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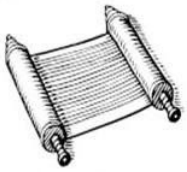

חרות ואחריות

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"Taking Responsibility for Torah"

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SBM 2020

Covid Vaccination and Triage: Halakhic Considerations and Their Limits

1. **Is there an obligation according to Halacha to receive the COVID vaccine?**

COVID vaccination differs from standard pikuach nefesh questions in three ways:

A. For many individuals, the risk to themselves in remaining unvaccinated is fairly small; the risk to any specific other individual is fairly small; but the statistical risk to human beings overall is much larger. For example, assume that X has a 20% chance of contracting COVID, and a 1% chance of dying if infected; their overall risk is 0.2%, which X can weigh against potential side effects from the vaccine. However, X may survive but be contagious to others, even a superspreader, and infect many others, some of whom will be at much greater risk of dying. So the risk that someone else will die as a result of X's decision to remain unvaccinated also needs to be factored in, and it may even be statistically greater than the risk to X, especially as it involves a risk that more than one person will die.

B. The effectiveness of vaccination is not associated with each individual decision, but rather affected by the overall degree of vaccination, until we achieve "herd immunity." So the risk-benefit calculus cannot be made on the basis of individual statistical impact.

C. Many individuals, as HaGaon Rav Asher Weiss shlita noted, can essentially "vaccinate" themselves by avoiding all human contact. However, they will have to do so indefinitely until herd immunity is achieved, which means that to regain normal society, others will have to take the risks they are avoiding. Furthermore, on a communal level, we anticipate that many unvaccinated people will (wrongly) fail to seclude themselves, risking themselves and others. So the communal interest, i.e. the way to have many fewer people die or become severely ill with long-term complications, is to create the strongest possible social pressure in favor of vaccination.

While halakhah does not ban all risk-taking, and allows a significant degree of autonomy for individuals to decide which risks are worth taking for what ends, the standard is much higher for imposing risks on others. Our question is not one of *safek pikuach nefesh* alone, but rather of *safek shefikhut damim* on some level.[1]

I will not opine directly on medical issues. However, based on consultation with eminently qualified medical professionals, I am comfortable saying that if asked for a psak, I would rule that under current circumstances:

- Individuals have a halakhic obligation to take the COVID vaccine when offered, unless they plan to absolutely isolate themselves.
- Schools, shuls, etc. have the right to require acceptance of COVD vaccination as a condition of full participation.
- Individuals have a moral obligation to take the COVID vaccine when offered, even if they plan to absolutely isolate themselves.

However, none of the above applies when there are case-specific, medically sound reasons to avoid vaccination.

2. **What should the triage priorities be in its distribution based on Halacha?**

As noted by Hagaon Rav Weiss, many individuals can protect themselves from contracting or spreading COVID by absolutely secluding themselves. It therefore seems to me that first priority should be given to people who do not have the option of seclusion. This category includes e.g. physicians, first responders,

[1] (I use this language rather than citing the verse "*lo tasim damim b'veitekha*" because I am not aware of halakhic discussions as to what if any degree of risk a householder must assume to correct dangerous conditions.)

prisoners[2] and nursing home residents. Category 1b includes those who have the personal option of seclusion, but are doing work that society deems necessary, so that someone will have to take the risk of associating with others if they refuse to. This category includes e.g. workers in PPE manufacturing plants and many supermarket employees,and workers all along the food supply chain who must go into work with others if everyone else's basic needs are to be met.

Beyond these groups, we are no longer evaluating direct *pikuach nefesh*, but rather how best to restore normal life, for individuals and for society. It may be that such decisions are best made locally. In one city, for example, it may be that online education has failed badly, and so teachers should be at the head of the line; in another, online education may have worked well, but the economy will collapse unless a particular industry can reopen. People who live in houses with yards may be less likely to suffer psychological harm from continued seclusion than people who live in apartments. On the other hand, it may be that centralized decisionmaking will enable much faster distribution. These decisions are also legitimately subject to administrative concerns, such as the risk of fraud or social unrest if particular types of people or occupations are given priority. All these issues seem to me beyond general halakhic treatment.

[2] All human lives must be treated as equally **valuable** in this context. This is the simple meaning of אין דוחין נפש מפני נפש and מי יימר דדמא דידך סומקין טפי, and reflects the practical consensus of all contemporary poskim.

A Teshuvah on Pikuach Nefesh and Shabbat-Employment

Dear Rabbi Klapper,

I have been offered a job that I would really love in the medical field, doing diagnostic work that can make the difference between life and death. The job is in a clinic that is open 8:30 - 5 on weekdays, and because the staff is so small, they are not willing to let me leave early on Fridays in the winter, and they have no legal obligation to do so. May I take the job, even though it will require me to work on Shabbat, and to drive home afterward?

Dear Refaela,

I am deeply honored to receive this sheilah. Your willingness to ask about such an important matter is humbling and inspiring.

After extensive consideration, I cannot find a way to permit you to accept this offer. While it is accepted practice for doctors and even many medical students to do rotations or be on call for Shabbat (with much discussion as to how they should handle specific tasks, especially when they are discretionary) – to my understanding, those permissions only apply to institutions or situations which require 24-7 availability, so that society needs someone to do that work at that time for lives to be saved. In your circumstance, from a medical perspective the clinic has complete discretion as to its hours, and outside of those hours, it does not make your diagnostic specialty available. No more or fewer lives would necessarily be saved if it opened and closed several hours earlier on Fridays in the winter.

Moreover, since your appointments are scheduled rather than ad hoc, they require at least some advance notice, and patients whose need for your service is discovered Friday afternoon will generally be asked to come back Monday if they need your services. This suggests that even once the facility has made its overall decision as to hours, there is no medical necessity for your presence specifically on Shabbat.

I hope that the clinic will nonetheless change its mind and find a way to accommodate your religious needs, whether by covering the times that you can't make or by allowing you to make appointments earlier on other days. Regardless, תהי משכרתך שלימה מאת אלקי ישראל.

With enormous admiration and appreciation,
Aryeh Klapper

A Teshuvah Regarding Pikuach Nefesh In A Time Of Pandemic

Dear Rabbi Klapper,

I have always taken great pride in the way that halakhic Judaism celebrates life. I celebrate my friends who are doctors and nurses as doing the work of Heaven. One of the reasons I so look up to them, and don't envy them, is that they willingly sacrifice their Shabbat experience to save lives. I could never imagine being on-call for work over Shabbat, or having to answer my phone for work.

Until this week. When it became known that healthcare workers and first responders were dying for lack of masks, I turned my high-end tailoring shop into a mask factory, and my workers have all volunteered to come in for free on Shabbat and Sunday to continue production. I'd feel terrible if all my workers were working for free while I was relaxing with my family, and besides, what is pikuach nefesh if not this? And wouldn't it be a terrible chillul Hashem if I didn't go?

But I will also feel terrible violating Shabbat. So please tell me what I should do.

Sincerely,
Ralph L. Schneider

Dear Ralph:

Thank you for your beautiful question. I am humbled by the depth of both your religious and your moral commitments. Words can't express how grateful and impressed I am by your and your workers' willingness to give your time for this purpose – certainly everything about this is a *kiddush Hashem*. It's hard for me to think of telling you what to do. But I'll tell you how I'm thinking about the question, and then we can discuss further how to make the actual decision.

There is no doubt that the Torah gives enormous value to pikuach nefesh. "And you shall live by them" teaches us that all the mitzvot except for three must be violated to save a life. Your volunteering is an enormous mitzvah. But the exceptions for avodah zarah and glui arayot teach us that life is not the only Torah value.

All three exceptions are *mitzvot lo* taaseh, DO NOTs. That's because not doing something can be more important than life even in the moment, whereas good things can generally be postponed. For example: There is no need to give up one's life for the sake of studying in the moment, but the martyrdoms of Rabbi Akiva and Rabbi Chanina ben Tradyon suggest that the same might not be true if the price of living meant never learning Torah again.

Moreover, halakhic decisions among competing goods may not rest on which is "more important."

For example: *Shomer petaim Hashem* allows people to engage in at least some forms of dangerous but remunerative employment, so long as the risks involved are considered negligible by one's society. Similarly, Rav Aharon Lichtenstein zt"l would ask when teaching Bava Kamma, which assigns compensation for all the various destructive things that bulls can do: Why didn't the Torah just ban owning bulls? Rabbi Dr. Moshe Tendler asks the same question on the societal level in his article ??: If pikuach nefesh overrides everything, why is it permitted for a state to build parks, rather than spending its entire GDP on healthcare?

