Holy Blessed One never causes them to sin accidentally.
What would they do?
They would rise and voluntarily swear nezirut to the Omnipresent,
*so as to be **obligated** to bring a sin-offering to the Omnipresent.*

According to Rabbi Yehudah, the sin may be the same self-denial as Rabbi El'azar HaKappar, or more likely the whole phenomenon of voluntarily taking an oath and thereby risking a profanation of G-d's Name. But the advantage of his position is that it explains why the sin is considered accidental. The oath is taken deliberately, but the intent is to fulfill a command of G-d that would otherwise be inaccessible to them. They are sinning for the sake of Heaven.

But are they sinning at all, if that is their motive? And if they are, does G-d accept their sin-offering?

Mishnah Yoma 8:9 seems directly on point.

האומר "אחטא ואשוב, אחטא ואשוב" – אין מספיקין בידו לעשות תשובה.
One who says "I will sin and repent, I will sin and repent" – he is not enabled to perform repentance.

Why should he then be enabled to atone via a sin-offering?

Perhaps because the Mishnah only states its ruling about someone who plans to sin twice – but sinning once, in order to have the experience of repentance, is not disapproved of. After all, it doesn't seem fair to deprive the perfectly righteous of this experience, when the dominant opinion seems to be that "In the place where the masters of repentance stand, the perfectly righteous are unable to stand!?"

What emerges is a very powerful legitimation of spiritual ambition, alongside a recognition that such ambition will always be in profound tension with law in general and halakhah specifically. Because of course this ambition is profoundly dangerous and antinomian. One commentator suggests that this was the argument that Potiphar's wife made to Yosef HaTzaddik: how can you achieve your potential if you never do anything that generates the obligation to repent? Yosef's response is that interpersonal obligations cannot be sacrificed in such schemes – the sin to G-d he could bear, but not the great wrong to his master.

This, I suggest, is the key to the law of the *nazir*. It gives an outlet for supererogatory ambition, for commoner Israelites to be quasi-High Priests, but in a way that gives the ambitious no basis for power over others; they have only the restrictions of the High Priest, not his rights or obligations. The process ends with a forced formal admission that this ambition is in some sense sinful. Absent that concession, they would be Icarus, flying too near the sun so that their wings melt and they drown. Or perhaps in Jewish terms, they would be Nadav and Avihu.

Was Negiah Prohibited in Eden?

October 25, 2019

This Dvar Torah may not be about what you think it's about!

Just before G-d commanded the first human, He explained our purpose(s). Since one philosophic definition of *chiyyuv* (=obligation) is to fulfill one's telos (=purpose), a reasonable hypothesis is that G-d's first commands provided a way for humans to fulfill those purpose(s).

Let's approach this questions by looking carefully at Bereishis 2:15-17, with my deliberately tendentious translation.

וַיִּקַּח ה' אֶת-הָאָדָם
וַיְנַחֵהוּ בְּגֵן-עֵדֶן
לְעִבְדָהּ וּלְשִׁמְרָהּ:
וַיֹּצֵא ה' אֶת-הָאָדָם עַל-הָאָדָם לֵאמֹר
מִכָּל עֵץ-הַגֵּן אָכַל תֹּאכַל:
וַיִּמְעַץ הַדְּבַעַת טוֹב וַרְעָה לֹא תֹאכַל מִמֶּנּוּ
כִּי יוֹם אֶכְלֶךָ מִמֶּנּוּ מוֹת תָּמוּת:
*Hashem Elokim picked up the human being
He put him down in the Arbor of Eden
l'ovdoh and l'shomroh.*

*Hashem Elokim imposed a command on the human being, as follows:
From all the trees of the arbor – you must eat;
but from the Tree of Knowledge, Good and Bad – you must not eat from it
because on the day of your eating from it, you will surely become mortal.*

L'ovdoh and *l'shomroh* are the human being's purpose(s) in the Garden. Given artistic freedom, I'd prefer to translate the phrase as "to serve and conserve it." Alas, I find it hard to read Torah as endorsing idolatry (*avodah* = service), and I'm leery of seemingly contemporary policy prescriptions (*leshomroh*=conservation), so my translation here is "to work and protect it."

To work an arbor means to make it more productive, to cultivate it. Why is cultivation a proper purpose? The sequence of events in verses 2:8-10 is suggestive.

וַיִּטֵּעַ ה' אֶת-הָאָדָם בְּעֵדֶן מִקֶּדֶם
וַיִּשָּׂם שָׁם אֶת-הָאָדָם אֲשֶׁר יָצָר:
וַיִּצְמַח ה' אֶת-הָאָדָמָה
כָּל-עֵץ נֹחַמֵד לְמַרְאֵה וְטוֹב לְמֵאֲכָל
וְעֵץ הַחַיִּים בְּתוֹךְ הַגֵּן וְעֵץ הַדְּבַעַת טוֹב וַרְעָה
*Hashem Elokim planted an arbor in Eden, to the East.
He placed there the human that He had formed.
Hashem Elokim generated from the ground
every tree attractive to sight and good for eating
and the Tree of Life amid the arbor, and the Tree of Knowledge Good and Bad*

G-d places Adam in the arbor after it has been planted, but before the ground generates trees. I suggest that this was so Adam would see the trees grow into being. He thereby understood that the arbor was not fixed and eternal, but rather required stimulation. He **intuited** his purpose of *l'ovdoh*.

"*The Tree of Life amid the arbor, and the Tree of Knowledge, Good and Bad*" may be

1. a subset of "all trees attractive to sight and good for eating," or
2. separately created at this time, or
3. already grown when Adam is first placed there, before any other trees are generated.

I prefer the last option. Adam would intuit that these trees require no stimulus – they need only be protected from harm.

Adam's purposes therefore are

- *l'ovdoh* = to cultivate all the ordinary trees of the garden, and
- *l'shomroh* = to preserve the central tree(s).

We can then identify the positive command “*from all the trees of the arbor you must eat*” as a fulfillment of *l'ovdoh* (one cannot eat fruits unless they have been produced), and the negative command “*but from the Tree of Knowledge, Good and Bad – you must not eat from it*” – as a fulfillment of *leshomroh*. If the positive and negative commandments are parallel. Adam would therefore understand that his obligation was to **avoid cultivating** the latter tree, with every expectation that it would not fruit.

But of course, it did fruit. Imagine poor Adam's confusion. Why would G-d command him not to cultivate the tree, if it would grow regardless?

Moreover – maybe if this tree fruited in its own, maybe all the other trees would also have fruited on their own, regardless of his efforts. Solzhenitsyn in *The Gulag Archipelago* tells of a prisoner in a labor camp who spends each day for decades turning the heavy wheel of a mill embedded in the camp wall, so that his fellow inmates could have flour. Finally released, he goes outside the wall, and sees that the mill was a sham, and the wheel connected to nothing – and promptly dies. Maybe Adam ate the fruit because he no longer saw his works as having any purpose.

G-d is not *chas veshalom* a Soviet taskmaster; He would not have assigned human beings purposeless tasks. So Adam must have misunderstood. Was it G-d's fault for not making His command clearer?

Of course not. To understand what G-d wished to happen, we need to look at the next steps of the narrative.

וַיֹּאמֶר ה' אֶל-לְהִים
לֹא-טוֹב הָיְתָה הָאָדָם לְבַדּוֹ
אֶעֱשֶׂה-לּוֹ עֵזֶר כְּנֶגְדּוֹ:
Hashem Elokim said:

*It is not good, the human being by himself
I will make him a help to counterbalance him.*

Just after G-d commands Adam, He states that Adam's current state is “*not good*,” and then creates Eve to assist him. A reasonable hypothesis therefore is that the creation of Eve is necessary for the proper fulfillment of His command. But why does G-d command Adam when he is not yet capable of obeying?

Let's shift one chapter forward. In 3:3, Eve tells the snake that G-d commanded human beings *וּלֹא תִגְעוּ בוֹ*, usually translated as “and do not touch it.” But G-d said nothing whatever about touching in Chapter 2! Why does Eve invent a prohibition?

The 19th century commentator S. D. Luzatto (SHaDaL) answers as follows:

*Perhaps there is no addition to Hashem's word here,
because the verb negiah is used many times in the borrowed sense of “damage,”
for example “do not touch My anointed” (Tehillim 105:15)*

SHaDaL's translation radically reoriented my perception of the command. I had thought it was about protecting human beings from the tree. In his reading, it is about protecting the tree from human beings.

A second possible approach is to see Eve as overzealously extending the prohibition. She found her religious experience inferior to Adam's, who had directly experienced G-d as commander, and so felt

compelled to add weight to His yoke. (She thus anticipated Dr. H. Soloveitchik's thesis about the motivation for *chumra* among Chassidei Ashkenaz and late 20th Century American Orthodoxy.)

Avot d'Rabbi Natan Version B (1:1) takes a third approach:

לא רצה אדם הראשון לומר לחוה
כדרך שא"ל הקדוש ברוך הוא
אלא כך אמר לה:
ומפרי העץ אשר בתוך הגן אמר א-להים
לא תאכלו ממנו
ולא תגעו בו פן תמותון
*The First Adam did not want to say to Eve
in the same way that the Holy Blessed One had said to him
rather he said to her thus:
"and from the tree which is amid the arbor," said G-d,
'you must not eat from it
and you must not touch it lest you die"*

Adam added a prohibition when talking to Eve because he wanted to be more than just a pass-through for Torah – he wanted to contribute. Note, however, that the midrash seems to explain why Adam (in violation of Mishnah Eduyot 1:3) wanted to express the Divine command in his own words; it does not explain why Adam seemingly altered its substance.

Holding these approaches in our mind, we can move to one last mystery. Where is Adam while the snake is seducing Eve into sin?

One answer in Midrash Rabbah is that G-d had taken Adam on a world tour. This suggests that G-d deliberately gave the snake the opportunity to speak privately with Eve. Why would He do that?

So we have three questions.

1. Why is Adam commanded before Eve's creation?
2. Why does Eve tell the snake about a prohibition against *negiah* that G-d never expressed?
3. Why does G-d enable the snake to speak to Eve without Adam present?

In "Equality Lost," the eponymous essay of his book *Equality Lost* and maybe the most powerful dvar Torah of the past 40 years, Rav Yehudah Herzl Henkin suggests that G-d commanded Adam **before** creating Eve so that Adam would have the opportunity to share the gift of Torah with her. Eve is created as a "*help to counterbalance him*," but she cannot play her role as equal unless he sees Revelation as a gift to be shared rather than a source of exclusivity and power. The test of whether he had fully shared was to see whether she could now stand on her own in Torah, and so G-d had to ensure that the snake found her alone.

But why did she fail to withstand the snake? Rav Henkin contends that Adam added the "fence" of touching, without distinguishing between the initial Divine decree and the humanly legislated fence. (This parallels Maimonides' understanding that it is a Biblical violation to present Rabbinic law as having Biblical force.) When the snake touches the tree, and seemingly nothing happens, Eve becomes convinced that everything Adam had told her was unreliable, and so she cannot resist the snake.

I suggest that Adam did not **deliberately** add on to G-d's command. Rather, he misunderstood the DON'T as forbidding cultivation, and then expressed it to Eve in his own words, rather than G-d's.

The prohibition actually was against eating, and intended to protect humans from the tree. But because Eve had no access to the original text of Revelation, she propagated Adam's error, and they sinned together when his error was exposed.

“It is not good, the human being by himself” – Two heads are better than one, and in genuine discussion, the truth often emerges. G-d created Eve to be Adam’s match in Torah conversation. He revealed His command to Adam before Eve was created, intending for their conversation to take place within a shared set of assumptions, without competing subjective experiences of the primary dataset (cf. *לא בשמים היא*). But Adam did not share his Torah fully with Eve. We are still paying for his mistake. So long we fail to create genuine equality of opportunity in Torah education, we are still making his mistake – and therefore countless others.

The True Cost of Having Children (And It Is Not Day School Tuition!)

by Benzion Chinn (SBM 2003)

November 8, 2019

This essay should be read as a dialectic between Rod Dreher's Benedict Option and Rabbi Jonathan Sack's Not in God's Name. Dreher is a Christian who openly urges his Christian readers to behave more like Orthodox Jews by focusing on creating small enclaves for their children instead of trying to influence the larger society. Sacks offers a reading of Genesis that subverts its particularism in favor of universalism.

Abraham is paradoxically both a universalist and a particularist. His character is universalist, but his story is quite particular. One can read the Abraham narrative as the tragically necessary process by which Abraham the universalist is forced to become the father of a particular nation.

Abraham's universalist character becomes evident by contrasting him with Noah. Noah builds an Ark, while Abraham pitches a tent. Noah's Ark represents complete indifference to or rejection of humanity. Noah brings his family inside and allows G-d to shut the door in silence, leaving everyone outside to die. By contrast, Abraham's tent is open. Everyone is welcome, even idolaters. Where Noah accepted the Flood in silence, Abraham challenges God over Sodom.

Yet it is Noah who becomes the father of generic humanity, while it is not Avraham's destiny to bring Godliness to the entire world. Instead, God consistently orders him to place barriers between himself and the rest of humanity, even while promising that **all** the nations of the world would be blessed through him. Abraham obeys the commands but resists their implications.

The first command Abraham receives is to leave his father's house and travel to Canaan, essentially separating himself from his idolatrous family and giving up on them. (This is explicit in Joshua's version of the story, which we recite in the Passover Seder.) He obeys the command but resists its implications by allowing Lot to come with him, and by taking with him the "souls" that he acquired in Haran. He still assumes that his task is to save them. God then forces Abraham to part ways with Lot. Abraham hesitates, and later comes to Lot's rescue when he is captured by the four kings.

Our parshah ends with God commanding Abraham to make his family physically different from the people around them. Circumcision was an ultimate social barrier. In next week's parshah, Abraham is forced by God to listen to Sarah and expel Ishmael even though Ishmael was circumcised.

Why would Abraham agree to pursue actions that contradicted his fundamental nature of openness? Always hanging in front of Abraham is the desire for children; it is the MacGuffin that defines his narrative. God repeatedly promises him children. Leave Haran and you will have children. Enter into the treaty of parts after leaving Lot one final time and you will have children. Circumcise yourself and you will have a child.

What is so valuable about children? People all the way back to Adam had children. Abraham eventually has Ishmael with Hagar. What is unique in what Abraham is being offered in Isaac?

Isaac represents the promise of spiritual continuity, something that had not existed before. While belief in God may have gone back to Adam, there were no guarantees that it would be passed to the next generation. Abraham had to learn about God from square one all by himself. This was the fundamental failure of the generations from Adam until Abraham.

What is the price of Isaac, of spiritual continuity? Abraham does not want to hear it, but it is placing barriers between himself and the world. Abraham has to choose between converting thousands and having an impact on his generation only to be forgotten afterward, or being able to raise one child, Isaac, and build a tradition that will last forever.

While having Isaac becoming Abraham's spiritual heir is going to require the expulsion of Ishmael and eventually the akeda, it is not a coincidence that the critical downpayment that Abraham needs in order to bring Isaac into the world is the ritual of circumcision. It is easy to attack circumcision. Go read chapters 2-4 of Paul's Epistle to the Romans. Abraham circumcising his flesh does not make him more righteous before God. Abraham already had faith. It is clearly more important to be circumcised of the heart. If anything, circumcision of the flesh presents what economists call moral hazard in that one might believe that he is also circumcised of the heart. Above all else, circumcision creates the categories of circumcised and uncircumcised, placing a barrier between people.