The answer is not that jobs, bulls and parks are more important than pikuach nefesh. Rather, we need to recognize that "most important" values should not become "exclusive values." Preserving life is an enormous value, but other values are what makes life worth preserving. *Shomer petaim* is just one of the principles halakhah used to hedge pikuach nefesh about and ensure that it does not utterly dominate the halakhic scene.

The halakhic discussion around autopsies beautifully illustrates this complex halakhic calculus.

In the late 18th century, Rabbi Yechezkel Landau (Responsa Noda B'Yehudah 2:YD210) was forwarded a three-way rabbinic exchange about whether to permit autopsying a patient who had died of bladder-stone surgery in order to improve surgical knowledge for future such operations. Rabbi Landau pointed out that all sides of the previous discussion had ignored the elephant in the room: if knowledge gained from autopsies saved lives, shouldn't that justify any prohibition conceivably involved in conducting autopsies?

One might respond *in hakhi nami*, sure - if dissecting every Jewish corpse would save even one life, then that's what halakhah requires. But Rabbi Landau did not see this as a plausible outcome.

Rabbi Landau further noted that if performing an autopsy to gain medical knowledge constitutes pikuach nefesh, then they may be performed on Shabbat. And if so, then shouldn't anyone working in life-and-death healthcare be permitted to work on Shabbat! One might allow drug manufacturers to run their plants only if there is a chance of a shortage that couldn't be made up after Shabbat. But what about research labs working on cures of cancer, or new vaccine development? Isn't every moment lost from pikuach nefesh inexcusable?

One might respond again *in hakhi nami*, we do whatever halakhah requires. Rabbi Landau instead developed a new halakhic standard for *pikuach nefesh*. That standard was "*choleh lefaneinu*," meaning that *pikuach nefesh* applies only to a concrete, identifiable, physically present patient. One can autopsy Patient A only if Patient B with the same illness is already in one's care.

Rabbi Landau's standard has essentially disappeared as a matter of practice, although it is often paid lip-service. For example, responsa often cite Chazon Ish YD 208:7 for the proposition that *lefaneinu* is only an example, and "the matter is common" suffices. Or one might cite Rav Yechiel Weinberg's opinion (כתבי) הרב וינברג א:כב that in an age of instantaneous communication, every presently ill person in the world is considered *lefaneinu*. Responding to the present crisis, Rav Osher Weiss and Rav Herschel Schachter each ruled that patients whose near-term arrival in hospital is statistically likely are considered *lefaneinu*.

Rabbi Landau's original formulation had no precedent, so I am not overly concerned about whether these rulings hew to his standard. Rather, my question is how, with his standard obsolesced, we respond to Rabbi Landau's concern that *pikuach nefesh* would take up too much space in halakhah, with Shabbat as the specific example.

One last time, one might respond *in hakhi nami*. Doctors and EMTs already carry their cellphones everywhere on Shabbat, and many doctors go in for their regular rotations, and ambulance crews stand by for Hatzoloh, and we are glad and admiring of them, and yet Shabbat survives. But maybe the slope is slipping, and we need to draw new lines to hedge in *pikuach nefesh*. Yet at the same time, we must be extraordinarily careful not to draw those lines too tightly.

Poskim tried to draw two new lines in the discussion about ZOOM sedarim and check-in phone calls during the first "3 day Yom Tov" in isolation. The first was between medical professionals and the rest of us. Pulpit rabbis were reclassified as triage therapists, who were therefore **obligated** to check their messages on Yom Tov, while doing so remained completely forbidden to the rest of us. The second is better illustrated than explained. Amudim and then the RCA allowed check-in calls, but insisted that the call be initiated via a *shinui,* e.g. tapping the screen of a smartphone with one's nondominant hand. (Whether or not this actually constitutes a *shinui* is beyond my scope here.)

An effective *shinui* turns a *deoraita* violation into a *derabanan*. But Rabbi Landau explicitly stated that *pikuach nefesh* is a binary switch halakhically; either it permits both *deoraita*s and *derabanans,* or it permits neither. Moreover, everyone understood that cellphones are not static, so that the *shinui* would not be maintained for all actions during the call, and no one suggested that ambidextrous people could not make the calls. The call for a *shinui* was a *heker*, a marker that this kind of *pikuach nefesh* was different, even if we hadn't yet figured out exactly how.

Here's what I think was the key felt if not yet formulated difference. The phone calls were needed because we were confident that some members of a given group would be in danger of suicide, but not because we knew that any specific person was in danger. So the case did not meet the meaning of the *lefaneinu*

standard, even though we could point to a class of people we were treating as endangered. Until we formulate a new standard, demanding a *heker* makes a lot of sense.

Your question similarly fits in the breach where *lefaneinu* used to hold the halakhic line. That means we probably need to think creatively rather than just answering yes and no.

We also need to think about what precedents we'll be setting, positive or negative, and try to be as clear as possible to everyone about why you're making the decisions you are. For example: Would we be fine if all Jews spent their Shabbat afternoons sewing masks, which absent pikuach nefesh would certainly involve several capital violations of Shabbat? Do we think that bureaucrats responsible for distributing funds for purchasing or manufacturing PPEs can work on Shabbat, if that means that more equipment will be made available faster?

So here are a few of the questions I think we should be asking in your specific case, but that I think might be relevant in many cases:

1) Is working on Shabbat the only option you have for achieving this result? Could you, for example, achieve the same result by telling your workers that you'll come in Saturday night in addition to Sunday?

2) Are you giving up all your free time for this, or are you still working 9-6 during the week? Would you cancel a long-planned vacation (if such things were still possible)?

3) Is what you are doing personally essential for the work to be done, or do you just think that you're better at the work?

4) How confident are you that your masks are going places where they save lives, as opposed to letting people engage more safely in activities not strictly necessary to save lives?

I'm sure you've already thought of other questions along these lines.

Here is what I am thinking of as the halakhic calculus we should use.

1. Halakhah has two models for permitting prohibitions in time of necessity, *hutrah* and *dechuyah*. *Hutrah* means that once the necessity of accomplishing something is established, we don't look to minimize the degree or number of prohibitions you violate. *Dechuyah*, by contrast, means that we permit only the absolute minimum and degree of violations necessary.

The conventional standard for *pikuach nefesh* on Shabbat is an odd hybrid: we formally rule *dechuyah*, but tell people to act as if it the ruling was *hutrah*, because we're afraid that thinking about how to observe a *dechuyah* standard will cause delay and hesitation and eventually cost lives.

2. Halakhah doesn't distinguish between definite risk-to-life and non-trivial-chance of risk-to-life in terms of overriding prohibitions.

3. In cases like this, however, I think we should revert to an actual *dechuyah* standard, and permit only what is absolutely necessary. Moreover, I think that what we should be willing to permit should be directly proportional to the strength of the answers to your questions. For example, if you and your workers are living your ordinary hours during the week, and choosing to work on Shabbat when you could accomplish the same thing by double-shifting during the week, I would see no basis for permitting any formal Shabbat violations on your part. Maybe you could walk by and give them a thumbs-up, despite the risk that observers will think that you're benefiting economically from their work. If you're working to exhaustion, and no other schedule is feasible, but you're not sure where your masks are going, I might allow more, but certainly not *deoraita* violations. If you know that these masks are going straight to frontline healthcare workers, and that any choice you make other than working on Shabbat will lead to such workers having to do without masks, then I would let you do whatever was necessary, but with a *shinui* where possible without impeding either the masks' or your efficiency.

Thank you again.

With great appreciation,
Rabbi Aryeh Klapper

May One Write a Ketubah In STAM Script?

Dear Rabbi Klapper,

A friend recently asked me to write his ketubah, and I agreed. He knows that I have studied safrut, although I have never written any STAM, and wants and expects a ketubah in full Torah scroll font, including the *tagim* on the letters. However, a sofer STAM I consulted told me that there was a *minhag hasofrim*, scribal custom, not to include the *tagim* when writing a ketubah. This would disappoint my friend, so I am turning to you to ask whether I should, may, should not, or may not write him a ketubah including the *tagim*.

Dear R. Noach נ"י,

It is a pleasure to receive questions suffused with both learning and humility. I will do my best to be worthy of the task you entrust me with.

Your question raises at least three issues:

1) Is there a universal custom among sofrim not to write tagin in ketubahs?
2) If yes, are you bound by that custom?
3) Are there grounds other than minhag to forbid or discourage writing a ketubah with tagim?

There is a fourth issue as well. While, since you have not yet set a price, there is no issue of breaking a contract or ח"ו accepting a מי שפרע on yourself, it seems that you have created an expectation in your friend that it would be preferable to fulfill. More importantly, the expectation is related to an upcoming wedding. The mitzvah of being משמח חתן וכלה applies even well in advance of the wedding – see for example הערות הגרי״ש אלישיב פסחים מט:

ובזמנינו כתבו הפוסקים דגם סעודת שידוכין מה שעושין על גמר הקנין בין חתן לכלה נחשב סעודת מצוה.
והיינו המעלה המיוחדת של סעו"מ שמצינו במשנתינו **מצד שמחת חתן וכלה. דזה שייך גם בסעודת השידוכין** וכנ"ל
In our time, the poskim have written that even the "seudat shiddukhin" that people make for the completion of the kinyan *between the groom and bride is considered a seudat mitzvah,*
Meaning that it participates in the unique advantage of seudat mitzvah found in our mishnah because of its relationship to the mitzvah of bringing joy to a groom and bride, which is relevant also to a seudat shiddukhin

although the specific example of seudat shiddukhin is disputed. The ketubah will in any case be part of the couple's experience on the wedding day itself, and small disappointments can have outsize effects. So I would say here that כל המשנה ידו על התחתונה, meaning that you should write the ketubah with *tagim* unless doing so is definitively prohibited or wrong.

1-2. Is there a universal custom among sofrim not to write tagin in ketubahs? If yes, are you considered a sofer?

I asked three rabbonim choshuvim who have been sofrei beit din for gittin and/or STAM. None of them was aware of such a formal minhag, although two of them commented that they had not seen ketubot written with tagim, and one of them referred me to halakhic materials that generally supported chumra in this area. I also found no mention of such a minhag in הכתובה כהלכתה. A group minhag cannot exist unconsciously –לא ראינו אינו ראיה. So it seems that empirically there is no universal minhag among contemporary sofrim in this regard, and certainly not one that extends to people who do not write STAM.

3. Are there grounds other than minhag to forbid or discourage writing a ketubah with tagim?

This issue appears to start from a responsum of Rambam cited by Rabbeinu Yerucham (see also אורחות חיים ח"א הל' ת"ת אות ט):

ומן הראוי לך שתדע כי הכתיבה הזאת, הנקראת כתב אשורית, כיון שנתנה בו תורה ובו נכתבו לוחות הברית - כי הוא מגונה מאד להשתמש בו רק בכתבי הקדש,
ומימי קדם ישר' נזהרין בזאת, והיו כתביהן וחבורי חכמותיהם וכתבי חול שלהם בכתב עברי.
לכן תמצא חרות על שקלי הקדש דברים של חול בכתב עברי,
ולא נמצא מעולם אות אחת מזה הכתב אשורי' בדבר שנמצא משארית ישראל, לא במטבע ולא באבן, אלא הכל בכתב עברי
וע"כ שנו הספרדיי' כתיבתם ושמו אותותם אותות אחרות
It is proper for you to know that this script which is called ktav ashurit, since the Torah was given in it and also the luchot were written with it – that it is very shameful to use except for the Holy Writings, and from ancient days Israel has been scrupulous about this, and their writings and the compositions of their sages and their secular writings were in ktav ivri.
Therefore you find on shiklei hakodesh the secular words are in ktav ivri
and there has never been found even one letter of ktav ashurit in anything found from the remnant of Israel, whether coin or stone, rather all is ktav ivri.
This is why the Sefardim altered their script and transformed their letters into others

A different version is found in שו"ת הרמב"ם רסח which includes a report of RI Migash's position:

... ובגלל זה העניין שינו הספרדיים כתבם ונתנו לאותיות צורות אחרות, עד שנעשה כאלו כתב אחר, כדי שיהיה מותר להשתמש בו בדברי חול.
וגנה רבי' יוסף הלוי ז"ל לכתוב הגט בכתבנו זה (שאותיותיו) מחוברות מאוד. ואמר: יבוא ממנו משמע תרי לשאני בגיטא וזה (מפסידו).
וכתבו הסופרים אותו, ר"ל הגט, בכתב שאותיותיו מופרדות, ר"ל בכתב אשורי כספר תורה.
וגנה זאת גם כן ואמר: כיצד נשתמש במכתב א-להים זה ויבוא לידי זלזול, אלא יכתוב בזה האופן של הכתב הנקרא אלמד'בד"בטו.
...because of this issue, the Sefardim altered their script and gave the letters other forms, until it became as if another script, so that it would be permitted to use it for secular matters.
Rabbi Yosef Halevi z"l denigrated writing a get in our script, whose letters are very close together, and said that this would lead to ambiguity which can invalidate a get.
The scribes then wrote it, namely the get, in a script with more separated letters, meaning the ketav Ashuri used for a Torah scroll.
But he denigrated this as well, saying: How can we use this Divine script, which will come to be treated degradingly?! Rather, let it be written in the script called X.

Beit Yosef YD 283 brings an excerpt from Rabbeinu Yerucham:

מן הראוי שתדע
כי כתב אשורי, כיון שניתנה בו תורה ונכתבו בו לוחות הברית, הוא מגונה מאד להשתמש בו רק בכתבי הקודש,
וע"כ שינו הספרדיים כתיבתם ושמו אותותם אותות אחרות עד שנעשה הכתב ככתב אחר להתיר להשתמש בו בדברי חול:
It is proper for you to know
that ktav ashuri, since the Torah was given in it and the luchot were written with it – it is very shameful to use except for the Holy Writings
Therefore the Sefardim altered their script and transformed their letters into others to the point that their script gained an independent identity for the purpose of permitting its use for secular matters.

He does not cite this position in Shulchan Arukh. Rav Mosheh Isserles (RMI) cites at the end of YD 284:

וי"א דאין לכתוב דברים של חול בכתב אשורית שכותבין בו התורה (שם בשם רבינו ירוחם).
Some say that one must not write secular matters in ktav ashurit with which we write the Torah

The default in formal halakhah would therefore be a prohibition for Ashkenazim, but not for Sefardim.

However, the 17th century commentary Beit Hillel on RMI attests that Ashkenazim apparently did not adopt this prohibition:

בית הילל יורה דעה סימן רפד ס"ק ב
"יש אומרים דאין לכתוב דברים של חול בכתב אשורית שכותבין בו התורה" –

והנה בהיותי נבחר מהמדינה לעשות תיקונים ביערסליב, נשאלתי מפי משכיל אחד מאי טעמא אין אנו נזהרין בזמן הזה בירידים שכותבין על הטבלא בנייר כאן יש למכור איזה דבר, דהיינו יין או בשר או שאר דברים, ותולין על הפתח וכותבין בכתב אשורית, וזהו איסור גמור לפי יש אומרים זה.
"Some say that one must not write secular matters in ktav ashurit with which we write the Torah" – When I was chosen by the state to make improvements in Yaroslav, I was asked by an educated person why we are not cautious today during fairs, where they post written papers saying "Here X is for sale," meaning wine or meat or such, and they hang it at the entrance and write in ktav ashuri, which is absolutely forbidden according to the position RMI records as "Some say."