Abraham's great contribution to the world was not that he had faith. Noah had faith. Abraham's importance lies in the fact that he managed to pass that faith on, and to do that he needed circumcision. It is the great virtue of ritual that, as opposed to intellectual belief, it can be passed on to future generations. Ritual can do this because it serves as a living vehicle for faith. All this is made possible because ritual creates an identity of us the believers separated from the unbelievers. It is the very fact that ritual creates barriers that allow it to serve as a vehicle to transmit faith to another generation. Without it, we are left with Noah, a man whose righteousness consisted of one generation with no continuity.

Perhaps it is Abraham's virtue that he never consents to being a particularist and never gives up on his earthly family. Abraham has many children and becomes the father of many nations even if it is only Isaac that carries the covenant. If Abraham was Noah and could willingly, maybe even happily, turn his back on the world, the nation of Israel could never have amounted to more than a cult. The fact that our founding as a particularist nation was at the hands of a universalist who never truly embraced particularism in his heart has kept us morally grounded. If we are going to be particularists let it be out of tragic necessity and not out of hatred of the world. Let us always remember that the nations of the world are our brothers and sisters.

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Why We Need More Akeidah Conversations

November 15, 2019

Should Modern Orthodox Jews be at peace with the current state of halakhah? No. Does this mean that we should choose against halakhah when it conflicts with the assumptions of the culture(s) we embed ourselves in? No. Does that mean we should seek out and celebrate such conflicts? No.

There are not difficult questions. Just about all of us understand that halakhah *as practiced by the overall halakhic community* is necessarily imperfect; that halakhah must *at least on occasion* be able to stand against the moral tide; and that it would be ridiculous to choose to live in Sodom in order to maximize the conflict between halakhah and social norms.

These propositions are not right or left wing. The meaningful ideological arguments are about **what** the imperfections are (e.g., are you bothered more by our casual resort to civil courts rather than batei din, or by our inability to call corrupt batei din to account?); **when** we must resist an external moral consensus; and **how** we can teach that necessary resistance without breeding indecent disrespect for the opinions of humankind and the *tzelem Elokim* of many individual human beings.

The process of engaging with a moral critique often leads to recognizing imperfections. This is so whether one ends up resisting or rather accepting the critique. Recognizing imperfections leads to pressure for change. Fear of change therefore leads to fear of engaging with critiques.

Harvard leadership expert Professor Ron Heifetz teaches that a key art of leadership is “managing disequilibrium.” As I understand it, the idea is that unless people feel dissatisfied with the status quo, they’ll be unwilling to deal with the loss of comfort that is definitionally part of change. But making people too uncomfortable, too aware of the tenuousness of the present, carries terrors that can also be paralyzing or destabilizing. It’s hard to make mature risk-benefit calculations when the possibility of losing everything is constantly before your eyes.

Leaders have to find a way to make people just uncomfortable enough to be productive. They also have to be honest. This makes leadership extremely difficult when the game is really being played for existential stakes.

Modern Orthodoxy is playing for existential stakes these days. There are two ways in which the conversation about ethics and halakhah can lead to our community’s dissolution. The first is if we deny halakhah the right to make demands that are morally repugnant to the other cultures we participate in. The second is if we insist that halakhah is impervious to and uninterested in being morally critiqued.

I take these positions on internal Torah grounds. Verses like “for (the Torah) is your wisdom and discernment in the eyes of the nations, who will hear all these statutes and say: None but a wise and discerning nation, this great people,” and the concepts of sanctifying and desecrating G-d’s Name, demonstrate that Judaism values the good opinion of humanity, indeed sees the development of a shining reputation as a goal. But the very same obligation of sanctifying G-d’s Name teaches that sometimes we must carry out halakhah even though others “kill us for it all day long.”

Here’s the thing. In America, until recently, we were able to claim that our conflicts with the dominant cultures were about theology, not morality or ethics. Take the “Big Three,” the specific mitzvot that Jews must die before transgressing. Idolatry? Theology (and besides, no major American religion admitted belief in fetishistic idolatry). Bloodshedding? Surely we’re all against that. Adultery? Even the secular movie code banned that. There always were, and always will be, countertendencies and transgressors, but the weight of the culture was clearly on our side.

None of that is true anymore. Idolatry? Pluralism is a more important value than any theological claim. Bloodshedding? Well yes, we’re all against that, but only if no one considers the possibility that it extends

to abortion, assisted suicide, braindead patients, or even euthanasia. Adultery? No longer a public concern, and certainly the category *gilui arayot* is out if it includes any form of homosexual activity.

I don't mean to sound like a crotchety old man bemoaning the good old days: "Do not say: 'What has happened? Because the earlier days were better than these,' because you have not asked this from a place of wisdom." Furthermore, the culture shifts have been multidirectional; some of us are afraid that Christian worship will be established, or that abortion to save the life of the mother will be prohibited, or of backlash against sexual minorities. Polarization in America may generate two cultures each of which are less compatible with our morals than the previous default.

All of these challenges are opportunities to examine whether we are in fact understanding the Torah and the halakhic tradition as G-d intended us to. To take one example from each category:

1. We have been challenged to consider how the category "*avodah zarah*" applies to religions whose intellectual elite clearly espouse philosophic monotheism, and who understand the apparent popular worship of a pantheon as the worship of a single G-d in multiple manifestations. This challenge is intensified when we identify morally more with the "idolaters" than with the monotheists (such as Isis) destroying their idols.
2. More (and more sophisticated) teshuvot and maamarim have been written about abortion in the past century than in all previous halakhic history. We know the range of positions; we have broken up the gestational period; and we are beginning to understand the risks and rewards of extending categories such as *pikuach nefesh* to mental illness.
3. The Orthodox community's enthusiastic embrace of IVF and broad use of birth control has made much classical rhetoric about the necessary connection between sex and procreation tenuous (although Judaism has never linked them absolutely). This has led to an efflorescence of sex-positive Orthodox works and reconceptions of the basis of marriage.

I also don't mean to endorse all arguments for change. I hold that even Meiri categorized medieval Christian religious practice as *avodah zarah*. The abortion sh'eilot I have been asked were relatively easy to permit, and yet they were soul-searing experiences. It seems very likely to me that American culture is hopelessly naïve about the extent to which we can undermine old rationales for sexual restrictions and still expect society to maintain any rules at all. I don't think that requiring the highest standard of consent – even if we get exponentially better at achieving that – can do all the work. We may be Wile E. Coyote long since over the cliff but not yet willing to look down.

But I also don't mean to rule specific outcomes out of bounds before hearing all arguments for them – which means, an outcome is only out of bounds until I hear a good enough argument for it to bring it in bounds. We need to explain why, as seems obvious to most of us, the Torah's radical animus toward *avodah zarah* does not apply to many contemporary religions that seem to fall within the boundaries of the halakhic category *avodah zarah*. We need to ensure that nothing in our practice of halakhah reduces anyone to existing merely for the sake of procreating, or to having their existence defined by their sexuality, rather than having holistic ontological significance. We cannot deny the reality that the link between sex and procreation is now a matter of volition rather than necessity, and that this will only become more true over time.

And to be clear – I don't think all outcomes are equally likely before I hear the arguments for them. Some outcomes **seem** impossible to me, and it would take evidence of unprecedented probative weight to get me to accept them as sufficient even to be relied on in extremis when endorsed by great sages. Others are just waiting for a better argument to be made, or for existing arguments to be embraced by halakhists who have acceptable scholarship and judgment.

Modern Orthodoxy cannot avoid these conversations any longer. We need to engage moral critiques of halakhah, in the context of vigorous internal Torah conversations. These engagements will inevitably lead

to changes in the way that halakhah is practiced and applied in our community. These changes will be uncomfortable, and some of them will generate very legitimate controversy. So we need to find a sufficient counterforce to make us engage.

Maybe we can find it in the text of this week's parshah.

Akeidat Yitzchak is a deeply uncomfortable text. The profound discomforts it generates in us can lead to paralysis; to amoralism; to radical change that masquerades as continuity; or to abandonment of the halakhic project as a serious basis for living in the world.

In the hands of effective and serious leaders, though, perhaps reading the akeidah together can also lead to enormously productive halakhic and religious conversations that give us the courage, self-confidence, and humility needed to navigate our changed cultural position with integrity. And true courage, as Dumbledore said, is standing up both for and to our friends. Sometimes it involves both at the same time.

We need to have more "Akeidah conversations." And we need to have them in full realization that Avraham's moral struggle plays out on Yitzchak's *cheshbon*.

Not because child sacrifice is a live issue, thank G-d, but because unwillingness to have these conversations will sooner or later leave us religiously hollow. These conversations will be hard, and not everyone will be ready to engage in all of them. I know that I am not. But in the absence of such conversations, integrity vanishes, and the worst rule, and the best leave.

Thanksgiving, Jewish Identity, and Antisemitism

November 29, 2019

Toldot is an utterly terrifying parshah for parents. Yitzchak and Rivkah have two sons. They start fighting in the womb! Their fights – in the womb! – are about both self-interest (who comes out first) and values (idolatry or Torah). Character is determined and destiny. There was nothing Yitzchak and Rivkah could have done to make Esav turn out better, or to prevent eternal fraternal enmity.

Toldot is an utterly terrifying parshah for parents. Yitzchak and Rivkah have two sons. They share a genetic heritage, and an environment – they had the same potential. They fought – but all male siblings fight, especially twins. They had different strengths and weaknesses – like all human beings. But a series of parenting errors put and kept Esav on the wrong path, and cemented childhood roughhousing into adult hatred.

Toldot is an utterly terrifying parshah for parents. Yitzchak and Rivkah have two sons, and each of them grows up obedient and cooperative. Suddenly, at bar mitzvah (according to Midrash Lekach Tov) –

– ויגדלו הנערים
ר' פנחס בשם ר' לוי אמר
עשו ויעקב דומים לעצבונית והדס שהיו גדלין זה על גב זה
וכיון שהגדילו – זה נתן ריחו וזה חוחיו
כך
כל י"ג שנה – לא היו ניכרין מעשיהן
כיון שהגדילו – ניכרין מעשיהן
The boys matured –
Rabbi Pinchas said in the name of Rabbi Levi:
Esav and Yaakov are similar to an itzbonit and a hadasthat grew one on top of the other
Once they matured, this one gave forth its perfume, and this one its thorns.
So too
For the first thirteen years – Esav and Yaakov's deeds were not distinguishable
Once they matured – their deeds were distinguishable
This one a man of simplicity, this one a skilled predator.

Yet even this striking image is tinged with ambivalence, at least for modern readers. Jastrow translates *itzbonit* as wild rose – did Esav still have flowers? (but see also Yeshayah 55:13). In the folk ballad Barbara Allen, the hard-hearted eponym realizes too late, after Sweet William dies of lovesickness for her, that she loved him as well, and has herself buried beside him. A perfumed flower grows out of his grave, a thornbush out of his, but “in the end they formed/ a true lover’s knot/ and the rose grew ‘round/ the briar” (lyrics as sung by Joan Baez). So, too, Yitzchak and Yishmael apparently reconcile at Avraham’s funeral. Is it too much to hope for Yaakov and Esav to do the same? (Maybe, and maybe not – that is a tale for another parshah.)

Toldot is an utterly terrifying parshah for high school Torah teachers. Avraham was buried *b’sivah tovah* = *in goodly old age* – this means that Esav did not begin to sin in Avraham’s lifetime. Avraham died at 175. He had Yitzchak at 100, which means that Yitzchak was 75. Yitzchak had Yaakov and Esav when he was 60 – so they must have been 15 at Avraham’s death, which means that Esav began sinning two years before Avraham’s death! The answer is that Esav hid his sins for the first two years, while Avraham was alive. He was indistinguishable from Yaakov.

When I was Orthodox Rabbinic Adviser at Harvard Hillel, parents or teachers would sometimes bemoan the corrupting influence of the secular campus on their previously innocent children. I don’t deny that the secular campus, like very other environment, can be corrupting. But I also taught high school, and high school students who seemed to all the world like the very model of day school success would confide in me

that they had no plans to be frum on campus. Sometimes they would “play frum” when their parents came to visit, but the charade generally had to end sometime.

They didn’t confide in all of their Torah teachers. As the Keeper says to Captain Kirk: “Captain Pike has an illusion, and you have reality. May your way be as pleasant” (Star Trek, TOS, The Menagerie Part II).

There is another explanation of the chronological discrepancy. Minchat Yehudah (a commentary by the Tosafist R. Yehudah ben El’azar, available on www.alhatorah.org) reports that ריב”א (presumably Rabbi Yitzchak ben Asher HaLevi) found in a midrash that “Yitzchak was hidden away in the Garden of Eden for two years in order to heal from the incision where his father began to slaughter him.” He suggests that those two years were a sort of suspended animation – like Noah on the Ark! – and did not count as part of Yitzchak’s life, so Esav and Yaakov were really born 62 years after his own birth, and Avraham died at their bar mitzvah.

I had not previously seen this midrash. It reminded me immediately of Rashi’s explanation of the apparent redundancy of the angel’s cease-and-desist order to Avraham: “Do not send your hand forth against the lad, and don’t cause him an injury.” Rashi explains that after the first command, Avraham asked whether he could at the very least draw a drop of blood, so the angel banned even injury.

Shalom Spiegel’s The Last Trial made famous the crusade-era interpretation in which Avraham in fact slaughters Yitzchak, G-d resurrects him, and the angel succeeds only in preventing the second sacrifice. In other words, Avraham obeyed the second command but not the first. Minchat Yehudah’s midrash seems to have Avraham obeying the first command – “Don’t slaughter” – but not the second.

Minchat Yehudah does not tell us whether the bacta tanks of Eden completely renewed Yitzchak’s skin. I suspect that he became whole psychologically – not the same as before, but whole – but that he always had a physical scar, and that Yaakov and Esav knew full well where the scar had come from.

What do such children grow up thinking? Some of them are genuinely inspired by both the willingness to sacrifice and to be sacrificed. These are the children of Navaredok – even before the Shoah, in the early Soviet Union – who could endure anything for the sake of keeping Torah alive under oppression. It is a very powerful message, but possibly one that requires continued oppression, or the live memory of oppression, or at least belief in the inevitability of oppression to be effective.

When Avraham dies, Esav and Yaakov have only Yitzchak’s experience left. They know what they are giving up for Judaism, but Esav no longer feels that the sacrifices are motivated by idealism, let alone justified by idealism. What kept Esav *frum* was his connection to Avraham, and let’s be honest – perhaps also fear of Avraham. The possibility that one will be sacrificed tomorrow concentrates the mind wonderfully. Esav knew that Yitzchak would never be able to punish – to inflict any sort of harm on him – for the sake of religion.

Yaakov connected to Rivkah. Rivkah was a *baalat teshuvah* – she left with Eliezer voluntarily, against her family’s will, and in rebellion against the worst parts of their culture. She is attracted and overwhelmed from the start by Yitzchak’s capacity for religious experience. No one has ever succeeded in imposing anything on her.

Rivkah never got through to Esav. That doesn’t mean that his going astray was inevitable – it just meant that she needed help. But to give her that help, someone had to understand in time that Esav’s conformity was shallow, rooted in fear and personality, and find a way for him to develop an autonomous connection to Torah. Too often, I suspect, his teachers, with the best of intentions, tried instead to set themselves up as substitutes for Avraham. To be fair, they probably had success with many similar students. Esav married at 40. If only Avraham had lived another 27 years, Esav might never have broken away.