Similar accounts can be found throughout the centuries. See for example Tzitz Eliezer:

שו"ת ציץ אליעזר חלק טו סימן ז (א)
שאלני אם מותר להכנס לביהכ"ס עם עתון-חול שאין בו כל דברי תורה כדי לקרוא בו - כמובן שאין בו להבדיל גם לא דברי שחץ - והשאלה היא מפני שמודפס בכתב עברי.
על אתר השבתי לו שמותר, ולא דמי למ"ש הרמ"א ביו"ד סי' רפ"ד סייף ב' דיש אומרים דאין לכתוב דברים של חול בכתב אשורי שכותבים בו התורה, ויעוין גם ברמ"א בסי' רל"ז סעי' ו ופ"ת סק"ב ע"ש, דכתב הדפוס שלנו לא נקרא כתב אשורי שכותבים בה את התורה, ואפילו בכתב אשורי ג"כ יש מקום להתיר בהיות ואין בזה כל דברים שבקדושה.
וכפי שאמרתי לו שזכורני שכבר נזכר מזה להיתר, ראיתי כעת בספר שו"ת יעב"ץ ח"א סי' י' שהעלה בכזאת דמותר, ומעיד דעביד עובדא בנפשיה לעיין בביהכ"ס בספרי פילוספיא המועתקים ללשון עברי, כי בלשון עצמו ליכא משום קדושה, אלא בתר ענין אזלינן עיין שם.
עוד מצאתי בספר שו"ת דברי יוסף (אירגאס) סימן מ"א שהעלה בדבריו דמהדברים של חול, אף שכתובים באותיות כתב אשורי, ודאי שאין איסור למוחקם או ליכנס עמם לבית הכסא, ומעיד שכן המנהג פשוט ליכנס עמם לביהכ"ס ואין פוצה פה ומצפצף יעו"ש ביתר פירוט ואריכות.
הרי לנו מהנז"ל כפי שעניתי לו על אתר דמותר ליכנס לביהכ"ס בדברי חול הכתובים בכתב עברי, וגם לרבות אפילו בכתובים בכתב אשורי [ולמעשה גם בההיא דהרמ"א הנ"ל העלו ג"כ להיתר, יעוין ערוה"ש יו"ד סימן רפ"ג סעיף י"ד וסי' רפ"ד סעיף ח' עיין שם ואכמ"ל.]
I was asked whether it is permitted to enter a lavatory with a secular newspaper that contains no divrei Torah in order to read it – assuming of course that is also contains no pornography – the question is because it is printed using Hebrew characters.
I responded on the spot that it was permitted, and that it was not comparable to what RMI writes in YD 284:2 that "Some say that one must not write secular matters in ktav ashurit with which we write the Torah" – see also RMI YD 237:6 and Pitchei Teshuvah YD 237:2, that our printed font is not called "ktav ashuri with which we write the Torah" – but even in ktav ashuri there is room to permit since (the newspaper) contains no matters of holiness.
As I said to him, I remember that this issue has already been mentioned permissively, and now I see Shu"t Yaavetz 1:10 who came out that this is permitted, and testifies about himself that in the lavatory he read philosophy books translated into Hebrew, because the language itself has no holiness, rather we care only about the content.
I further found in Shu"t Divrei Yosef (Irgas) #41 who came out saying that secular matters, even when written in the letters of ktav ashuri, are certainly not prohibited to erase or to bring into a lavatory, and he testifies that the widespread practice was to bring them into a lavatory with no one raising any objection – see there with greater detail and length.
We get from all these that, as I answered on the spot, it is permitted to bring a newspaper printed in Hebrew characters into a lavatory, even including those written in ktav ashuri [and as a matter of practical halakhah they (=mainstream poskim) came out permitting even the case that RMI prohibits – see Arukh HaShulchan YD 283:14 and 284:40.]

It is worth noting that Beit Yosef's excerpt from Rabbeinu Yerucham elides the Rambam's argument from archaeology, namely that all ancient Jewish coins etc. used ktav ivri rather than ktav ashurit. Recent discoveries seem to call this argument into serious question empirically – see e.g. the coin at https://www.ancient-hebrew.org/inscriptions/117.html and the Bar Kochba letter at https://www.ancient-hebrew.org/inscriptions/124.html. Rav Yosef Caro may have had access to similar counterevidence, and that may be why he leaves the argument out of Beit Yosef and omits the halakhah entirely in Shulchan Arukh.

It is also worth noting that Rambam's formulation of the prohibition differs significantly from the one he attributes to RI Migash. Rambam frames it as degrading to use ktav ashurit for any purpose other than

kitvei hakodesh, which seems likely to mean Scripture; whereas RI Migash is concerned lest the script be treated disrespectfully (although it's not clear to me why a get would be treated disrespectfully – perhaps he was concerned that if a mistake was discovered, the invalid document would simply be tossed away). RMI prohibits writing secular matters, which presumably means that all matters of Torah, at the least, are permitted.

I don't know how RMI derives his formulation from Rambam. However, empirically, in the autograph edition of the Mishneh Torah (see http://maimonides.bodleian.ox.ac.uk/) the topic headings are in ktav ashurit, which suggests either that RMI correctly intuited Rambam's position, or else that even in the original it was rhetorical rather than legal.

From all this it seems clear that minhag Yisroel was to be lenient in this matter throughout, and that any broad stringency is a later and anachronistic matter, akin to speaking Yiddish rather than Hebrew when dealing with secular matters despite the explicit permission on Shabbat 40b.

However, this popular disregard was regularly opposed by poskim who saw the forms of the letters as inherently sacred. See for example Radbaz cited by Pitchei Teshuvah 283:3:

עיין (בתשו' רדב"ז ח"ד סימן מ"ה) שכתב דאפילו דברים של חול אסור לרקום אותם בכתב אשורית, שהכתב בעצמו יש בו קדושה רבה

See (Responsa Radbaz 4:45) who wrote that it is forbidden to embroider even secular matters in ktav ashurit, because the script itself contains great holiness

See also Arukh HaShulchan EH 284:

וכתב רבינו הרמ"א די"א דאין לכתוב דברים של חול בכתב אשורית שכותבין בו התורה ע"ש
וכבר הזכרנו זה בס"ס הקודם והבאנו ראיה להיתר מלשון הקודש
והי"א צ"ל דס"ל דבכתב אינו דומה לבע"פ שהרי הרבה סודות התורה תלויין בתמונת האותיות כמו שהאריכו חכמי הקבלה בספריהם ואיך נוציא זה לדברי הבל וריק?
אבל מה נעשה, שהמדפיסים ידפיסו כל דברי חול בכתב אשורית ואין בידינו למחות, והוא רחום יכפר עון, ואשרי חלק המדפיס כשיזהר בזה, ושכרו הרבה מאד בזה.

Our teacher RMI wrote "Some say that one must not write secular matters in ktav ashurit with which we write the Torah" –
we already mentioned this at the end of the previous subsection, and we brought proof for this permission for from the issue of (speaking) 'lashon hakodesh',
and we must say that the "some say" hold that writing is not comparable to speech, as many secrets of the Torah depend on the picture of the latters, as the Sages of the Kabbalah have written at length in their books, and how could we expend them for worthless and empty matters.
But what can we do? The printers will (continue) to print all secular matters in ktav ashuri, and we have no power to protest, and He Who is Merciful will grant atonement for sins, but blessed is the portion of the printer who is careful about this, and his reward will be great for this.

See also the testimony of R. Chaim Dovid Halevi:

שו"ת עשה לך רב חלק ה סימן כז
וכבר רמזתי במכתב הרצוף בזה, שכל גדולי חכמי ספרד, עד הדור האחרון ממש, (וזכיתי בימי ילדותי בירושלם להכיר משרידי אותם גדולים בתורה וחכמה ויראת ה' טהורה), לא כתבו אף מלה אחת בכתב אשורי מרובע, אלא בחצי קולמוס הנקרא כתב משיט"א בלבד, ואפילו את ספריהם הדפיסו באותיות רש"י דוקא, וכך נהגו גדולי חכמי אשכנז באירופה.
ועל זה כתבתי שלצערנו אנו כבר ויתרנו על זה, אבל עד כדי זלזול של הכנסת כתב אשורי לבית-הכסא - לא נקל ח"ו...

I already alluded in the attached letter that all the greatest sages of Sefarad, up to literally the past generation, (and I was privileged in my youth in Yerushalayim to experience the remnants of those great ones in Torah and wisdom and undiluted fear of Hashem), did not write even one word in block ktav ashuri, rather with the half-pen called X alone, and even their books were printed specifically in ktav rashi, and the greatest of the Sages of Ashkenaz in Europe behaved similarly. Regarding this I wrote that "To our pain, we have already let this slide," but to the point of degradation, namely allowing ktav ashuri to be brought into a lavatory – we will not G-d forbid be lenient...

Note that R. Halevi proves that the issue is unrelated to ktav STAM rather than ktav ashurit, so that with or without *tagim* makes no difference.

On the other hand, Ktav Sofer reports that his grandfather the Chatam Sofer used ketav Ashurit when sending wedding invitations:

שו"ת כתב סופר אבן העזר סימן כב
ובזכרוני שגם בשטרי הזמנה של אבוהון ורבן של ישראל כבוד קדושת אאמ"ו מאוה"ג החת"ס סופר זצוק"ל הי' כתובי' באשורית ולשון לועז, ובל"ס הי' טעמו ונימוקו אתו דלא חש לכל זה.
My memory is that the written invitations sent out by my ancestor, the teacher of all Israel, light of the diaspora, his holy honor my grandfather the Chatam Sofer zt"l were written in ashurit and in a nonJewish language, and without doubt he had good reasons for not being concerned for all this

Ketav Sofer himself nonetheless concludes that with regard to such invitations

ומ"מ טוב לבחור בכתב רש"י או כיוצא בו.
Nonetheless it is good to choose ktav rashi or something similar

Ketav Sofer reaches this conclusion solely on the basis of Rambam's original formulation, as followed by R. HaLevi's teacher, in which the only permitted use for ketav ashurit is writing Scripture. He explicitly rejects the idea that invitations to a seudat mitzvah, kal vachomer to a wedding, should be considered 'secular" or "profane" use:

אבל במח"כ שגה, כי הזמנה לסעודת מצוה כגון לסעודת ברית, וקו"ח לשמחת חתן וכלה - דבר מצוה יחשב.
הגם שמזמינים לרחוקים שיבואו, וידוע לשניהם כי אין באפשר שיבואו והוא רק לכבוד ולחבה נודעת - זה בעצמו כבוד המצוה, שיתכבדו מכובדים לכבוד המצוה, ובדידן לכבוד התורה ולומדי' ואוהבי' ומנהיגי', וכן כל כיוצא בו, וזה פשוט:
But begging Your Honor's forgiveness, you erred, because an invitation to a seudat mitzvah, such as to to a seudah for a brit milah, all the more so for the sake of bringing joy to a groom and bride – is considered a mitzvah matter.
Even though they invite people from far away, and both parties know that it won't be possible for them to attend, and the invitation is only a matter of honor and expressing affection – this itself is part of honoring the mitzvah, that those worthy of honor should be honored for the honor of the mitzvah, aming us for the honor of Torah and those who learn it, love it, and lead in accordance with it, and so too everything similar, and this is obvious.

It is therefore clear that the chumra he ends with is not halakhic, but rather a concern for mystical sensibility.

Igrot Moshe argues that if this is true of wedding invitations, all the more so it must be true for ketubot:

לכן יש לסמוך למעשה להתיר לכתוב כתובה אף בכתב אשורית, כמו שעושין אחדים במדינתנו באמעריקא /באמריקה/ שכותבין אצל סופר כתובה בכתב אשורית ממש.
Therefore we can rely in practice (on this precedent) to permit writing a ketubah even in ktav ashurit, as some do in our country America, that they have the ketubah written by a sofer in actual ktav ashurit.

However, he too ends up with an extrahalakhic chumra, saying that even though RI Migash is not accepted as halakhah, and even though we write gets lekhatchilah in ketav ashurit, Ri Migash's objection to writing a get in ketav ashurit suggests that he would not have allowed it in a ketubah either.

אבל בזה יש מקום להחמיר מאחר דהרמב"ם בתשובה סובר בשם הר"י מיגאש דמנע מלכתוב אף גט בכתב אשורית וזה אולי שמע אבי החתן ממני ולא בלשון איסור.
But regarding this there is room to be stringent, since Rambam in a responsum holds in the name of RI Migash that he refrained from writing even a get in ktav ashurit,
and perhaps the father of the chatan heard this from me, but not using the language of prohibition

Perhaps some scribes on this basis adopted a custom of writing a ketubah in the manner of a get, namely in ktav ashurit but without tagim.

Rav Ovadiah Yosef surveys the topic with his usual mastery in a responsum on printed wedding invitations, and concludes

שו"ת יביע אומר חלק ט - יורה דעה סימן כד

כלל העולה שהמקילים בזה יש להם על מה שיסמוכו ואין למחות בידם.

The principle that emerges is that those who are lenient regarding this have what to rely on, and one should not object to their practice

It seems clear from the flow of his responsum that this permission applies equally to handwritten materials.

Rav Yaakov Ariel in באהלה של תורה א י"ד מא initially tends toward regarding a ketubah as "chol," but changes his mind upon seeing Igrot Mosheh:

וכאן יש להעיר שמן הראוי להימנע מלצייר אותיות סת"ם בכתובות וכרזות שונות, שאלו ענייני חול הן. וכן נראה להעיר על שטרי כתובה המודפסים בכתב אשורי ובתגין כמו בספר-תורה - והלא כתובה היא תשמיש של חולין! ואע"פ שהיא לצורך מצוה, מסתבר שכתובה אינה טובה מגט. ואדרבה, הגט, יש בו מעשה מצוה, שמגרש בגט כדת משה וישראל ולא בדבר אחר. מה שאין כן בכתובה, שעיקרה הוא הסכם ממוני בין בני הזוג. ולכן היה נראה לענ"ד שיש להמליץ על שינוי הכתב המקובל בשטרי הכתובה.

אך אח"כ מצאתי בשו"ת אגרות משה (יו"ד ח"ג סי' ק"כ) שמתיר להדפיס שטרי כתובה בכתב אשורי (ועי"ש שזכיתי לכוון לחלק מסברותיו). ובספר "משפט הכתובה" (להגרא"ח בר- שלום, ח"א עמ' קי"ח-קי"ט) כתב שמכיון שכתובה אינה נזרקת, והיא משמשת לצורך מצוה - מותר לכתוב אותה באותיות אשוריות. אך בכרזות של חול, המושלכות לאשפה בסופו של דבר, ודאי שיש להימנע מלהשתמש בהן בכתב אשורי.

Here we can point out that it is proper to refrain from drawing STAM letters in ketubot and various announcements, as these are all secular matters. It also seems correct to make this point regarding ketubot that are printed in ktav ashuri with tagim as in a Torah scroll – isn't a ketubah a secular use! Even though it serves the purpose of a mitzvah, it seems reasonable that a ketubah is not better than a get. On the contrary, a get actually performs a mitzvah, that he divorces with a get in accordance with the religious law of Moshe and Israel rather than with anything else, as opposed to the ketubah, which is at root a financial agreement between the parties. Therefore it seemed to my impoverished minf that we should encourage altering the traditional script when writing ketubot.

However, afterward I found in Igrot Mosheh YD 3:120 that he permits printing ketubot on ktav ashuri (see there that I merited arriving at some of his rationales on my own), and in the book Mishpat HaKetubah (by the gaon R. A.C. Bar Shalom, 1:108-109) he writes that since the ketubah is not thrown out, and it serves a mitzvah purpose, it is permitted to write it in ashurit letters. But secular announcements, which in the end are thrown in the garbage, certainly one should avoid using ketav ashurit in them.

Rav Yosef in the name of Berit Kehunah, and Rav Ariel in his own name, also suggest a counterpoint to the assertion that ketav ashurit is degraded when being used in secular documents – perhaps instead it is degrading for the language of Torah to be confined to "sacred documents" rather than spreading throughout life, just as we have seen in our day the amazing kiddush Hashem created by the revival of Hebrew as an everyday language. Kodesh should suffuse chol rather than fleeing from it.

On the basis of all the above it seems clear to me that there is no halakhic issue with writing a ketubah in full ketav STAM, especially as a commissioned ketubah is regarded as a work of art and treated with great respect. Someone with strong mystical sensibilities may be machmir for themselves, and it may be a virtuous act for a scribe to make at least one alteration in the script, so as to make clear that a ketubah does not have per se kedushah, and so that the subjective act of writing STAM remans a unique experience. However, the mitzvah of being mesameiach chatan vekallah is obviously just a precursor of the overarching value of shalom bayit, and HKBH allows His Name, written in ketav ashurit, to be erased for the sake of shalom bayit. Therefore, one should not impose such chumrot at the cost of disappointing a bride or groom.

הנלע"ד כתבתי, וה' יצילני משגיאות
אריה דוד קלאפפער

A Speculative Anatomy Of A Beit Din Mistake

An Israeli Rabbinic Court case from 2016 provides a window into the importance of thoughtful procedural guidelines, rigorous halakhic analysis, and perhaps most of all, a deep sense that halakhah charges batei din with responsibility for its purposes as well as its details. I'll try my best to live up to that charge even as we begin by wading into the thick of the details.