Yaakov teaches us that Jewish identity can thrive without being rooted in the expectation of oppression. We have not had many opportunities to try the experiment. This Thanksgiving is a time for American

Jews to reflect with gratitude on the beauty and fragility of our experience. Let us resolve to both preserve it and deserve it.

Are We Living in a Greek Tragedy?

by Adena Morgan

November 29, 2019

It is a familiar formula from Greek mythology. A prophecy is given to a family that their child will bring doom and destruction. They try to prevent it, but in doing so cause the prophecy to be fulfilled, and what they feared does indeed come to pass. The moral is the inexorable nature of fate. What is determined to happen cannot be avoided.

At first glance this week's Parsha turns this formula on its head. A mother is given a prophecy that both of her sons will be the patriarchs of different nations and that the older will be subservient to the younger. She acts to bring it about, and although in doing so deceives her husband and older son, she is ultimately successful. The younger son receives the father's blessing of dominance intended for the elder. This is the complete opposite of the Greek formula, as the mother works to fulfill the prophecy rather than prevent it.

The traditional Jewish understanding of these events is that Rivkah, the mother, is heroic in her efforts to secure the primacy of her younger son, Yaakov, whose descendants still benefit from her actions today. Eisav, the older son, was undeserving of this blessing, as he is evil and scorns his special status as the firstborn of his generation, meant to carry on the mission of Avraham. The father, Yitzchak did not realize the true nature of Eisav, for if he had, he would never have even considered choosing him over Yaakov.

However, there are several parts of the text that challenge this narrative. For someone who is rejected from being part of the Jewish story as unworthy, the Torah spends an inordinate amount of space describing Eisav's pain and internal monologue. And for someone who should be happy that the family project will continue into the next generation, Yitzchak is instead very upset. For the rest of his life Yaakov is faced with scenarios in which he is deceived in a similar manner, which can be seen as a rebuke for his actions here. Additionally, Yitzchak receives prophecy after the birth of his sons. If it is preordained by God that his older son be subservient to the younger, why isn't this explained to him the way it was to Rivkah? Instead, he is told only that his descendants will be numerous and inherit the land promised to Avraham. There is no mention of a hierarchy between Yitzchak's sons or that only one of them will be chosen to receive the blessings given to Avraham. Are these details indicating that all is not well with what happened? Is it possible that this episode is indeed a tragedy after all?

Let us consider what could have happened if the mother hadn't heard the prophecy and made her younger son impersonate the older. The couple, barren for many years, would have rejoiced at the birth of two sons into the chosen family, double the amount of the previous generation. Naturally, one of them would need to be the leader of the family and he would have "ruled" over his brother. It appears the father wanted this to be the older son as the bechor and either did not know about the sale or did not care. Both sons' families could have lived in the land promised to Avraham and help fulfill the prophecy about the number of Avraham's progeny by begetting many children.

But, as we know, this did not happen. The younger brother steals the blessing meant for the elder, creating a rift in the family. Although the older brother receives a consolation blessing, it ensures a cycle of continuous competition between the two sides of the family. This brings us back to the Greeks; fate is predetermined and humans are only left to decide if they are willing or unwilling to live according to its dictates.

Yet, this is not the end of the story. Time passes and the brothers are able to reconcile when the younger voluntarily subordinates himself to the elder. This seems to be a reversal of the prophecy. However, instead it is a different interpretation as it is clear that the younger son still maintains spiritual supremacy. While the Greek notion of fate is that it is unchanging and binding, the Torah teaches the idea that there is no single way to live out one's destiny. The choices humans make result in changes to their futures.

Although the brothers later separate, they do so as friends, and each settles in different parts of the land promised to their grandfather. For the time being the cycle of dominance and suppression is broken and the brothers are able to coexist peacefully for many generations. As the inheritors of the destiny spoken about in the Parsha we too have the opportunity to choose how it will unfold. We can view our relationships with other peoples in terms of dominance and suppression and live in endless cycles of violence. But that is not the only option. For as we learn from Yaakov it is possible to live with others in mutual prosperity. For at the end of the day, would you rather be living in a Greek tragedy or forging your own destiny?

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Should Assisted Suicide be Legalized? A Jewish Perspective

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Autonomy and dignity are standard grounds for arguments supporting the legalization of assisted suicide. The *prima facie* case is excellent: forbidding suicide limits human autonomy, and compelling people to live against their will diminishes their self-determination and therefore their dignity. Counter-arguments often rest on assertions about the supreme value of life, even when life lacks autonomy or dignity. These assertions appear sectarian and therefore fail to convince when invoked in secular contexts. There is, accordingly, a grave risk that public discourse about assisted suicide will come to mirror that regarding abortion, in which religious belief and modern liberalism are incompatible foes rather than partners.

Jewish tradition provides resources for an alternative discourse that is hospitable to religion but takes place *within* a framework that valorizes autonomy and dignity. Below, I present some of those resources in their own terms while also showing how they can be applied to construct discourse in the secular public space.

The “Equally Red Blood” Principle

Jewish law sees the text of the Torah and a form of moral reasoning called *sevara* as independently legitimate sources of Divine law. In some cases, the Talmud argues that the *sevara* is so obvious that a Torah verse confirming it would be redundant. Following the rabbinic premise that nothing in Torah is redundant, verses that appear to communicate principles discoverable by *sevara* are reinterpreted to teach something else. This suggests that *sevara* is epistemologically antecedent to Torah, and accordingly meets the standard for nonsectarian ethics: it is universally accessible and universally applicable.

This antecedence is dramatically evident in Talmudic discussions about what actions Judaism requires an adherent to die rather than perform. Jewish law maintains that almost all religious duties and prohibitions may be ignored in cases where observance proves life-threatening. However, there are three offenses—murder, sexual sin, and idolatry—for which adhering to the law takes precedence over saving one’s life. The duty to die rather than commit idolatry is derived from a verse, and the primacy of avoiding incest and adultery is derived from a verse that compares rape to murder. But the duty to be killed rather than murder another is itself derived from *sevara*. In other words, the meaning of the verse comparing rape to murder can be discovered only after the *sevara* regarding murder is known.

The *sevara* demanding that we choose death over murder is presented in a narrative. An anonymous man tells the sage Rava that his feudal lord has ordered him to kill an innocent third party, and the penalty for disobedience is death. Rava responds: “Be killed, but don’t kill! Who can say that your blood is redder? Perhaps his blood is redder!” Rava’s question is rhetorical; he would not accept any explanation of why one person’s blood is redder. In other words, Rava holds that it is a self-evident truth that all human beings are created ontologically equal, and that they remain so throughout their lives.

Life is a Crucial but Not Supreme Value

The “Equally Red Blood” principle is necessary to ban murder for self-preservation because Jewish tradition otherwise treats lifesaving as an almost supreme value; it allows the violation of all prohibitions except idolatry, adultery and incest, and murder.

That life outweighs almost all prohibitions is seemingly derived from the text of Leviticus 18:5: “These are the commandments that a human being shall perform and live by them.” The Rabbis noted that “live by them” suggests that one need not perform them when that will lead to death; but also that “these” implies a “those,” namely idolatry etc.

The need for a Biblical proof text suggests that the default is that one may never do wrong to avoid dying. However, Jewish tradition concludes that this is only true parochially, for Jews, because they are

commanded to sanctify God's Name even at the cost of their lives. Gentiles are not so commanded. Therefore, the verse would be redundant if it only covered Gentiles, because the default *sevara* is that the preservation of life overrides all prohibitions (except those against taking life).

What is that *sevara*? Before settling on the verse "and live by them", the Talmud entertains a set of other suggested sources for the rule that lifesaving overrides observance of Shabbat. One of these is a *sevara* – "You (the lifesaver) must desecrate one Shabbat so that he (the person whose life you are saving) may observe many Shabbats." This derivation is given legal force in the tradition, even though it is not the primary derivation. Its implication is that what makes life so valuable is that life brings with it the capacity to do worthwhile things. This is not the sole ground for valuing life, but it is vital for its place in the Jewish hierarchy of values.

Application

The fact of mortality intrinsically and ineluctably diminishes the dignity of human beings. Human beings can choose when to die, in the sense that they can choose to die sooner; but we cannot choose not to die. However, a reasonable argument can be made that, at least under some circumstances, an autonomously chosen time and mode of death produces less indignity than otherwise. Under such circumstances, there is significant political support for making it legal to assist people who have chosen such a time and mode in implementing their choice.

Nonetheless, the default setting of American society is that suicide is tragic, and the product either of mental illness, unbearable suffering, or moral failure. We generally presume that someone seeking to jump off a bridge should be persuaded not to; someone found with slashed wrists should be hospitalized; and so forth, without extensive prior inquiry into whether choosing death will enhance their dignity. The rising suicide rate is regarded as an "epidemic" and as a healthcare crisis.

The obvious way to square these two attitudes – the default against suicide and the support for assisted suicide – is to say that we evaluate some lives as less worth preserving than others. We see suicide as an unreasonable choice for the young and healthy, with emotionally satisfying relationships, and so forth. But we see suicide as a reasonable choice for, say, the terminally ill, or for those facing dementia or complete paralysis.

Put differently: We decide that the blood of some people is less red than that of other people.

The counterargument from Jewish tradition is not that life is of supreme value, but rather that all lives are of equal value. Supporting some suicides while preventing others violates this principle of ontological equality. Such violations may be intrinsically wrong, on grounds that have universal appeal. Opposing such distinctions may also be good public policy on slippery slope grounds.

Proponents argue that legalizing assisted suicide is proper because it maximizes autonomy and dignity. The counterargument from Jewish tradition is not that life is more valuable than autonomy and dignity, but that life derives its value, or 'the redness of its blood', from the capacity to choose, and that we ought not judge some opportunities to choose to be more valuable than others. Choosing death is a claim that all one's other choices are meaningless, in other words that one's blood is no longer red at all. Assisting a suicide validates that claim.

Caveat and Conclusion

I have argued that Jewish tradition provides two secularly useful arguments against legalizing assisted suicide. First, Jewish tradition asserts the ontological equality of all human lives, whereas legalizing assisting some but not all suicides requires the claim that some lives are more valuable than others. Second, Jewish tradition argues that life is valuable because it enables autonomous choice, whereas assisted suicide declares future choices to be worthless. I need to make clear that these are arguments against legitimization and legalization, but they do not necessarily imply that suicide is always

unjustifiable. In fact, while Jewish legal texts universally deprecate suicide in general, many Jewish narrative texts valorize specific suicides. This gap requires explanation.

My suggestion is that Jewish tradition distinguishes between legal ethics and case ethics. Laws create general policies, and general policies will always yield wrong outcomes in some outlier cases. More strongly – there is a class of actions that can be ethical only when they are taken in full awareness that they are legally proscribed, and ideally punishable, unless the courts choose to exercise discretion not to prosecute. Jewish markers for that class include principles like “sinning for the sake of Heaven”, which valorizes illegal actions engaged in to successfully achieve a greater good, and “zealots attack him”, which tolerates a kind of vigilante justice in flagrante for some kinds of offenses. I have argued elsewhere that this is the proper category for the case of torture in “ticking bomb” cases.

Assisted suicide, and perhaps suicide more generally, may fall into this category as well. The proper policy is to create an enormously powerful default in favor of the value of life. Legalizing assisted suicide has the effect of enlisting the state as a moral supporter of the decision for death, and of the proposition that the lives of some citizens are less valuable than those of others. It therefore may have the ironic impact of making assisted suicide absolutely unjustifiable morally.

Why Didn't the Rabbis Eliminate Mamzerut? Part 1

September 13, 2019

Devarim 23:3 bans a *mamzer* and his or her descendants – even the 10th generation! – from marrying ordinary Jews. Mishnah Yebamot 4:13 records that Rabbi Akiva held that all Biblically forbidden relationships generate *mamzerut*; Shimon HaAmsuni held that *mamzerut* results only from relationships (other than *niddah*) punishable by *karet* (excision) or worse; and Rabbi Yehoshua held only from those relationships punishable by execution. The law follows the middle position of Shimon HaAmsuni, with the result that *mamzerut* results only from cases of adultery and incest.

All these Rabbis were fully aware that the law of *mamzerut* unfairly punishes children for their parents' sins. Yet we find no record of a position declaring that “there never was and never will be a *mamzer*.” Why not?

A moral critique of *mamzerut* is memorably articulated in Vayikra Rabbah (Emor 6) by Daniel the Tailor, who frames it as an interpretation of Kohelet 4:1

ושבתי אני ואראה את כל העשקים אשר נעשים תחת השמש
והנה דמעת העשקים ואין להם מנחם
ומיד עשקיהם כח ואין להם מנחם
*I turned, and saw all the oppressions that take place under the sun.
Behold – the tears of the oppressed! and they have no comforter.
Power flows from the hands of their oppressors, and they have no comforter.*

– . . . **ושבתי אני ואראה את כל העשוקים**

דניאל חייטא פתר קרייה בממזרים:

הנה דמעת העשוקים –

אבותם של אלו עוברי עבירות, ואילין עלוביא, מה איכפת להון!?

כך אביו של זה בא על הערוה:

זה מה חטא ומה איכפת לו!?

ואין להם מנחם, אלא מיד עושקיהם כח –

מיד סנהדרי גדולה של ישראל שבאה עליהם מכחה של תורה

ומרחקתן על שום לא יבא ממזר בקהל ה'

ואין להם מנחם

אמר הקדוש ברוך הוא:

“עלי לנחמן,

לפי שבעוה”ז יש בהן פסולת,

אבל לע”ל אמר זכריה

“אנא חמיתיה אלו כורסוון כולו דהב נקי”

I turned and saw all the oppressions . . .”

Daniel the Tailor interpreted this verse as referring to mamzerim –

Behold – the tears of the oppressed

Their fathers are transgressors, and they suffer: why is it their responsibility? !

So this one's father commits adultery:

what sin has the son committed, and why is it his responsibility?!

and they have no comforter, rather power flows from the hands of their oppressors–

*from the hands of the Great Sanhedrin that comes against them with the force of Torah
and marginalizes them on the basis of the verse “a mamzeir may not enter the Congregation of Hashem”*

and they have no comforter

Said the Holy One Blessed Be He:

“It is My responsibility to comfort them,”

for in this world they have in them impurities,

but in the Coming Future the prophet Zechariah said

“I have seen those thrones all of pure gold.”

The Bar Ilan Responsa Project records only one other statement by Daniel the Tailor. In Bereishis Rabbah 64:7, he reads Bereishis 26:14 as teaching that “If a person does not make himself like a slave to his slave, he has not acquired him.” One suspects that this principle was not enforced in rabbinic property courts. It seems safe to categorize Daniel the Tailor as a social critic of halakhah.

Rabbinic literature quotes Daniel’s critiques (albeit not in the Talmuds), without any explicit reservation or controversy. Nevertheless, Professor David Halivni argues that his critique of *mamzerut* boomeranged. Daniel argued powerfully and memorably that *mamzerut* was an inherently immoral institution. He thus directly challenged the morality of the Torah. Any subsequent elimination of *mamzerut* in practice would therefore feel like a confession that the Torah was morally imperfect. That was religiously untenable. So *mamzerut* continued.