In the case before the Rabbinic Court, a man alleges that immediately after he and his wife divorced via get, they went to dinner, were persuaded by relatives to reconcile, went back to her apartment, and had *biyah* (intercourse). They then lived together for several weeks. He contends that a second get is therefore required. The textual ground for this contention is Mishnah Gittin 8:9

המגרש את אשתו ולנה עמו בפונדקי
בית שמאי אומרים
אינה צריכה הימנו גט שני
ובית הלל אומרים
צריכה הימנו גט שני
אימתי? בזמן שנתגרשה מן הנשואין
ומודים בנתגרשה מן האירוסין שאינה צריכה הימנו גט שני,
מפני שאין לבו גס בה
One who divorces his wife and then lies with her in an inn –
Beit Shammai say:
She does not require a second get from him;
but Beit Hillel say:
She requires a second get from him.
When? When she was divorced after nisuin
but they concede that if she was divorced after eirusin*, that she does not require a second get from him, because he is not casual with her.*

The criterion of "casualness" makes clear that Beit Hillel's concern is

a. that the couple had *biyah* together, and
b. that the *biyah* was intended to effect *kiddushin* between them.

Talmud Gittin 81b explains that this concern is based on the legal presumption that "A person does not fornicate instead of marrying" = אין אדם עושה בעילתו בעילת זנות. The Talmud further explains that the concern exists even if there were no witnesses to the *biyah*, but only to the couple secluding themselves, because "witnesses to seclusion are in fact witnesses to *biyah*."

In the case before the Rabbinic court, there were no valid witnesses to the couple secluding themselves, let alone to the sex. The simple reading of the Talmud is that there can be no concern for *kiddushin* without valid witnesses to at least seclusion.

However, because the couple lived together for several weeks in a Jewish neighborhood, acting in public as a married couple would, one might argue that there is public knowledge that they secluded themselves, and that since they were previously joined via *nisuin*, that public knowledge includes a presumption of *biyah*. This argument requires applying a position taken by the medieval commentator Rabbi Aharon Halivei (RAOH) in a different case, to which we now turn.

Talmud Ketubot 72b records a dispute between Rav and Shmuel about the following case:

Yitzchak betroths (= is *mekadesh*) Rivkah, a minor whose father has died, with the consent of her remaining mother and brother. She immediately moves into his house. Minors in her situation have the option of rescinding the betrothal (= *miyun*) at any time until they accept either *kiddushin* or *nisuin* as adults. The existence of this option demonstrates that the couple is not married under *deoraita* law; otherwise they would require a *get* to end the relationship. Rivkah reaches majority without *miyun*, and continues to live with Yitzchak in his house. She then accepts *kiddushin* from a different man, whom we'll call Yishmael.

Rav treats the second *kiddushin* as a nullity, meaning that he regards Rivkah as being married *deoraita* to Yitzchak;

Shmuel requires Rivkah to obtain a get from Yishmael.

The gemara explains that Rav's position is based on the principle that "A person does not fornicate instead of marrying." In other words, we assume that

a. Yitzchak and Rivkah had *biyah* at some point after she reached majority, and that
b. they mutually intended their *biyah* to accomplish *kiddushin*.

The apparent weakness of this explanation is that acts of *kiddushin* are ordinarily valid only when they are done in the presence of witnesses.

RAOH resolves Rav's position as follows:

Public knowledge that a man and woman are acting generally in a manner exclusive to married couples creates a presumption that they are also acting in that way privately, i.e. having *biyah*. Furthermore, public knowledge turns the members of the public into witnesses. He draws a parallel to the ordinary case of kiddushin accomplished via *biyah*, where witnesses to seclusion (*yichud*) suffice because of a similar presumption. This proves that *kiddushin* are valid even if the witnesses have only inferential knowledge of the act of *biyah*.

RAOH's explanation of Rav suggests that we require a get to dissolve a relationship whenever there is

a. a well-grounded public inference that *biyah* has occurred, and
b. a rabbinic assumption that the *biyah* was intended to accomplish *kiddushin*.

By contrast, most rishonim require inferential knowledge **by specific witnesses at a specific time of a *biyah* act**. They explain Rav's position by assuming that Rivkah and Yitzchak secluded themselves in the presence of witnesses at some point after Rivkah reached majority, just without explicitly informing the witnesses that their intent was *kiddushin*.

Note that Rav's position can also be explained in at least one other way, by saying that *kiddushin* of a minor becomes effective *deoraita* even without *biyah*-for-the-sake-of-*kiddushin* if she continues to live with her husband without *miyun* after reaching majority.

Beit Shmuel Even Haezer 31:22 (see also 43:3, 121:9, 153:32) cites Teshuvot Maimuni#29 as making a claim parallel to RAOH's in the following case:

A man was *mekadesh* a woman with a ring that they later discover is worth less than a *perutah*. They continue to live together in the manner of husband and wife after the ring's value is discovered.

Kiddushin with a ring worth less than a *perutah* are invalid. So the logic must be that by continuing to live together, the couple creates a reasonable inference that they have had *biyah-for-the-sake-of-kiddushin*.

Beit Shmuel comments that Teshuvot RIVASH #103 cites RAOH without comment, but that Teshuvot RIVASH #6 cites RAOH but declares that his position is rejected by all other rishonim.

Do Beit Shmuel, and RIVASH, endorse RAOH's position or reject it? Noda B'Yehudah (NbY) 2:52 suggests a compromise.

NbY addresses a case inverse to Rav and Shmuel's:

An adult woman became *mekudeshet* to a minor (which cannot be valid) and lived with him for a while after he reached majority. The husband then disappeared without divorcing her. The woman denies that the marriage was ever consummated, but there was certainly *yichud* in the presence of witnesses. She is apparently an *agunah*.

In order to free her, Noda B'Yehudah must demonstrate that the first marriage was a nullity. This means that he needs to distinguish her case from the case of Rav and Shmuel according to as many positions as possible. The approach he takes is to say that

a. RIVASH and Beit Shmuel each accept RAOH's argument in part and reject it in part
b. that the woman's case is parallel to the part of RAOH's argument that Beit Shmuel and RIVASH reject
c. that we pasken like Beit Shmuel and RIVASH

Noda B'Yehudah's logic is as follows:

RAOH is correct that when a man and woman live together **in an exclusively marital manner,** that creates a public presumption of *biyah*, even without witnesses to *yichud*. However, how can this presumption accomplish kiddushin, which requires witnesses to have at least inferential knowledge **of a specific act of *biyah***?

The answer (adopted by Beit Shmuel and RIVASH) is that in RAOH's case we say that the man intended the *kiddushin* made when she was a minor to come into *deoraita* effect when she reached majority. The presumed *biyah* demonstrates that he has not changed his mind, since "A person does not fornicate, etc." Therefore, the *biyah* does not accomplish kiddushin; it merely evidences kiddushin. Therefore, inferential knowledge that *biyah* happened is sufficient, even if there are no witnesses, even constructive witnesses, regarding any specific act of *biyah*.

However, in NbY's case, the woman's denial that *biyah* took place is credible against the presumption. Therefore, there was no *biyah*, and therefore, no *kiddushin* after the husband reached majority, whether on the basis of the *original kiddushin* (as RIVASH and Beit Shmuel would understand Rav's position), or via *biyah* (as RA'OH would understand Rav's position). Similarly, in Teshuvot Maimuniot's case it would not be sufficient to demonstrate that the husband and wife wished to be married; they would need to at least seclude themselves before witnesses in order for there to be any concern that *kiddushin* occurred.

In other words: According to NbY, everyone agrees that living together in a marital manner cannot effect *kiddushin* – the most it can do is create a **rebuttable** presumption that *biyah* occurred, and the consensus position[3] is that except in the specific case discussed by Rav and Shmuel, kiddushin can never be accomplished without witnesses to at least *yichud*.

Let's return now to the case before the Rabbinic court. According to NbY, it follows that

- ➔ even if we were utterly confident that ביאה occurred, and
- ➔ even if we apply the presumption "A person does not fornicate etc." to both parties -
- ➔ since there were no witnesses to seclusion, there is no reason to require a second get.

However, if

- ➔ one understands RA'OH as extending his position to cases where public knowledge creates a presumption that *biyah* occurred at some unidentified point, and
- ➔ one assumes that the couple lived together in a manner that created a presumption of *biyah*, and
- ➔ one applies the presumption "A person does not fornicate etc." to both parties,
- ➔ then one can construct a basis for encouraging a get regardless. Arukh HaShulchan states that best practice is to require a second get whenever there is no explicit Talmudic passage to the contrary, even if is obviously not required as a matter of bottom-line law.

The Rabbinic Court reached a unanimous verdict, but the dayanim published two separate opinions.

The first opinion, by Dayyan Ariel Edri, explains the Noda B'Yehudah as I did above. He further states that the Shulchan Arukh paskens against RA'OH, and that even Beit Shmuel paskens like RAOH, even in the case of RAV and Shmuel, only as a *safek* (doubt), not as a *vadai* (definite). Furthermore, he notes that in his case the ex-husband concedes that the only act of *biyah* happened before there was any public awareness that they were living together. Therefore, even according to RA'OH there should be no need for a get, and certainly not according to Beit Shmuel, who only paskens like RAOH as a *safek*.

[3] Which according to Noda B'Yehudah rejects RA'OH, although I do not understand why RA'OH cannot agree as well.

The second opinion, by Dayyan Yitzchak Almaliach, cites acharonim who disagree with Noda B'Yehudah and RIVASH (in at least Teshuvah #6) and Beit Shmuel (maybe), and believe that the RAOH is not a *shitat yachid* (lone/minority opinion). This allows the contention that living together publicly as husband and wife creates a presumption of ביאה, and therefore a *safek kiddushin*, and therefore requires a get.

However, he cites a dispute as to whether witnesses to seclusion create *kiddushin* if the couple denies that they had *biyah*. Shiltei Gibborim rules specifically regarding a divorced couple secluding themselves that the presumption of *biyah* Is rebutted by the couple's denial. Beit Shmuel questions this, but Rav Almaliach suggests that even Beit Shmuel accepts the couple's denial that *biyah* occurred when there were no witnesses to seclusion and the presumption is based only on general public knowledge.

In the case at hand, the couple denied that *biyah* happened after the first night, and as Dayyan Edri noted, the first night is irrelevant since there was as yet no public knowledge. Regarding the period after their living together became public knowledge, their denial of *biyah* is believed. Therefore a get is not necessary even according to RA'OH.

Bottom line: Both Rav Edri and Rav Almaliach are clear that there is no need for a get in their case. Yet the Rabbinic Court reached the unanimous decision that not only was a get required, but that the husband could be coerced into giving it. This seems especially astonishing in light of the general reluctance of the Israeli rabbinic courts to rule that a get may be coerced (a coerced get is invalid except in situations where a beit din is allowed to coerce it, so a mistaken ruling allowing coercion would lead to an invalid get).

What happened in their case, as I speculatively reconstruct it, was as follows: Shortly after moving out again, the husband reported to the court that for several weeks after the get, the couple had resumed living together as husband and wife. The beit din, without asking the woman for her account of the facts, summoned the couple for a second get. When the couple appeared in beit din again, the woman's attorney interposed a claim that no second get was necessary, although the woman would agree to receive it if the Rabbinic Court insisted. In response to questions from the Court, the women stated that *biyah* had taken place only the first night, and the man did not contradict her. The beit din insisted on a get anyway. At that point the beit din discovered to its shock and dismay that the man was not willing to give the second get unless the woman made new concessions on other issues in their divorce agreement.

Thus put the Rabbinic Court in a bind. Having insisted on a second get, releasing the woman to remarry without a new get would undermine their own credibility, and perhaps leave her the subject of rumors. On the other hand, leaving her an *agunah* when a get was not halakhically necessary would be ridiculous.

The Court's ingenious solution was to contend that the husband's initial complaint, plus the initial summons issued for a second get, created *laaz* (rumors of invalidity) about the first get. Therefore, it was in the woman's interest to receive a second get. Furthermore, the Court ruled that one can compel a get even when it is required only because of *laaz*, and especially if one can construct an argument that a get is necessary, even if one without the *laaz* one would not have required the get. Thus, assuming the Court's coercion was effective, from its perspective no major harm was done.

However, I do not share the Court's perspective, for many reasons, including but not limited to:

1. Coercion is not always effective, and the woman could be left an agunah for some time. Certainly she is not immediately free, as she would be if the court declared that no second get was necessary. (Even if the man agreed to the get immediately, she might be prohibited to marry for the next three months. In a case I dealt with, the woman may have begun a new relationship shortly after the man ceased to live in her house.)

2. By giving validity to an extension of RAOH's position to its case, the Court created a precedent for other cases, where coercion might not be effective. I learned of this case because a colleague cited it as precedent in the Diaspora, where batei din have no coercive power at all.

3. There is a possibility that the woman would become pregnant before receiving the second get. The child would then face a taint of *mamzerut*, which would be a social disability in some circles even if a court ruled as it should that he was not actually a *mamzer*.

4. If the woman began a new relationship before the second get, she may now relate to herself as someone who committed adultery. I have encountered many women who are not otherwise Jewishly observant but absolutely refuse to remarry without a get, even if that requires long delay because of their husband's cruelty. For such women, the notion that they have committed adultery unknowingly can be devastating.

5. The fundamental innovation of Torah in requiring a written get, which is amplified over and over in Rabbinic rhetoric and psak, is that a woman must never be left vulnerable to an ex-husband's attempt to invalidate their divorce. For this reason, the great Tosafist Rabbeinu Tam instituted a ban on anyone who challenged the validity of a get once it had been given. In this case, the Court summoned the wife for a second get solely on the basis of the husband's story.

Bottom line: I contend that the beit din made a serious error when it summoned the couple for a second get without first asking the woman for her story. That error CREATED a situation in which they felt that the best interests of the woman required a get, even though, having heard her story, it became clear that the get was not legally necessary. They then ruled to compel the husband (which Israeli batei din generally avoid; however, I do not know the record of these specific dayanim in that regard) in order to make up for their initial mistake. I pray they succeeded to that extent.

To enable this correction, they construct an argument, which they are careful state is "לרווחא" (= because why not?) rather than לחומרא (= to account for a position that is legally pushed aside), which would require a get in their case.

All this would have been avoided, I suggest, if the beit din had thought immediately about policy, practical risks, the risks of setting precedents, pastoral responsibility, and the overall purpose of halakhic divorce law. In general, the first principle for dayanim who deal with gittin should be that one never simply believes a party who will thereby gain power over another.

How Broad is the Constituency of Halakhah? A Conversation with Rabbi Francis Nataf

CMTL intends to publish many conversations with leading thinkers on this subject .

Aryeh Klapper: It's a great pleasure to be here with my dear friend, distinguished thinker, lecturer, and author, Rabbi Francis Nataf. Let's start right in. Do you think Orthodox legal decisions should be affected and evaluated by their effect on nonOrthodox Jews? Yes or no, and why or why not?

Francis Nataf: To me it seems self-evident that Jews, whether they're observant or not, are part of the halachic process and must be taken into account when making our decisions. Of course, observance is almost always somewhere along the spectrum, meaning that it's very rare to find someone who observes nothing at all. The *meshumad*, someone who's taken himself completely out by identifying with another religion, or what we call a *l'hakh'is*, meaning someone out to spite God or spite Judaism – today's non-Orthodox laypeople and clergy don't fit into those categories. So as far as I know, there's no category that excludes contemporary Jews from our consideration when deciding halakhah.

Certain transgressions may have specific effects; for example, the question of whether Jews who deliberately transgress Shabbat make wine not kosher by touching it, meaning that we treat them as if they were nonJews. There are opinions that distinguish between just a regular Jew who's not observing shabbat and someone who is antagonistic/*l'hakh'is*, and there are more liberal positions. Here in Israel, as society melds in different ways, the position that wine remains kosher when touched by a Jew who violates Shabbat is becoming more popular, especially in the *dati leumi* (Religious Zionist) world. I think that in the next couple of decades that position will become more universally accepted, and therefore won't pose an issue when observant and non-observant Jews come together.

Historically, I'm not sure that rabbis were only paskening for the observant; that's more I think a modern situation. The notion of the *austritt gemeinde* in 19th century Germany, an Orthodox community that separated itself from the general Jewish community, was a fairly new thing, granting that the numbers of non-observant already at that point in Germany, and in all sorts of other countries like our own around the world, had created a new situation in which observant Jews suddenly found themselves in the minority.