I contend that Professor Halivni overstates the case. It is true that the Talmud records Tannaitic positions that the Rebellious Son, Idolatrous City, and House With Tzora’at never were and never would be. But each of these positions is immediately countered by a statement of certainty (framed as eyewitness testimony) that it had been, and the law does not follow the positions that make these cases impossible. Moreover, the House With Tzora’at is not a moral issue, so it’s not at all clear that those positions were generated by moral discomfort. So *mamzerut* would have continued anyway.

Moreover, Daniel the Tailor eventually has a profound influence on Halakhah. The sixteenth century Syrian Rabbi Yoshiyahu Pinto (Responsa Nivchar MiKessef 138) cites Daniel as his motivation for seeking to permit a specific mamzer, even while conceding that the mother had committed adultery and emphasizing the severity of that sin. More recently, Rav Ovadiah Yosef zt”l regularly cited Daniel in his responsa permitting alleged mamzerim and mamzerot to marry ordinary Jews (and also in his responsa permitting agunot, a topic requiring separate treatment).

The linchpin for Rav Ovadiah is that G-d says “It is My responsibility to comfort them” against those “that come against them with the force of Torah.” Clearly it would be better not to come against them in the first place, and spare Him the need to comfort them.

The nineteenth century Rabbi Yosef Shaul Nathanson (Responsa Shoeil uMeishiv 1:1:5) read Daniel very differently. He argued that because G-d promised to comfort the victims of His halakhah, we need not worry about creating them. Daniel was not seeking to overturn halakhah on moral grounds, but rather to reconcile halakhic decisors to the pain caused by their decisions.

Rabbi Nathanson’s reading does not seem to fit well with Daniel’s other preserved statement. Perhaps more importantly, Rabbi Nathanson offers his reading in the context of an argument against taking a lenient position in a specific case of adultery **before** the woman became pregnant. We don’t know whether he would have maintained this attitude when addressing the reality of a potentially unmarriageable child.

I don’t think Rabbi Nathanson would have lacked integrity if he had spent months laboring to permit that child. Because **everyone** in rabbinic tradition has always understood that *mamzerut* is morally troubling, because it punishes children for their parents’ sins. Daniel the Tailor is just the best articulation of a universally acknowledged reality. The proper question is and was: Can the good of preventing adultery (or incest) justify that unfairness?

Let’s approach this question via an apparently unrelated suggestion from my teacher Rabbi Aharon Soloveitchik zt”l. Rav Aharon argued that the death penalty in civil society, or Noahide Law, is justified only because it deters other acts of violence. Executions without deterrent impact are just murder. In the United States, he contended, there is no way to carry out the death penalty often enough to accomplish

deterrence, without relaxing standards and procedures in ways that will lead to the unjustifiable execution of innocents. Therefore he opposed the death penalty in the U.S.

Rav Aharon's approach was in principle socially contingent. He did not challenge the morality of the Torah in permitting the death penalty, and he had no need to claim that the death penalty never had been and never would be carried out, or that all past judicial executions had actually been state-licensed murders. There may have been, and may yet be, societies where the proper balance of deterrence and punctiliousness can be maintained. But, he held, the United States in the late twentieth century was not such a society.

One can disagree with Rav Aharon in at least three ways. One can argue that

1. the death penalty has purposes other than deterrence (as Rav Aharon himself argued regarding the death penalty within Jewish society, that it grants the perpetrator atonement); or
2. that it is an effective deterrent as-is, or
3. that the relaxation of procedures necessary to allow it to be an effective deterrent would not make the execution of innocents more likely, or at least so much more likely as to outweigh the good of deterrence.

These grounds for disagreement likely reflect underlying different moral weightings of the different risks. But they enable dialogue and deliberation rather than dismissal or defenestration.

It seems likely that the closest we can come to justifying the status of mamzerut is the claim that it effectively deters adultery. (Granted this doesn't help us at all regarding mamzerut resulting from incestuous rape.) Otherwise, it is simple cruelty. It therefore becomes necessary to ask whether mamzerut is an effective deterrent in our time and place. I suspect reasonable people can differ about this question, and those differences may reflect the realities of different subcommunities.

What I think we can agree on is that mamzerut should be limited to the minimum number of cases necessary for effective deterrence. Very likely, precisely because mamzerut affects children rather than parents, effective deterrence requires only a barely plausible threat. We also must acknowledge that many American Jews are so far removed from halakhah that there is no possibility that any halakhic outcome could accomplish deterrence. Finally, the reality of effective birth control means that it is difficult for a potential effect on children to deter sexual behavior.

Since there are and probably always will be people who see marriage with factual mamzerim as a threat to the spiritual-genetic quality of the Jewish people, the risk that children will bear the consequences of parents' sins is always real, and those who can be deterred, will be. Humane poskim therefore can legitimately aim to resolve every case, so long as they can do so with integrity. This was plainly the approach of Rav Ovadiah, and is also the position of the Rav as conveyed to me by Rabbi Abraham Halbfinger of blessed memory.

The rub, of course, is what constitutes integrity. I plan to publish a follow-up essay soon reflecting on, illustrating, and hopefully illuminating that issue.

Why Didn't the Rabbis Eliminate Mamzerut? Part 2

September 20, 2019

Rabbinic law often seems radically more humane than the text of the Written Torah. This discrepancy leads some to conclude that the Rabbis of the Mishnah and Talmud consciously and deliberately overturned Biblical law when they found it morally disagreeable. This conclusion leads to a question/critique: Why don't contemporary rabbis do the same thing?

In Part 1, I briefly discussed cases where (some) Rabbis explicitly declared that a Biblical law “never was and never will be,” and why no such statement appears regarding mamzerut. I wrote that nonetheless “Humane poskim can . . . aim to resolve every case of mamzerut, so long as they can do so with integrity.” In other words, it is possible and legitimate for a contemporary halakhist to aim for the laws of mamzerut to never apply in practice, even though factually many pregnancies result from adultery or incest.

How can this be done with integrity? In what way is this different than eliminating a Biblical law on the basis of our own morality?

Mamzerut actually seems to be a more extreme case of elimination than the Rebellious Son, Idolatrous City, or House with Tzora'at. It's not just that the Rabbis didn't formally eliminate mamzerut; they actually extended it to new cases. Most dramatically, the Biblical prohibition, as understood by the Rabbis (Kiddushin 73a), applies only to a mamzer *vadai*/definite, but the Rabbis extended it to cases of *safek*/doubt! Contemporary halakhists who seek to resolve every case of mamzerut therefore seem to be diverging from the Rabbis as well as from the Torah.

This extreme version of halakhic authority is disturbing for another reason. We might cheer poskim when they undo stringencies that cause pain, but by doing so, are we also granting them the authority to undo leniencies? If the Torah does not constrain rabbis from imposing their morality on halakhah, why should we have more confidence in their morality than in the Torah?

Let's approach this issue through the specific lens of **Igrot Moshe**, the collected responsa of the great 20th century posek Rav Moshe Feinstein zt"l. I want to concede upfront that the synthetic position I develop below is not explicit in Rav Moshe's works, and some of the details are also derived or extrapolated. Nonetheless, I believe that it is a fair and accurate portrayal.

Mishnah Kiddushin Chapter 4 lists three groups of people with halakhic marriage-barriers that derive from *safek* rather than certainty: “*shtuki*, *asufi*, and *kuti*.” A *shtuki* is someone whose mother is known, but she refuses to name the father; an *asufi* is a foundling. (The *kuti* is unrelated to mamzerut issues.)

Rava (Kiddushin 73a) states that a *shtuki* and *asufi* are each Biblically permitted, but Rabbinically forbidden. Why would the Rabbis have created such a cruel prohibition? Since the Torah permits a *safek mamzer*, Rava reasons, the Rabbis cannot have been concerned for the minority possibility that these children are *mamzerim*. Rather, they must have been concerned that these children with unknown parents would **contract** an incestuous marriage, and thus give birth to *mamzerim*.

However, the Talmud (or Rava himself) rejects this explanation as far-fetched. It concludes instead that the reason must be מעלה עשו ביחסים, literally “they created a higher standard in genealogical matters.”

This conclusion seems to abandon, without justification, the opening assumption that the Rabbis would not contradict the Torah's decision not to be concerned for the minority possibility of *mamzerut*. How can this be?

Rav Moshe notes that the Talmud explicitly includes only the *shtuki* and the *asufi* in the new Rabbinic prohibition. Perhaps all other *safek mamzers* remain permitted! This possibility appeals to him, but it runs aground on Mishneh Torah, Laws of Sexual Prohibitions 15:21.

דין תורה שספק ממזר מותר לבוא בקהל
– שנאמר לא יבא ממזר בקהל ה'
ממזר ודאי אסור לבוא בקהל, ולא ספק,
אבל חכמים עשו מעלה ביוחסין,
ואסרו גם הספיקות לבוא בקהל.

*The law of the Torah is that a safek mamzer is permitted to marry into the Jewish community because Scripture says: A mamzer must not enter the community of Hashem, a **definite** mamzer is prohibited to enter the community, but not a safek. But the Sages instituted a higher standard in genealogical matters, and forbade even the safeks from entering the community.*

This undisputed ruling of Maimonides makes it clear that the shtuki and asufi are only examples, and the Rabbis forbade all safek mamzers.

But, Rav Moshe notes, Maimonides also makes clear that the prohibition is the same for all *safek mamzers*. This means that the reason for the prohibition can never be a genuine concern that the child is a “biological” *mamzer*, but rather – as Maimonides states – that some form of higher standard is imposed here. But what is the difference between a “higher standard” and a “genuine concern?”

Igrot Moshe EH 1:11 has one answer to that question. A genuine concern, analogous to all other cases of *safek*, would apply for all halakhic matters. A “higher standard” would apply only to matters that affect a holiness status conferred by genealogy. It therefore does not apply to the marriage prohibitions for biological kohanim that do not have the holiness status of *kohanim*, such as a *petzua daka*.

EH 1:24 points toward a different answer. Please bear with the unavoidable technicalities, and the necessarily clinical discussion of a tragic case of rape.

Mishnah Ketubot 1:10 reports that an unmarried young woman was raped when she went to draw water from her city’s well, and subsequently gave birth to a daughter. Talmud Ketubot 15a asks: Is the daughter eligible to marry a kohen? That depends on whether the rapist/presumed father was a man whose daughters are eligible (i.e. not a *mamzer* or *netin* or *chala*), or not. The Talmud concludes that the daughter is eligible (according to the positions that matter for our discussion) if

1. most of the men in the city were “eligible,” and
2. there was a caravan of travelers near the city, and most of the men in the caravan were “eligible.”

The need for the presence of a caravan, and for the majority of the caravan to be eligible, is that a “higher standard” was implemented for genealogical matters – we require “two majorities,” not just one. Since a majority of the potential “city fathers” were eligible, and also a majority of the “caravan fathers,” this higher standard is met.

The obvious problem is that this “higher standard” does not affect the statistical likelihood of the daughter’s eligibility. If 90% of the men in the city were eligible, and 60% of the men in the caravan, then including the caravan makes things worse statistically than if there were no caravan! Regardless, the actual likelihood is a single percentage, drawn from the overall population of potential fathers/rapists. So in what sense is this “two majorities?”

It must be that the “higher standard” for marrying a *kohen* is not statistical, but rather formal. Rav Moshe contends that this is the nature of “higher standards.” It follows that in mamzerut cases as well, on a statistical basis one needs only to demonstrate that the person is a *safek*. This removes the Biblical prohibition, and leaves one only needing to meet the “higher standard.” To meet the “higher standard,” one needs only a second formal argument that generates a *safek*, even if that formal argument does not affect the overall odds.

In EH 4:17, Rav Moshe presents a third way in which mamzerut differs from ordinary halakhot (at least according to Rambam). In other areas, where there is no specific Biblical leniency for cases of *safek*, any

probability greater than 50% generates a prohibition. However, regarding *mamzerut*, the Biblical leniency applies to any case where the probability is less than 100%.

Formal rules of halakhah turn majorities into certainties, and so formal rules can create Biblical *mamzerut*. However, in Rav Moshe's view, informal/circumstantial evidence and judgments about reality can just about never create a Biblical prohibition. In practice, evidence for *mamzerut* is generally circumstantial, (e.g. fertilization cannot be witnessed, but only inferred). Therefore, even if we make the Biblical standard "certainty beyond a reasonable doubt," rather than absolute certainty, Biblical *mamzerut* will be extremely rare. Rabbinic *mamzerut* will be much more common – but it can be overcome by a formally distinct second argument that generates some degree of doubt, **even if that argument doesn't change the overall odds.**

If we now put it all together, Rav Moshe understands the Talmud to be saying that the Torah is not concerned about children born from adultery or incest marrying in the community; even children who most likely were born from such relationships are perfectly marriageable. The rabbis imposed a higher standard – but that higher standard creates a formal requirement, not a higher statistical bar.

The formal requirement means that every public case of suspected *mamzerut* requires a formal rabbinic permission. For the process to be taken seriously, both the public and the rabbis must acknowledge that it is possible that no grounds will be found for permission. But every rabbi involved must also understand that in any specific case, not finding such a permission is their failure; there is nothing in the Torah that requires this child to suffer for their parent or parents' sins.

The result is that Rav Moshe, and any posek following his approach, can with full integrity, and full belief in the Torah as interpreted by the Talmud, seek to resolve every potential case of *mamzerut* in the direction of leniency. This despite the fact that no one in halakhah has ever suggested that cases of *mamzerut* never have been and never will be.

Seeking to resolve every case does not mean that one will always succeed. Poskim adopting this approach will properly be held accountable by poskim who adopt other approaches, including those who believe that the goal of halakhah is to prevent people who are factually children of adultery or incest from marry within the community. Leniencies developed without the greatest attention to intellectual rigor will fail in practice.

It should also be clear that Rav Moshe's position about *mamzerut* has no necessary implications for any other area of halakhah. What drives Rav Moshe is the conviction that the Torah specifically permits any potential *mamzer* about whose status there is any doubt at all, and that the Rabbis had no intention or interest in practically expanding the category (at least when doing so would have no significant deterrent effect on adultery – see Part 1). Rav Moshe's interpretations and rulings result from belief rather than critique.

In Part 3, I plan to step back from the specific issue of *mamzerut* and revisit the general question of whether interpretations that make a halakhah wholly impractical are necessarily the result of moral or ethical discomfort.

Why Didn't the Rabbis Eliminate Mamzerut? Part 3

October 4, 2019

Moral critics of contemporary Orthodoxy often make the following argument:
Chazal interpreted Torah laws out of existence when they found them immoral.
We find Law X immoral.
Contemporary rabbis (should) agree with us that Law X is immoral.
They should act like Chazal and interpret Law X out of existence.

This series of essays challenges that argument.

Let me be clear that I am a strong advocate for the role of morality in halakhic interpretation, and for seeking whenever possible to interpret halakhah so as to avoid causing other people pain. My discussion is about the extreme limits of such interpretation.

I will also note that in my experience and evaluation, attempts at such extreme interpretation tend to cause lasting harm and only the illusion of progress, for two reasons:

First, such interpretations galvanize reactionaries who seek *davka* to implement the law, and who seek to tar all creative interpretations with humane implications as founded in moral critiques of the Torah. The result is that people who might otherwise have been easily helped become political footballs; arguments that might have drawn consensus support are excluded from the discourse; and no one is actually helped to flourish in the community of their choice. This state of affairs is itself ethically lamentable, and must be fought; but it must also be acknowledged, and the battle is pointless if it destroys the very people it is meant to help.

Second, at least outside the State of Israel, the people who suffer from halakhic restrictions are generally those who most strongly believe that halakhah is the will of G-d and in the necessity of Orthodox community; otherwise, they would just leave. They will generally refuse to accept help that, within their own plausibility structures, is inconsistent with those beliefs.

However, truth is a value in and of itself. So if the argument that opens this essay is correct, I would acknowledge it even if I thought using it in practice was unwise. But I do not think it is correct.

My primary countercase is the law banning *mamzerim* from marrying within the community. Part 1 of this series showed that Rabbinic literature acknowledges that this law violates the fundamental moral sensibility that children should not suffer for their parents' sins, and yet records no effort to interpret it out of existence. Part 2 noted that normative halakhah nonetheless encourages poskim to **try** to interpret every individual case out of the category of *mamzerut*, and showed how Rav Moshe Feinstein's position allowed one to accomplish this with integrity.

Let's now begin looking at the evidence for the assertion that Chazal interpreted Torah laws out of existence for moral reasons. Sanhedrin 71a cites anonymous *beraitot* stating that three Torah laws "never were and never will be," and there are several statements elsewhere that seem to make similar claims about other laws. Part 3 begins from the second case discussed on Sanhedrin 71a, the Law of the Idolatrous City.

כמאן אזלא הא דתניא:
עיר הנדחת לא היתה ולא עתידה להיות,
ולמה נכתבה? דרוש וקבל שכר.
כמאן? רבי אליעזר,
דתניא:
רבי אליעזר אומר:
כל עיר שיש בה אפילו מזוזה אחת – אינה נעשית עיר הנדחת.
מאי טעמא?

אמר קרא: ואת כל שללה תקבץ אל תוך רחבה ושרפת באש,
וכיון דאי איכא מזוזה לא אפשר, דכתיב לא תעשון כן לה' א-להיכם.
אמר רבי יונתן:

אני ראיתיה, וישבתי על תילה.

Which position does this beraita follow:

*“The seduced-into-idolatry city never was and never will be,
so why is it in Scripture? Expound and receive reward.”?*

*Which position? That of Rabbi Eliezer,
as we learned in a beraita:*

Rabbi Eliezer says:

*Any city that has within it even one mezuzah – cannot be made a seduced-into-idolatry city.
Why?*

*Scripture says: “All its loot you must gather into its public square, and burn it in fire,”
and since if there were a mezuzah this (burning) would not be possible,
as Scripture says: “Do not do thus (destruction) to Hashem your G-d.”*

Said Rabbi Yonatan:

I saw it, and I sat on its tell.

For this passage to instantiate the thesis that *Chazal interpreted Torah laws out of existence when they found them immoral*, we need to establish at least three things:

1. That Rabbi Eliezer interpreted the Law of the Idolatrous City out of existence
2. That he did so in the service of a moral agenda
3. That his position is a viable precedent

Careful reading of the passage shows that Rabbi Eliezer himself never states that the law is purely theoretical. Rather, that position is found in a *beraita* (also cited in the Tosefta). The Talmud argues only that this position is compatible with, or grounded on, the position of Rabbi Eliezer. We cannot tell from this whether Rabbi Eliezer's position is **intended** to make the law purely theoretical.

Here it is important to consider in what way Rabbi Eliezer's position can be understood as making the law purely theoretical. The argument (careful of the double negatives) is that no Jewish city would ever not have a single sacred object with G-d's Name. This is not a logical impossibility. Rather, like Rabbi Shimon's claim that no parent would bring their child to be punished as Rebellious, it is a claim of **practical impossibility**. Not “this could never happen,” but rather “this would never happen.” Why? because Jews would never behave in such a way as to trigger this law. If they ever did, the law would be just. (Note that Rabbi Shimon himself does not seem to have qualms about the Idolatrous City. Mishnah Sanhedrin 111b cites him interpreting a verse as G-d's assurance that carrying out that Law will be regarded by Him as the equivalent of bringing an *olah* sacrifice.)

Perhaps a useful contrast is this dispute recorded in Sifrei Devarim 94.

את יושבי העיר ההיא –

מיכן אמרו:

אין מקיימים את הטפלים;

אבה חנן אומר: לא יומתו אבות על בנים –

בעיר הנדחת הכתוב מדבר.

The inhabitants of that city –

Based on this they said:

One does not keep alive the children (of an Idolatrous City);

Abba Chanan says:

“Fathers must not die for children (and children must not die for fathers) –

Scripture is discussing the Idolatrous City.”

Here Abba Chanan explicitly rejects a legal position regarding the Idolatrous City on the basis of a moral principle! The Biblical verse he cites has no specific textual connection to the Idolatrous City; it simply

drives him to reinterpret *inhabitants* as excluding children. Abba Chanan had no qualms about openly basing his legal interpretation on moral principles. The burden of proof is therefore on the claim that Rabbi Eliezer could do so only covertly.

In any case, Rabbi Eliezer's position is not consensus. By asking "Which position," the Talmud tells us that the answer will be one side of a dispute. On Sanhedrin 113a, the Talmud identifies the other side of the disputant as the anonymous Mishnah on 111b.

(שללה – ולא שלל שמים.
מכאן אמרו:
ההקדשות שבה – יפדו;
ותרומות – ירקבו;
מעשר שני) וכתבי הקדש – יגזזו.
(Its loot – and not the loot of Heaven.
From here they said:
The 'sanctified' objects in it – must be redeemed;
the priestly portions – must rot;
the second tithe) and the Holy Writings – must be secreted.

מתניתין דלא כרבי אליעזר.
דתניא:
רבי אליעזר אומר:
כל עיר שיש בה אפילו מזוזה אחת – אינה נעשית עיר הנדחת,
שנאמר
ושרפת באש את העיר ואת כל שללה כליל,
והיכא דאיכא מזוזה – לא אפשר,
דכתיב
לא תעשון כן לה' א-להיכם.
This Mishnah is against Rabbi Eliezer,
as we learned in a beraita:
Rabbi Eliezer says:
Any city that has within it even one mezuzah – cannot be made a seduced-into-idolatry city.
as Scripture says:
All its loot you must gather into its public square, and burn it in fire entirely,
and where there is a mezuzah, this (burning) is not possible,
since Scripture says:
Do not do thus (destruction) to Hashem your G-d.

Maimonides Laws of Idolatry 4:16 rules like the anonymous Mishnah, against Rabbi Eliezer.

We must also note the odd statement of Rabbi Yonatan that "I saw it and sat on its tell." Firstly, Rabbi Yonatan is an Amora, and Amoraim generally do not take such direct issue with a Tanna! (Perhaps Rabbi Yonatan was only taking sides with the Anonymous Mishnah.) Second, Rabbi Yonatan made the identical comment about the Rebellious Son: "I saw him, and I sat on his grave." Perhaps Rabbi Yonatan, who as an Amora lived long after halakhic courts had the power to inflict capital punishment, led an archaeological tour of great halakhic execution sites? But many acharonim point out that Rabbi Yonatan was a kohen, and therefore could not have sat on the grave and tell. But then why did he say that he did?

The answer, I suggest, is that Rabbi Yonatan's statement should not be understood as literal. Rather, when kohanim swore, they liked to do so with a reference to their status, and one strong form was "I am as sure this happened as if I had become *tamei* to a corpse." Another example of this, if I am correct, is the statement of the kohen Rabbi Elazar bar Tzadok cited on Berakhot 19b that "We used to leap over coffins to greet Jewish kings." In what universe would the only path to greet a king require one to leap

over coffins, regularly? Rather, Rabbi Elazar was as certain of the halakhah as if he had done it himself. So too, Rabbi Yonatan.

Rabbi Yonatan is not providing eyewitness testimony. We might have rejected that by saying that he had misidentified the gravesite, or that the executions in question had been rooted in legal error. Rather, he is staking out an ideological position **against** the claim that a Biblical law can be interpreted as purely theoretical.

Bottom line, the case of the Idolatrous City provides no evidence that Chazal deliberately reinterpreted a Biblical law out of existence, and no precedent for doing so ourselves. There is no evidence that the position “never was and never will be” generated a halakhic interpretation, rather than building off an independently arrived at plausible interpretation. The “never was and never will be” position is based on a practical rather than a moral claim. The halakhic interpretation associated with the “never was and never will be” position is one side of a Tannaitic dispute, and Rambam rules like the other side. Finally, the Amora Rabbi Yonatan appears to reject such a position in principle, not only in this specific case.

In Part 4, we’ll discuss the Rebellious Son, the second of the celebrated trio on Sanhedrin 111a. Part 5 will discuss the Leprous House, the third member. We’ll also discuss the position of Rabbi Akiva and Rabbi Tarfon about the death penalty in general. Finally, we’ll turn to a much less known Mishnah in Negaim that may prove a more useful precedent than any of those usually cited.

Why Didn't the Rabbis Eliminate Mamzerut? Part 4

October 8, 2019

Contemporary efforts to reinterpret ethically troubling Torah laws out of practical application generally raise theological hackles. Why? Didn't Chazal's interpretations do the same thing? Haven't many areas of Torah law been purely theoretical for a millennium or more?

In Part 1 of this series, I called attention to an apparent irony. Chazal explicitly acknowledge that mamzerut is ethically unjustifiable, and yet unlike for other laws, there is no record that any member of Chazal ever suggested that "mamzerut never was and never will be." I argued that aiming to resolve every actual case of possible mamzerut is nonetheless a proper goal for poskim.

In Part 2, I showed how Rav Moshe Feinstein set this goal for himself with complete integrity, and without arguing that this meant that mamzerut should be understood as a purely theoretical law. But I also showed that Rav Moshe regarded mamzerut as a special case, because Chazal interpreted the Torah as requiring poskim to rule leniently even in cases of probable mamzerut. Chazal nonetheless created an additional rabbinic restriction. However, consistent with their Torah interpretation, they allowed that restriction to be treated as a formal rather than as a substantive barrier.

Mamzerut is unquestionably special. On Kiddushin 71a, Rav Yitzchak rules that "a family of mamzers that has been subsumed (=allowed to marry within the community) – is subsumed." On Kiddushin 72b, Rabbi Yose holds that in the Future to Come all mamzers will be allowed to marry within the community. Rabbi Meir disagrees; but Rav Yehudah in the name of Shmuel declares that the halakhah follows Rabbi Yose. Rav Yitzchak is likely based on Rabbi Yose. If in the End all mamzers will be legitimated, it makes little sense to spend time and effort in our days "outing" them. It seems reasonable to argue that both Rabbi Yose and Rabbi Yitzchak were motivated by Tanakh's moral opposition to "visiting the sins of parents on their children." Probably, like Rav Moshe after them, they built off the universally accepted assertion on Kiddushin 73a that the Torah prohibits only a "definite" mamzer.

Because of its 'specialness,' mamzerut is not a sufficient precedent for contemporary attempts to adopt interpretations of halakhot that practically eliminate them. But 'special' is not necessarily 'unique.' Are there other halakhot that, like mamzerut, were understood by Chazal as ideally having minimal or no practical application? If yes, did Chazal regularly arrive at such understandings based on moral discomfort? If yes, is moral discomfort a legitimate basis for contemporary halakhists to interpret halakhot out of practical existence?

It turns out that there are quite a few halakhot that at least some members of Chazal understood as having minimal or no practical application. But it is much less clear whether those understandings were based on moral discomfort, or what precedent they provide for contemporaries.

Let's start our analysis by recognizing that there are several different ways to argue that a law is purely theoretical, or to interpret a law so that it becomes purely theoretical. One can argue that it is, or interpret it so that it is:

1. Physically impossible
2. Practically impossible
3. Morally impossible
4. Easily evadable
5. Logically impossible
6. Obsolete

These categories will be helpful as we survey the field.

Sanhedrin 71a cites anonymous *beraitot* stating that three Torah laws “never were and never will be.” Part 3 discussed the second case discussed on Sanhedrin 71a, the Law of the Idolatrous City. Let’s now move to the most famous of the three cases, the Rebellious Son/ *ben sorer umoreh*.

The Talmud asks:

*Which position does this beraita follow:
“The rebellious son never was and never will be,
so why is it in Scripture? Expound and receive reward.”?*

The question “which position etc.” assumes the existence of a dispute. The Talmud offers two alternative answers. The first is that the beraita follows Rabbi Yehudah. This is a reference to Mishnah Sanhedrin 71a, as interpreted by the Talmud. That interpretation is supported by another beraita.

/Mishnah/
*If his father wanted (to declare him a rebellious son) but not his mother, or vice versa –
he is not made (=legally treated as) a rebellious son,
until both of them want.*

*Rabbi Yehudah said:
If his mother was not fit for this father –
he is not made a rebellious son.*

/Talmud/
*What is the meaning of “not fit?”
If you say it means ‘not legally fit,’
in the end, his father is his father and his mother is his mother (so the conditions of the verse are met)!?
Rather, it means that his mother is (not) equivalent to his father.*

*A beraita said the same thing:
“Rabbi Yehudah said:
If his mother was not equivalent to his father in voice, appearance, and height –
he is not made a rebellious son.*

*Why?
Scripture says: He does not heed our (plural) voice (singular)” –
(and) once we require voice to be equivalent, we also require appearance and height to be equivalent.*

Once we understand Rabbi Yehudah’s “fitness” to mean that the parents must have indistinguishable voices, appearances, and statures, it makes sense to say that the law of the rebellious son is *physically impossible*.

Rabbi Yehudah’s position regarding voice is derived from a close reading: the parents jointly declare that the son does not heed their “voice,” singular. By contrast, the move from voice to requiring equivalent appearance and height appears almost sleight of hand, as nothing in the verse relates to appearance or height. Moreover, ‘speaking with a single voice’ might refer to compatibility of parenting method and aims rather than to anything physiological. That might even be what Rabbi Yehudah meant by “fit” in the Mishnah. For these reasons, it is a tenable hypothesis that Rabbi Yehudah’s ruling, as understood by the beraita and the Talmud, was driven by moral discomfort and had the intent of making the law purely theoretical.

But – the Talmud acknowledges that Rabbi Yehuda’s position, however understood, is controversial. The beraita stating that the rebellious son “has not been and never will be” follows Rabbi Yehudah against the anonymous opening position of the Mishnah. In such situations, the halakhah presumptively follows the anonymous Mishnah. In his Commentary on the Mishnah, Maimonides states that “the law does not follow Rabbi Yehudah,” and his Mishneh Torah (Laws of Rebels 7:10) agrees. For all we know, Rabbi Yehudah’s position was rejected precisely because it made the halakhah practically impossible, or

alternatively because it was obviously driven by a moral agenda rather than by textual fidelity. So his position may be a rejected precedent.

We might also decide that Rabbi Yehudah never meant the radical position the Talmud ascribes to him. Perhaps even in the *beraita* the Talmud cites to support its interpretation of him, he requires only physical compatibility, not identity. So no one ever actually interpreted the Torah so as to make the law of the rebellious son *physically impossible* because they found it *morally impossible*; that was just a thought experiment, which was rejected.

Alternatively, we might decide that Rabbi Yehudah adopted his radical interpretation only because he **already knew** that the law was *practically impossible*.

Why would we say this? The Talmud next identifies the position that the law is purely theoretical with a *beraita* in which Rabbi Shimon, unlike Rabbi Yehudah, states that conclusion explicitly. The identification with Rabbi Yehudah is mentioned first because the Talmud is organized around the Mishnah, so it first mentions the position that is in the local Mishnah. But substantively, we would only understand Rabbi Yehudah that way if we knew that he agreed with Rabbi Shimon.

Here are Rabbi Shimon's words:

*Said Rabbi Shimon:
Because this one ate a tartimar of meat and drank a half-log of wine,
his father and mother take him out to be stoned?!
Rather: This never was and never will be,
(so) why is it in Scripture? Expound and receive a reward.*

Rabbi Shimon argues that the law is *practically impossible*. The text explicitly requires the parents to actively bring their child to be punished, but they would never do such a thing.

Is Rabbi Shimon describing the law as it was presented to him, or describing the law based on his own interpretation? The Torah says that the parents must tell the elders that their child is *zolel v'sovei*, gluttonous and a drunk. Rabbi Shimon agrees with the anonymous position in Mishnah Sanhedrin 8:2 as to how much meat and wine that requires; Rabbi Yose there doubles the amounts. Is there an amount large enough that Rabbi Shimon would see as sufficient to motivate parents to take their child out to be stoned?

Parents sometimes deal with addicted children in ways they would never consider under other circumstances. Yet "tough love" does not extend to execution. Moreover, I can't believe that his evaluation would change if we adopted Rabbi Yose's required amounts, and I am not aware of any position that ever required more. So it seems to me most likely that Rabbi Shimon is describing the halakhah as it was presented to him. He can be used to argue that interpretations which yield the result of *practical impossibility* are reasonable and within the tradition, but not as a precedent for **developing** interpretations **with the intent** of making a law practically impossible.

Even though Rabbi Shimon is merely describing the law, the form of the Talmud's opening question tells us that his position is disputed. It is therefore not surprising that the Talmud follows his statement by citing Rabbi Yonatan as saying: "I saw him (a rebellious son), and I sat on his grave (after he was executed)."

We already discussed Rabbi Yonatan's apparent eyewitness report in Part 3. But let's note here that Rabbi Yonatan is an *amora* (Talmudic era), and the ordinary rules of the Talmudic game are that *amoraim* do not argue directly with *tannaim* (Mishnaic era) such as Rabbi Shimon. So we should be alert for a *tannaitic* position disagreeing with Rabbi Shimon. Such a position may be cited on Sanhedrin 72a.

*Rabbi Yose the Galilean says:
Because this one ate a tartimar of meat and drank a half-log of wine,*

the Torah says that he should be taken out to be stoned?!
Rather: The Torah fully understood the psychology of the rebellious son,
that in the end he will exhaust his father's possessions, seek his custom and not find it,
go out to the crossroads and rob the people/
(So) the Torah said: Let him die innocent and let him not die guilty...

Both the form and the substance of Rabbi Yose the Galilean's statement suggest that it was originally presented as a contrast with Rabbi Shimon. He agrees with Rabbi Shimon that the son's sins are trivial; but he trusts the Torah to be making a prediction that justifies the execution.

Rabbi Yose the Galilean starts by seeing the law as *morally* impossible. He responds to this impossibility with an apologetic; the law seems unjust to us, but only because we can't know what G-d knows about this young man's future. This is a kind of universal solvent for moral difficulties with Biblical law, and it provides no basis for reinterpreting the law in the face of moral difficulty.

Maybe Rabbi Yose the Galilean believes that even parents would be persuaded by his reasoning, and would bring their child to be punished. Or maybe he agrees with Rabbi Shimon that they **would** not, but *practical impossibility* does not bother him, at least so long as it is not the result of an interpretation driven by a claim of *moral impossibility*.

The bottom line is that the Talmud's discussion of the law of the rebellious son, and the positions that the rebellious son never was and never will be, are not valid precedents for interpreting a halakhah out of existence on the basis of moral objections. We showed in Part 3 that the Idolatrous City is also not a valid precedent. But Sanhedrin 71a discusses a third case, and there are cases beyond those three. Perhaps one of the others, or the overall pattern, will provide stronger precedents. Stay tuned for Part 5!

Why Didn't the Rabbis Eliminate Mamzerut? Part 5

October 11, 2019

Sanhedrin 71a cites a beraita which declares that three Biblical laws “never were and never will be,” rather are purely hypothetical. The Talmud associates the declaration with beraitot conveying a specific legal position about each law.

In Parts 1-4 of this series, I showed that regarding the Rebellious Son and the Idolatrous City, those legal positions are not radical **reinterpretations** of the laws in response to moral concerns. Rather, the declarations of hypotheticality are **reactions** to those preexisting legal positions.

A fair counterquestion is: What motivated these extreme legal positions, if not moral discomfort with the law as it would otherwise be understood?

This seemingly powerful question rests on a false premise. It assumes that these legal positions could only have been produced by extreme interpretations, i.e. interpretations arrived at by methods that the interpreter would dismiss in other circumstances. But this is not so.

Let's turn for example to the third law, that of the Leprous House. Mishnah Negaim 12:3 records a Tannaitic dispute:

...שהיה ר' ישמעאל אומר:
עד שיראה בשני גריסין על שתי אבנים או על אבן אחת;
ר"ע אומר:
עד שיראה כשני גריסין על שתי אבנים, לא על אבן אחת;
רבי אלעזר בר"ש אומר:
עד שיראה כשני גריסין על שתי אבנים בשני כתלים בזויות, ארכו כשני גריסין ורחבו כגריס.
...as Rabbi Yishmael would say:
(The lesion does not make a house leprous) until it appears in the size of two beans on two stones,
or on one stone;
Rabbi Akiva says:
Until it appears the size of two beans on two stones,
not on one stone;
Rabbi Elazar beRabbi Shimon says:
Until it appears the size of two beans on two stones
on two walls in a corner.

It is the legal position of Rabbi Elazar beRabbi Shimon that the Talmud associates with hypotheticality. How is his position arrived at? Vayikra 14:36 first speaks of the lesion appearing on the **קיר(ו)ת/walls** of the house, and then of its appearance on the **קיר/wall**. Rabbi Elazar beRabbi Shimon therefore requires a wall that is also walls, i.e. a corner. There is nothing unusual about this mode of legal reading; if anything, it is not clear why the resulting requirement is so unlikely to be met.

Note that roughly the same mode of reading generates Rabbi Yehudah's requirement for the parents of the Rebellious Son to have identical voices; in Devarim 21:18; the mother and father say that their son “does not heed our **voice**” – singular. Moreover, an anonymous Mishnah on Yoma 62a, identified by the Talmud with the same Rabbi Yehudah, requires the two goats of Yom Kippur to be identical in appearance, height, and value. The reason no one declares that the goats never happened is that it is easier for human beings to overlook minor physical differences among goats than among people, especially when the people are of different genders.

In other words: the legal positions that the Talmud associates with hypotheticality are extreme only in their effect on the likelihood of the law being applied in practice. There is nothing extraordinary about the interpretations that generate them.

A further proof that these interpretations are not generated by moral concerns is that the third case, the Leprous House, is not morally bothersome to the extent that a reader might feel compelled to eliminate its practical application. (This argument is also made by Rabbi Ethan Tucker [here](#).)

Rabbi Dan Margulies (WBM '16) disagreed with this proof when I published it on Facebook some months ago. He argued that destroying someone's house is a uniquely demoralizing punishment, especially when it results from a secondary event rather than directly from a specifically identified sin. Destroying a house can also be a form of collective punishment. The ongoing public conversation about whether destroying the homes of terrorists is a legitimate punishment suggests that my initial dismissal of the moral issue was too facile.

Rabbi Tuvy Miller (SBM '13) in his [CMTL alumni DT "The House That Was?"](#) took a diametrically opposite approach to constructing a moral issue. Rabbi Miller begins from Rashi (based on midrashim), who notices that the Torah introduces the 'leprous house' with language that sounds more like a promise than a threat.

ונתתי נגע צרעת –

בשורה היא להם שהנגעים באים עליהם,
לפי שהטמינו אמוריים מטמוניות של זהב בקירות בתיהם
כל ארבעים שנה שהיו ישראל במדבר,
ועל ידי הנגע נותץ הבית ומוצאן

*This was an announcement to them that these 'afflictions' would come upon them,
because the Amorites concealed gold treasures in the walls of their houses
during the Jews' forty year sojourn in the wilderness,
and via the 'affliction' they would tear down the house and find them (the treasures).*

I had always assumed that this interpretation **rejects** the position that the Leprous House is purely hypothetical: promises of wealth that depend on an unrealizable condition are simply cruel. Rabbi Miller argued, however, that the "never was and never will be" position might be a moral **reaction** to this interpretation. Since the Torah in several contexts recognizes that despoiling a defeated enemy undermines the morality of war, how could the Torah promise financial benefits from the destruction of the Seven Nations?

These critiques are wonderful contributions to Torah, and I am grateful for them. Nonetheless, I don't see them as plausible drivers for extreme reinterpretations.

With regard to Rabbi Miller's suggestion, Tanakh doesn't always ban spoils – sometimes it seems to strongly encourage spoiling – and the bans seem clearly unusual, beyond-the-ordinary gestures. Even those bans might not apply to abandoned safe deposit boxes discovered years later.

With regard to Rabbi Margulies' suggestion, I am not convinced that destroying a dwelling raises moral challenges as serious as execution. Moreover, since the Torah does not explicate the cause of house-plagues, perhaps they occur only when every inhabitant of the house has sinned, and so there is no issue of the innocent suffering together with the guilty.

The true underlying issue, then, is: Must we assume that Torah laws are intended to have real-world application, and therefore reject interpretations which make them hypothetical?

Maimonides presumed that we must, That's why with regard to all three of the Leprous House, the Idolatrous City and the Rebellious Son, he ruled against the positions that the Talmud associates with hypotheticality. The Amora Rabbi Yonatan also rejected hypotheticality on ideological grounds, declaring that he was as certain of the actuality of the Idolatrous City and the Rebellious Sin as if he had sat on their tell/grave. The only reason Rabbi Yonatan doesn't make a parallel statement about the Leprous House is

that he doesn't need to; Sanhedrin 73a records a beraita in which two Tannaim report actually seeing ruins that were identified as those of Leprous Houses.

I contend, however, that the author of the "never was and never will be" beraita rejects this assumption. Like Rabbi Joseph B, Soloveitchik's Halakhic Man, he is not bothered if an ideal structure of Halakhah has no precise real-world correlate.

I suspect that many readers will immediately accuse me of anachronism. Halakhic Man is a product of NeoKantian philosophy and Brisk, and his positions cannot reasonably be assigned to a member of Chazal. Surely it is beyond reason to think that the Rav and the Chazon Ish were simply recreating a Tannaitic dispute.

This argument is powerful, but it is also demonstrably false. The Tannaitic dispute about this issue is explicit in Mishnah Zavim 2:2. The Mishnah discusses which sorts of emissions make a man a *zav*, and which are considered the product of ordinary processes. Rabbi Yehudah holds that one is not a *zav* if he even experienced any sort of visual sexual stimulus. Rabbi Akiva holds that one is not a *zav* even if he merely ate or drank anything.

אמר לו:

אין כאן זבין מעתה!?

אמר להם:

אין אחריות זבים עליכם

They said to (Rabbi Akiva):

Now there will be no zavim!?

He replied:

The responsibility for (the existence of) zavim is not yours.

It seems unavoidable to me that Rabbi Akiva held like Halakhic Man, and his interlocutors like Maimonides.

Stay tuned for Part 6!

Why Didn't the Rabbis Eliminate Mamzerut? Part 6

October 18, 2019

Vayikra 15:2 tells us that a man become *tamei* (=ritually impure) if he is *zav* (has an emission) from his flesh. *Zav* is distinguished from ordinary emissions in a variety of ways, including that the emission must not be attributable to a non-*zav* cause. Mishnah Zavim 2:2 lists eating and drinking as non-*zav* causes. Rabbi Akiva declares that “eating and drinking” includes consumption of any food or drink whatsoever.

אמרו לו:

אין כאן זבין מעתה?!

אמר להם:

אין אחריות זבים עליכם.

They said to him:

Now there can be no zavs?

He said to them:

The responsibility for (the existence of) zavs does not rest upon you.

The disagreement between Rabbi Akiva and his anonymous interlocutor here mirrors the dispute on Sanhedrin 73a regarding whether three Biblical laws “never were and never will be” (see Part 5). Neither side offers a rationale for their position.

We can speculate that with so many mitzvot gone dormant after the Second Temple's destruction, it became clear to Rabbi Akiva that studying these mitzvot must have value independent of preparation for performance; and it was only a small step from there to conclude that the value of study is **essentially** independent of preparation for performance; and finally that the eternity of Torah is enhanced rather than harmed by asserting that some mitzvot exist **solely** because there is value in studying them.

Rabbi Soloveitchik in **Halakhic Man** essentially identifies the methodology of Brisk with Rabbi Akiva's ideology. We can accordingly identify Rabbi Akiva's interlocutors with a matter-of-fact Telzer critique of Brisk; so much of the Torah's legislation bears such marked similarity to the content and methods of practically intended legal systems, that it seems absurd to understand it as having no practical aims. Briskers respond that Torah criminal law covers the same ground as other systems of criminal law, but plainly would be ineffective at deterring crime. They cite the contention of Rabbi Nissim Gironi (Derashot HaRAN #11) that Torah criminal law is intended to “bring the Divine effluence down into the world,” while a parallel system of “the king's justice” – to which halakhah gives almost unfettered discretion – deals with the practical issue of deterrence.

Derashot HaRan's contention seems incompatible with Mishnah Makkot 1:10.

סנהדרין ההורגת אחד בשבוע נקראת חובלנית

רבי אלעזר בן עזריה אומר:

אחד לשבעים שנה;

רבי טרפון ורבי עקיבא אומרים:

אילו היינו בסנהדרין – לא נהרג אדם מעולם;

רבן שמעון בן גמליאל אומר: אף הן מרבין שופכי דמים בישראל.

A Sanhedrin that kills once in seven years is called “Brutal.”

Rabbi Elazar ben Azariah says:

Once every seventy years.

Rabbi Tarfon and Rabbi Akiva says:

Had we been on the Sanhedrin – no person would ever have been killed.

Rabban Shimon ben Gamliel says:

They would have multiplied bloodshedders in Israel.

If deterrence is accomplished by a parallel legal system, why is Rabban Shimon ben Gamliel's critique relevant to the Sanhedrin?!

We might answer for RAN that he concedes that in the absence of a king (or perhaps if the king fails in his responsibility), the Sanhedrin assumes responsibility for the parallel system as well. In that case, Rabbi Akiva and Rabbi Tarfon were taking an absolute position against the death penalty. Alternatively, perhaps RAN thought that this was the issue in dispute. Rabban Shimon ben Gamliel believed (incorrectly) that halakhic criminal justice had a deterrent function, whereas Rabbi Akiva and Rabbi Tarfon believed (correctly) that it did not.

Even according to RAN, however, the criminal law has a **practical** function, namely "bringing the Divine effluence down into the world." Must the law be implemented to accomplish this purpose? Perhaps the trial is a sufficient implementation, regardless of the verdict.

Talmud Makkot 7a explains the position of Rabbi Akiva and Rabbi Tarfon as follows:

היכי הוּו עבדי?
רבי יוחנן ורבי אלעזר דאמרי תרוייהו:
ראיתם טריפה הרג? שלם הרג?
אמר רב אשי:
אם תמצא לומר שלם הוה, דלמא במקום סייף נקב הוה?
בבועל את הערוה היכי הוּו עבדי?
אביי ורבא דאמרי תרוייהו:
ראיתם כמכחול בשפופרת?
ורבנן היכי דיינו?!

כשמואל, דאמר שמואל: במנאפיים = משיראו כמנאפיים.

How would Rabbi Akiva and Rabbi Tarfon have acted to prevent executions?

R. Yochanan and R. Elazar both said:

"Did you see whether the victim was a tereifah or rather whole?"

Said Rav Ashi:

"And if he appeared whole, perhaps there was already a hole where the sword cut him?"

How did they prevent execution in cases of sexual transgressions?

Abbayei and Rava both said:

"Did you see the act of penetration?"

So how would the Rabbis have acted to enable executions in cases of sexual transgressions?

They would have followed Shmuel, for Shmuel said:

The rule regarding adulterers is that only the appearance of adultery is necessary.

It seems likely that Rabbi Akiva and Rabbi Tarfon would have insisted on the trial, even though they would always have questioned the witnesses until they found a point ambiguity sufficient to acquit.

However, various commentators connect Rabbi Akiva's position here with his position in Zavim. For our purposes, perhaps the most interesting is Rabbi Eliezer Berkovits in his Halakhah: Kocha veTafkidah (published in translation as Not in Heaven, but the translation here is mine).

תשובתו של ר' עקיבא היתה: "אין אחריות זבים עליכם",

היינו –

ר' עקיבא לא חש לכך שלפי שיטתו נעקרה פרשת זבים מהתורה.

האחריות על הפוסק היא להכריע על פי הבנתו את הענין.

ולמה לא נאמר איפוא כי גם בפרשת הרוצח חכמים

לא קיבלו אחריות על עצמם

לפסוק דין באופן שיהיו רוצחים?

ועל כן, אם לפי ראות עיניהם יש לחוש למיעוטא

של שמא במקום נקב סייף הוה –

הם אינם יכולים לדון את האדם למיתה.

*Rabbi Akiva's response was: "You do not have responsibility for the existence of zavim."
meaning:*

Rabbi Akiva was not concerned that his position uprooted the chapter dealing with zavim from the Torah.

*The responsibility of the posek is to decide the issue in accordance with his understanding.
Why, therefore, shouldn't we say that with regard to the chapter on murders as well,
the Sages did not accept upon themselves the responsibility
to rule in a way that would lead to the existence of legally identifiable murderers?
Therefore, if in their judgment one should take into consideration the unlikely possibility
that there was a wound where the sword cut him –
they cannot judge the man liable for execution.*

Rabbi Berkovits suggests that the position of Rabbi Akiva and Rabbi Tarfon regarding the death penalty is dependent on the position he articulated in the context of, namely, on his belief that an interpretation of Torah is not false just because it leads to the practical elimination of a Torah law.

What generates or motivates Rabbi Akiva and Rabbi Tarfon's position? Rabbi Berkovits appears to frame it within their technical claim – they thought execution required the elimination of even the slightest doubt of innocence.

One can make this a purely technical question, addressed in other sugyot, of whether there is a compelling Biblical source for relying on probability in capital cases. This would require sugyot elsewhere that provide such a source to be following Rabban Shimon ben Gamliel.

However, one can also make this a moral claim. Rabbi Akiva and Rabbi Tarfon thought that human knowledge could never be certain enough to permit executing a person.

On this second understanding, does the position of Rabbi Akiva and Rabbi Tarfon provide a precedent for morally reinterpreting Torah laws out of existence?

The answer may be yes, with certain conditions. We will discuss those conditions in subsequent essays. For now, though, I conclude by noting that Rabbi Berkovits correctly recognizes that Ramban to Makkot 7a utterly rejects the claim that Rabbi Akiva and Rabbi Tarfon relegated Torah capital jurisprudence to the realm of hypothetical law.

איכא למידק;
אי הכי, עקרת פרשת רוצחין ופרשת עדים זוממין . . . ?!
איכא למימר
הא דאמר ר"ע לא נהרג בה אדם מעולם – לאו דוקא,
אלא על הרוב וגוזמא בעלמא,
שהרי אתה מוצא שיהרג בנואף ונואפת כשיראו כמכחול בשפופרת, וכל שכן באיסור שבת וע"ז . . .
*We can ask against the position of Rabbi Akiva and Rabbi Tarfon:
If so, you have uprooted the chapters of murderers and of perjured witnesses . . . !?
But we can say in response that
When Rabbi Akiva said "No man would have been killed" –
he was not being literal,
but rather speaking generally and exaggerating,
as you would find adulterers killed if the witnesses saw the actual penetration
and all the more so it would be possible to execute in cases of Shabbat violation and idolatry.*

Ramban's understanding of Rabbi Akiva here can be extended to Zavim as well. Rabbi Akiva is generally understood to mean only that one is not a zav if one has eaten or drunk **in the previous 24 hours** – this means that the case of zav is possible after a fast such as Yom Kippur, for example. This

interpretation is explicitly adopted by Tiferet Yisroel. Others extend this approach even to the cases of the Rebellious Son, the Idolatrous City, and the Leprous House.

If we follow this approach, it turns out that there is no precedent anywhere in halakahah for interpretations that makes a Torah law genuinely impossible. Can one limit Torah law to extremely rare cases? Rabbi Akiva holds yes, but his position is disputed. What about creating a loophole that enables the evasion of the Torah law in all cases? In Part 7, we'll look at a 20th century iteration of this discussion.

Why Didn't the Rabbis Eliminate Mamzerut? Part 7

November 8, 2019

Several passages in Rabbinic literature reject halakhic arguments on the ground that they would prevent a Torah law from ever applying in practice. It is tempting to see these passages as rejecting any and all claims that a Torah law can be purely hypothetical, and as ruling against the Tannaitic positions (Sanhedrin 73a) that certain Torah laws “never were and never will be.”

We must resist this utterly incorrect temptation. However, understanding **why** it is wrong opens up a more sophisticated taxonomy of claims that Torah laws are not intended for practical application, and enables us to better understand the positions of post-Talmudic authorities.

Devarim 19:19 teaches that the punishment for bearing perjured witness against another is

וַעֲשִׂיתֶם לוֹ כַּאֲשֶׁר זָמַם לַעֲשׂוֹת לְאָחִיו
You must do to him as he plotted to do to his brother.

Mishnah Makkot 5b records a dispute between the Sadducees and the Sages. The Sadducees held that perjured witnesses (*edim zomemim*) in capital cases may be executed only once the defendant has been **executed**, while the Sages held that *edim zomemim* may be executed once the defendant has been **convicted**. A beraita cites Beribbi as taking the Sages' position one step further – *zomemim* may be executed **until** the defendant has been executed, but not afterward. Beribbi's father points out that this makes no moral sense, but Beribbi responds by citing the general principle that punishments for Torah law can be derived only via exegesis, not via logic.

The Sages' law of *edim zomemim* embodies a moral paradox. How can attempted murder-by-testimony deserve execution, when successful murder-by-testimony does not?!

Mishnah Makkot 1:1 addresses a peculiar non-capital *zomemim* case. What if the perjured testimony aimed at desanctifying a kohen by claiming that his mother was a divorcee? If the witness is not himself a kohen, we must resort to lashes as punishment – but what if the witness is a kohen? R. Yehoshua ben Levi (RYbL) answers that we *do to him*, and not to his descendants; since desanctifying a kohen automatically desanctifies his descendants, the *zomemkohen* can only receive lashes. But, the Talmud asks, maybe in this case, where the desanctification is a punishment rather than a consequence, it would not extend to descendants? RYbL responds that the verse does not permit punishing the witness but not his descendants, because that would not be punishing the witness *as he plotted to do to his brother*, as the witness intended to desanctify the other person's children.

An Amora named Bar Peda is not satisfied with RYbL's answer. Perhaps he believes that desanctifying the *zomem* alone would fulfill *as he plotted to do to his brother*, since the verse does not require “doing to him as he plotted to do to his brother's **descendants**.” Bar Peda therefore proposes an alternative:

ק"ו:

ומה המחלל –
אינו מתחלל,
הבא לחלל ולא חילל –
אינו דין שלא יתחלל?
A fortiori:

*If the desanctifier (the kohen who marries a woman who invalidates the kehunah of their sons)
is not himself desanctified,*

*The one who comes to desanctify (via perjured testimony) but fails –
does it not follow that he should not be desanctified?*

Bar Peda's proposal inverts the rule that punishments cannot be derived from logic. Rather than using logic to derive a punishment for a more severe case, he seeks to eliminate punishment in a less severe case.

Ravina launches a devastating attack on Bar Peda:

אם כן, בטלת תורת עדים זוממין?!
– ומה הסוקל
אינו נסקל,
– הבא לסקול ולא סקל
אינו דין שלא יסקל!?!
If this is so, you have eliminated Torah law regarding zomemim!?
[One would argue:]
Just as the successful stoner (the witness whose victim is executed)
is not stoned,
doesn't it follow that the one who merely attempts stoning
is not stoned?!

The Talmud accepts Ravina's attack as dispositive, and rejects Bar Peda's approach.

At first glance, Ravina appears to be assuming that all Torah laws must have practical application, and thus to take sides in the dispute as to whether one can say that a Torah law "never was and never will be." If Bar Peda's interpretation made the law of *zomemim* impossible, Ravina argues, then the interpretation itself must be false. We might then construct Bar Peda's position as taking the other side of that dispute. He accepts Ravina's claim that his logic eliminates *zomemim* in practice, but is willing to make the law purely hypothetical.

But this understanding is very wrong, a complete category error. Let me explain why.

Ravina's objection is that Bar Peda's reasoning makes the **idea** of the perjured witness incoherent. Since the successful perjured witness is not punished *as he plotted*, Bar Peda's reasoning yields the result that if the successful *zomem* is not punished *as he plotted*, then the unsuccessful *zomem* must also not be punished "as he plotted." However, the Sages (as understood by Beribi) held that the verse allows punishing *zomemim* when and only when their plot fails!?! The law thus makes utterly contradictory claims, and can teach us nothing, **whether or not it is ever implemented**. Unlike the laws of the Rebellious Son, the Idolatrous City, the Leprous House, and the *Zav*, it cannot be expounded, and therefore there can be no purpose in (or reward for) studying it.

Ravina's rejection of Bar Peda does not require him to believe that a house will ever exist that meets the requirements of a Leprous House, or that parents will ever actually be willing to condemn their son to execution as Rebellious. Those are **practically** unlikely. His objection is only to making the law **logically** impossible.

Bar Peda may agree that the law cannot be **logically impossible**, and contend only that Ravina's **reasoning** is wrong. Ravina assumes that if an argument would yield a punishment, but the law does not give that punishment, the law must reject the argument. Bar Peda disagrees. He holds that the rule that punishments cannot be derived via logic is a black box; it does not mean that all logical frameworks that would yield punishments are therefore wrong. Therefore, even though a logical argument cannot be used to **generate** punishment, it can be used to prevent punishment.

Bar Peda's argument takes no position one way or the other on the issue of whether Torah laws can be interpreted in ways that make them **practically** impossible, let alone highly unlikely to happen.

The same analysis applies to the challenges of the form "If so, then you have eliminated" found on Ketubot 32b and Temurah 28b.

The bottom line is that nothing in Rabbinic literature supports interpreting a Torah law so that it becomes logically impossible. The discussion is only about making it extreme unlikely in practice.

Extreme practical unlikelihood can itself be divided into at least two categories. This can be seen from Mishnah Nedarim 9:1.

רבי אליעזר אומר
פותרין לאדם בכבוד אביו ואמו
וחכמים
אוסרין
אמר רבי צדוק
עד שפותרין לו בכבוד אביו ואמו,
יפתחו לו בכבוד המקום!?

Rabbi Eliezer said:

*We open a way for a person (to permit his oath) via the honor of his father and mother,
but the Sages
forbid.*

Said Rabbi Tzadok:

*Once they open for him via the honor of his father and mother,
let then open for him via the honor of the Omnipresent!?
If so, there would be no oaths!?*

Why does “opening for him via the honor of the Omnipresent” mean that “there would be no oaths?” One answer is that since G-d (generally) disapproves of oaths, every oath could be permitted on the basis of this argument.

In other words: The argument here is not that the law becomes logically impossible, or that it becomes practically unlikely, but rather that it will have no effect, as there will be a universally available mechanism for avoiding its consequences. “If so, there would be no oaths” seems to reject even that kind of practical elimination of the law.

However, it is not clear what exactly that line means, or that it reflects a consensus or even a majority. On Nedarim 84b, Abbaye and Rava dispute the meaning of the line, and each of their positions is understood in various and sometimes opposite ways by subsequent interpreters. Furthermore, many commentators disagree (to some extent based on variant texts) as to whether the line is said by Rabbi Tzadok or rather is an anonymous attack on Rabbi Tzadok.

The bottom line is that it is certainly unacceptable to interpret a Torah law so that it becomes logically impossible; but it **may** (or may not) be acceptable to interpret Torah law so that the law has no practical effect.

Why Didn't the Rabbis Eliminate Mamzerut? Part 8

December 29, 2019

“Why didn't the Rabbi eliminate mamzerut?” This series opened with that question. We've learned a lot along the way, for example:

1. that even in among Chazal the issue of whether Torah laws can be purely hypothetical extends beyond the famous three cases of the Rebellious Son, Idolatrous City, and Leprous House,
2. that the issue might be the subject of rabbinic dispute from the Tannaitic period through our own day,
3. that we need to distinguish among different forms of “interpretive elimination”
4. that “never was and never will be” might be hyperbole, and
5. that the answer may be different in different halakhic contexts.

Part 8 wraps up our discussion of primary sources by returning to the issue of mamzerut specifically.

The last mishnah of Tractate Eduyot (8:7) records a four-way dispute as to the role of Eliyahu HaNavi when he returns in pre-eschatological times. Our interest is in the first two positions:

אמר רבי יהושע
מקובל אני מרבן יוחנן בן זכאי
ששמע מרבו ורבו מרבו
הלכה למשה מסיני
שאין אליהו בא
לטמא ולטהר לרחק ולקרב
אלא לרחק המקורבין בזרוע ולקרב המרוחקין בזרוע
משפחת בית צריפה היתה בעבר הירדן ורחקה בן ציון בזרוע
ועוד אחרת היתה שם וקרבה בן ציון בזרוע
כגון אלו אליהו בא לטמא ולטהר לרחק ולקרב
רבי יהודה אומר
לקרב אבל לא לרחק
Said Rabbi Yehoshua:
I am in direct receipt of a tradition from Rabban Yochanan ben Zakkai,
who heard it from his teacher, and his teacher from his teacher
Halakhah l'Mosheh MiSinai
that Eliyahu isn't coming
to make lineages tamei or tahor, to distance them or bring them near,
except to distance those brought near by force, and to bring near those distanced by force.
The family House of Tzerifah was in Transjordan
and Ben Tziyyon distanced it by force,
and there was another family there
and Ben Tziyyon brought it near by force –
Eliyahu is coming
to make lineages like those tamei or tahor, to distance or bring them near
Rabbi Yehudah says:
To bring near, but not to distance.

It seems that according to Rabbi Yehoshua, the **fact** of descent from a halakhic mamzer will become halakhically irrelevant in Eliyahu's time – what matters is the undoing of past injustices.

On Kiddushin 71a, Abbayay asserts that Rabbi Yehoshua and Rabbi Yehudah both assumed a position later formulated explicitly by the Amora R. Yitzchak.

דאמר ר' יצחק:
משפחה שנטמעה – נטמעה.
אמר אביי:

אף אנן נמי תנינא:
 “משפחת בית הצריפה היתה בעבר הירדן וריחקה בן ציון בזרוע,
 עוד אחרת היתה וקירבה בן ציון בזרוע.
 כגון אלו אליהו בא לטמא ולטהר, לרחק ולקרב” –
 “כגון אלו” – דידיעין,
 אבל משפחה שנטמעה – נטמעה.
*for R. Yitzchak said:
 A family that has been assimilated – has been assimilated.
 Said Abbayay:*

*We have learned this in a Mishnah:
 “The family House of Tzerifah was in Transjordan,
 and Ben Tziyyon distanced it by force;
 and there was another family there
 and Ben Tziyyon brought it near by force –
 Eliyahu is coming to make lineages like those tamei or tahor, to distance or bring them near” –
 “Like those” – meaning that we are aware of the facts of their lineage
 but a family that has been assimilated – has been assimilated.*

According to Abbayay, Rabbi Yehoshua and Rabbi Yehudah agree that Eliyahu will not expose any invalid lineages whose status is not already known. Are they talking about descendants of *mamzerim*?

Kiddushin 72b records a Tannaitic dispute that seems to run along the same axis:

ממזירי ונתיני –
 טהורים לעתיד לבא,
 דברי ר' יוסי;
 ר' מאיר אומר:
 אין טהורים.
*Mamzerim and Netinim (=Gibeonites) –
 will be tahor in the Coming Future,
 in the opinion of Rabbi Yose;
 Rabbi Meir says:
 They will not be tahor.*

The Amora Rav Yehudah cites Shmuel as stating that the Halakhah follows Rabbi Yose.

According to Rabbi Yose, *mamzerim* will be able to marry freely into the Jewish community in “the Coming Future.” How does “the Coming Future” relate to the time of Eliyahu’s return? How does Rabbi Yose’s apparently blanket permission relate to the position of Rabbi Yehoshua, according to whom some lineages will be distanced?

These three passages can be coordinated in many different ways. Our interest is specifically in the way Ramban assembles the jigsaw puzzle.

“כגון אלו אליהו בא לטמא ולטהר לקרב ולרחק” –
 משום פסולי עבדות וחללות קאמר...
 אבל פסול ממזרות ונתינות – לא,
 דאיפסקא הלכתא כרבי יוסי
 דאמר שהן טהורין לעתיד לבא
 ומשמע אפילו בידועים
 דאלו באותן שנטמעו –
 השתא נמי טהורין הם,
 שאפילו היודעים בהם –
 אין מעידין בהם,
 לפי שהם טהורין מן התורה

וכן משמע כל הסוגיא
 דרבי מאיר ורבי יוסי – לאו במשפחה שנטמעה פליגי
 – אלא “משפחה שנטמעה – נטמעה” –
 זו דברי הכל,
 וממזרי ונתיני טהורין לעתיד לבא –
 פלוגתא אחריתי היא, בידועים . . .
 וא”ת:
 וכי מצות לא יבא תבטל?!
 לא שתעקר,
 אלא נוהגת היא כל ימות המשיח,
 אלא הוראת שעה לממזרים שהיו בדורות שיכשרו...
*“Eliyahu is coming to make lineages like those tamei or tahor, to distance or bring them near” –
 was said regarding slave-lineages or invalidated kohen lineages...
 but not with regard to mamzerim or netinim,
 because the halakhah was decided in accordance with Rabbi Yose,
 who said that mamzerim and netinim will be tahor in the Coming Future.
 The implication is that he says this even about **known** mamzerim and netinim
 because those who have been assimilated –
 are tahor already now,
 because even those who (have been assimilated but) are known –
 we must not testify regarding them (that they are mamzerim and netinim),
 because the Torah declares them tahor.
 The entire Talmudic discussion also implies this,
 that Rabbi Meir and Rabbi Yose are not arguing about a family that has been assimilated;
 rather, (the position that) “A family that has been assimilated – has been assimilated” –
 is a consensus,
 and the issue of whether mamzerim and netinim will be tahor in the Coming Future
 is a dispute on a different axis, about those whose status is known...
 But if you were to challenge:
 Will the prohibition A mamzer must not enter the congregation of Hashem be nullified?!
 No – it won’t be uprooted,
 rather it will be practiced throughout the Messianic Era,
 just that there will be a one-time ruling that all mamzerim from past generations will be made ‘kosher’...*

According to Ramban, it is always forbidden to expose *mamzerim* who have already married into the community. Therefore, when Rabbi Yose rules that all *mamzerim* will be eligible to marry in the Coming Future, he must mean this to apply even to *mamzerim* who have not yet married into the community, i.e. to people whom the community has excluded as *mamzerim*. This being so, it seems that the prohibition against including *mamzerim* will have no application in the Coming Future, which Ramban agrees is an impossible outcome! Ramban responds that according to Rabbi Yose, Eliyahu’s coming will not nullify the halakhah, but only establish a one-time amnesty. Children born of adultery or incest after the amnesty will again be excluded.

Ramban thus excludes what we might call a “category transformation.” We can understand this exclusion in at least two ways.

1. Minimally, Ramban would hold that one cannot take a Torah law which applies to real-world cases and redefine it so that it now applies to a null set. In other words, one cannot say that a law which was, will never be.
2. Maximally, Ramban would hold that the word *mamzer* in the future must have the same referent legally as it has in the past, and it would be a violation of the eternity of Torah to say that the exclusion of the *mamzer* from the community of Hashem no longer applies to that referent.

To avoid having his interpretation lead to a theological nonstarter, Ramban resorts to the rather extreme tactic of saying that Tanakh predicts a future *hora'at sha'ah*, emergency decree.

Ramban therefore appears to explicitly reject the idea that halakhists can interpret a Torah law out of existence in cases where it has previously been understood as having practical application.

Why Didn't the Rabbis Eliminate Mamzerut? Part 9

December 30, 2019

Let's grant a number of assumptions:

1. Kohanim are generally forbidden to contract corpse-*tum'ah*
2. Corpse-*tum'ah* can be contracted either from a corpse, or else from a metal object that has contracted it from a corpse
3. Raavad holds that a kohen is not prohibited from contracting corpse-*tum'ah* from a metal object that has contracted it from a corpse.
4. Raavad (Commentary to Mishneh Torah, Laws of Nezirut 5:15-17) holds that a *kohen* who has already contracted corpse-*tum'ah* is not prohibited from further contact with a corpse. (For an excellent treatment of the controversy about the Raavad's position, see the article by Rabbi Yaakov Jaffe and Rabbi David Shabtai [here](#).)

On the basis of these assumptions, one can reasonably conclude that, according to Raavad, it is permitted for a *kohen* to deliberately acquire corpse-*tum'ah* from a metal object ("sword"), and having done so, to deliberately come into contact even with corpses.

Is this outcome possible?

Rabbi Nachum Weidenfeld, (Responsa Chazon Nachum 1:115) in a letter dated 5697, cites Responsa Shaarei Hazekeinim (I have not found the original) as rejecting this possibility.

דאיך אפשר לומר
דנטמא בטומאת חרב כחלל אין כהן מוזהר אח"כ לטמא עצמו במת,
דא"כ, בטלה טומאת כהנים לגמרי,
שהרי יש תחבולה לכהן תמיד . . .

How is it possible to say

that a kohen who acquired corpse-tum'ah via a sword is not prohibited afterward to touch a corpse; if so, the (prohibition against) kohanim becoming tamei has become a complete nullity, as there will be an always-available tactic that a kohen can use (to avoid the prohibition)!?

The premise of Shaar Hazekeinim's question appears to be that Torah laws must always have practical application. Rabbi Weidenfeld accepts this premise; but he aligns it with one side of a broad dispute about the nature of halakhah.

אבל הנ"ל בזה
הנה שי' הראב"ד ז"ל הוא על יסוד מתני' דשמחות (פ"ד מט"ז)
דפליגי ר"ט ור"ע בנטמא בו ביום
דר"ט מחייב ור"ע פוטר
ועתו"ס שבועות (י"ז)
וע"כ שי' הראב"ד
דגם עכשיו בזה"ז שכולנו ט"מ
והוי נטמא בו ביום
דליכא אי' טומאת כהנים לר"ע,
ולפי"ז נראה דר"ט ור"ע אזלי לשיטתי'

דלא קשה לר"ע דא"כ בטלה טומאת כהנים בכל זמן ע"י תחבולה שיטמא עצמו מתחלה בטומאת חרב כחלל דאליבא דר"ע אין קושי' דמאי בכך שהרי במתני' דזבים (פ"ב מ"ב) ר"ע אומר אכל כל מאכל ושתה כל משקין אמרו לו אין כאן זבין מעתה, אמר להם אין אחריות זבין עליכם,

ולפי"ז הכ"נ יאמר ר"ע אין אחריות טומאת כהנים עליכם
דאם באמת יעשה תחבולה לטמא עצמו תחלה בטומאת חרב
לא יהי' עליו אי' טומאת כהנים בכל זמן
ולכך שפיר אמר ר"ע דנטמא בו ביום דפטור
אבל ר"ט ס"ל כאמרו לו אין כאן זבין מעתה

לכך ס"ל ג"כ דאפי' נטמא בו ביום חייב
דאס"ד דפטור א"כ אין טומאת כהנים מעתה ע"פ תחבולה לטמא עצמו תחלה בטומאת חרב,
והיא הערה יקרה:

*What seems correct to me in this matter is
that Raavad's position is founded on a dispute in Tractate Smachot (4:16)
where R. Akiva and R. Tarfon disagree regarding a kohen who contracted corpse-tum'ah earlier that
day
that R. Tarfon forbids him to contract tum'ah again, but R. Akiva permits – (see Tosafot Shavuot 17).*

*Raavad must hold that
nowadays, when we have all contracted corpse-impurity (and have no means of removing it),
we are all considered "having become tamei earlier that day,"
so according to R. Akiva we have no further prohibition against becoming tamei,
and it turns out that R. Akiva and R. Tarfon are consistent with their positions elsewhere,
meaning that R. Akiva would not be bothered by the challenge "if so, the (prohibition against) kohanim
becoming tamei has become a complete nullity",
since according to R. Akiva that is not a challenge – what is the difficulty?!
since in Mishnah Zavim 2:2 we read:*

"Rabbi Akiva says:

If he even ate any food or drank any drink (he is not a zav);

They said to him:

If so, there will be no zavim!?

He replied: The responsibility (for the existence of zavim) is not yours."

*So here too, R. Akiva would say "you have no responsibility for the existence of kohein-tum'ah,"
and by using this stratagem of first becoming sword-tamei –*

he would never be subject to the prohibition,

therefore R. Akiva says that if he became tamei earlier that day – he is exempt,

but R. Tarfon holds like the response to R. Akiva there that "If so, there would be no zavim!?"

therefore Rabbi Tarfon holds that if he became tamei earlier that day – he is liable,

since if he were exempt, "there would be no prohibition of kohen-tum'ah" via this stratagem.

This is a valuable insight.

According to Rabbi Wiedefeld, Rabbi Tarfon rejects interpretations according to which a Torah law might always be evaded, even though the law remains logically coherent and practically possible. Rabbi Akiva, by contrast, has no difficulty accepting such interpretations. Rabbi Weidenfeld does not decide between Rabbi Akiva and Rabbi Tarfon.

Rabbi Yitzchak Avi Liebes, in his Kuntrus Rofei Kol Basar, adopts Rabbi Wiedefeld's interpretive approach. However, he decides that since halakhah generally follows Rabbi Akiva against Rabbi Tarfon, this understanding of Raavad's position **can** be used as a ground for permitting a kohen to accept an organ donated from a cadaver.

In Igrot Mosheh 1YD:230:6, Rabbi Mosheh Feinstein disagrees strongly with Rabbi Liebes. on two grounds.

First, he argues that the existence of such a stratagem is indirectly but clearly inconsistent with a set of Talmudic statements.

הוא תירוץ דחוק
דיצטרך לדחוק
באמר לו אביו היטמא שלא ישמע לו,
שהוא באינו מוצא כלי שנגע במת ליטמא ביה תחלה,
וכן באבדה שהיא בבית הקברות,
שאיירי ג"כ באופן שעד ששיגי כלי שנגע במת ליטמא בו תחלה לא תהיה האבדה שם,
וכן מה שנזכר בדברי אגדה לשון "מה לכהן בביה"ק" לא שייך זה,

דגם כהנים הרי אפשר להם להיות מצויין בביה"ק
ע"י שיטמאו תחלה בכלים שנגעו במת.

This (Rabbi Wiedenfled's interpretation, as presented by Rabbi Liebes) is a forced solution as anyone holding it will be forced to say that when the Talmud says that when a kohen's father tells him to become tamei, that he should not obey, that this refers to a case in which he could not find a metal implement that had touched a corpse from which to acquire corpse-tum'ah, and similarly, when the Talmud says that a kohen must not recover a lost object that is in a cemetery, it refers to a case in which the lost object would no longer be there by the time he found a metal object from which to acquire corpse-tum'ah, and similarly the aggadic question "What is a kohen doing in the cemetery?" has no place, since kohanim can frequent cemeteries if they previously acquire corpse-tum'ah from metal objects that contacted corpses.

Secondly, and more directly relevant to our topic, Rabbi Feinstein argues that Rabbi Akiva's position regarding zavim has no relevance to the case at hand.

ועצם הדמיון לזבים אינו אליבא דסברא,
דדין זבים לא איכפת לן שיארע זה כלל,
ורק שאמרה תורה שאם יארע דבר זה שיהיה זב – יהיה טמא,
ולכן אף שהוא רחוק שיארע, ואפשר שלא יארע לעולם –
שייך למינקט הדין,
וכמו בבן סורר ומורה, וכמו בעיר הנדחת,
ששייך למינקט הדין אף למ"ד שלא יארע לעולם,
כדאיתא בסנהדרין דף ע"א,
אבל איסור טומאה לכהנים,
שהוא קפידת התורה שהכהנים יהיו טהורים מטו"מ מצד קדושתן –
מסתבר שהאיסור הוא באופן שלא יוכלו להיטמא ע"י עצה קלה,
ויש ודאי אחריות לאיסור טומאת כהנים
שיהיה בעולם
ולכן הוא תירוץ דחוק.

ומצד חומר הקושיא אפשר יש לומר . . .

The fundamental comparison to zav is not reasonable, because the law of zavim – we are not bothered if it never happens, just the Torah said that if this happens, that he is a zav – he will be tamei, therefore – even though a position makes it unlikely to happen, and possibly to never happen – we can adopt it as the law, just as regarding the Rebellious Son, and the Idolatrous City, where it is possible to decide the law even according to the position that holds it will never happen, as we find on Sanhedrin 71, but the prohibition against kohanim becoming tamei, which reflects the Torah's insistence that kohanim be tahor from corpse-tum'ah because of their sanctity– it is reasonable that the prohibition is made in a way would not permit becoming tamei via a simple tactic, and certainly there is responsibility for the prohibition against kohanim become tamei, that it should exist in the world. Therefore this is a forced answer. But because of the strength of the attack, perhaps we can say . . .

Rabbi Feinstein argues that one must determine the purpose of a Torah law in order to decide whether even Rabbi Akiva would tolerate interpretations that would make it a practical nullity. This position plainly has very broad implications. I will seek to at least begin to explore them in Part 10.