Nevertheless, I think the issue here is really metahalakhic. The issue is not so much what the halakhah has to say, and more how to use the halakhah to advance the greater interest of the Jewish people. People such as Rav Hirsch in Germany and the Chatam Sofer in Hungary advocated separation because they felt that was in the best interest of the Jewish people. They thought the only way to keep the people that their community had, and prevent further assimilation, was to fight and create obvious divisions, obvious demarcation lines. I think that's changed. I think that's changed in North America; I think that's changed in Israel.

Take intermarriage. No one's saying that we should *matir* (permit) intermarriage; there's no way to go that far, and there's no reason to find *heterim* for intermarriage. But the question is what we can do to try to hold as many Jews who are intermarried, and their children (even if only the father is Jewish, depending on how you understand the concept of *zera Yisrael* and so on). The question is: what's the best policy? In the past, a hardline policy of separating from the child, setting an example by having the community ostracize them, not giving them aliyot latorah - that was harsh and it definitely turned some people off, but it also was effective at least on some level. In our society that encourages more and more autonomy, as individual life becomes less communal, I think that the effectiveness of that policy has worn off.

Visiting various Chabads in the last few years, I've been very surprised to see that they're very welcoming to intermarried couples. They're not giving a *haskomoh* (approbation) to intermarriage, but they treat the non-Jewish partner with dignity, with the metagoal of winning over at least the Jewish part of the couple and possibly the spouse as well.

My wife had me listen to a segment of the podcast Heavyweight. The emcee of this podcast played around with becoming frum when he was younger, through Chabad. He didn't go for it in the end, and moved to

New York and married a non-Jewish woman. Before this podcast, he decides to visit his old rabbi, and the rabbi challenges him: " You know, no matter what happened you can still continue; you were really interested back then. And because of your parents you didn't want to continue the road, but your life's not over - if that's the choice you want to make, you can make it." So he says to the rabbi: "Um yeah, but you know I'm married to a nonJewish woman now!" So the rabbi says to him: "So who's to say she's not part of the story?" Which was very clever, but it's also a certain - instead of being freaked out, and I would have been very uncomfortable had I been in that chair, I don't know if I would have responded as quickly or as thoughtfully, but there's an adaptation on the meta level that needs to be filtered back into halakhah.

I think that automatically happens subconsciously anyway, that poskim automatically internalize certain values, certain meta values, and work with those metavalues as they are constructing responsa.

AK: I want to push on one aspect of what you said. Your framing seemed to me explicitly meta-halakhic, policy, a sort of utilitarian conception of how halakhah looks at everyone, *lav davka* the nonorthodox. We say to every Jew that we'll make the decision that is best for the Jewish people **about** you – you come and ask your specific halakhic *sheilah*, but the question in our mind is what answer would be best in the best interests of the Jewish people, consistent with the formalities of Halakhah.

For Kantians, if for no one else, that approach is problematic because it sounds like we're treating the individuals standing in front of us as means to the ends of the Jewish people, rather than as ends in and of themselves. Part of the critique I'm interested in articulating is that we don't usually think of that as the right way to approach a *sheilah* from an Orthodox Jew - generally we think that the right way to approach a *sheilah* is to consider what's best for the individual *shoeil.* But when we get to these issues, we start moving toward approaches that are more utilitarian or instrumentalist, such as which way will people be more likely to stay frum, what's best for the Jewish people as a whole.

So here's how I'll push. We could say that the whole issue of whether non-shomer Shabbat Jews create *stam yaynam* when they touch wine is solely a function of whether we believe that the need of the hour is to create barriers, and it's really good to bring this halakhah home to people, because while some of them will just go on their way or be more turned off. that won't affect their level of observance, others will say, "Oh my goodness! We are considered in the same category as idolaters!" and that becomes a spur to teshuvah So that's a really good reason to keep the barrier. While the argument against is that no, there are people who would really be open to Shabbos, but they're so insulted by this particular ruling that we lose them. That's a pragmatic argument.

My attitude towards this particular halakhic issue is very heavily shaped by two experiences.

The first is having people ask me whether they're allowed to drink their own wine – they're not completely *frei*! that's a question that comes up a lot, seriously and unseriously - and that I think illustrates a certain tension and paradox. For exactly whom would one pasken that they can't drink their own wine, and expect them to obey?!

The second is that around 20 years ago, when I was Orthodox rabbi at Harvard Hillel, we brought students home to our house for Shabbos meals all the time. One of the things I most enjoyed was getting to know them on the 25 minute walk to where we lived. So they're in the middle of telling me their life stories, and for some reason we have a nonmevushal grape beverage ready for kiddush, and a student is helpful and pours for everybody else, and as I'm about to make kiddush, that student says "and by the way, my mother had a conservative conversion" - and I just froze, I just completely froze - I didn't have the self-possession to start thinking about how to balance *kvod haberios* and the interests of the Jewish people and so forth.

Now that was about conversion rather than non-observance, but it's related. Suppose we bracket all the metahalakhic questions - here is a person who is likely to be humiliated in many Orthodox contexts. If you have no social interaction with non-Orthodox Jews, and your goal is to prevent such interactions, then those contexts will be rare, but if you live in a world where the observant and the non-observant interact socially, there will be plenty of moments when following certain halakhic positions will cause you to humiliate or hurt people, as I did there.

My local solution was to never have non-mevushal wine in our house, because I just couldn't deal with ever being put in that situation again. But what I'm wondering is: do you think that the default is to ensure that Jews of whatever level of observance, and human beings generally, are not embarrassed or hurt because of halakhah? Meaning that in exceptional circumstances we might allow individual community members to be humiliated for the good of the community, but our fundamental framework is that the constituency of Halakhah is everybody, so there's a strong default pressure against psak that might lead to non-observant people being embarrassed or hurt because they're part of whom we're supposed to think about - we can't just say "okay, they're not our constituency"? Do you agree or disagree?

FN: I agree. But rather than framing this as metahalakhah that merely has to be consistent with the formalities of halakhah, I prefer to say that these values are ensconced in halakhic formalities. All halakhah is representative of values. So when we speak about not embarrassing a person, that is explicitly within halakhah on certain specific issues that are defined as kavod haberiot, such as tearing toilet paper on Shabbos when there is no cut paper, and this shows that the dignity of human beings is a halakhic value.

The metahalakhic issues I raised shouldn't override every other value in halakhah, such as kavod haberiot, but I think they can have an impact on halakhic decisionmaking. Therefore, if I decided that taking a hard line would influence more people to become shomer shabbat, that would play into my halachic decision process - it wouldn't necessarily trump in every situation, but it would move the level of where I would consider kavod haberiot as determinative.

I'm not so concerned about Kant - I think that mainstream Judaism is not Kantian, in the sense that a person can be a means to a greater end. We are communitarian by nature, not individualistic, and we do see that each person is called upon at some point in some ways to give up their own needs for the sake of what's good for the tzibbur.

All these values play a role in halakhic decisionmaking, although generally subconsciously as opposed to consciously, so that often only the formalities are explicitly discussed. I think you're much more aware than most poskim, even in the Modern Orthodox world, of what values you're translating into psak.

But even when the poskim are unaware, it's still there, and each posek weights those values differently. That's the nature of the being when you ask a human to work with halakhah - that's why poskim reach different decisions. A machine can take all the halakhic variables and spit out a one-size-fits-all decision. There are different sizes not just because of the consumer of the halakhah, the person who asks the *sheilah* or is in a situation where a *psak* is needed, but also because of the producer. Rav Shlomo Zalman is very different from Rav Ovadiah Yosef who is very different from Rav Elyashiv; all of them come to the process with certain meta-ideals that inform how they work with the halakhic details, and the details also are in and of themselves important.

Kavod haberiot is an important variable. I'm not sure there's any difference between a shomer shabbat and non shomer Shabbat in that regard - if we were to put them in the exact same situation. I see no reason why we should be any less concerned about the kavod of a non Shomer Shabbat person than about that of a shomer shabbat.

AK: I don't think we're disagreeing at all about the overall principles. I was speaking *lesheetatkha* – it seemed to me that you had framed everything metahalakhically, so that all the details became formalities. I agree entirely that kavod haberiot is a value in halakhah not a metavalue, and that every halakhah reflects values.

I might argue – probably would argue - about the extent to which we're Kantian. Barukh Brody z"l has a marvelous article about the pluralistic ethics of halakhah. That we're not absolute Kantians doesn't mean that Kantian ethics aren't a strong default.

FN: The rav of our synagogue a couple of years ago expressed that his reason for supporting the *heter mekhirah* was that if all Israelis were to buy only Arab produce, then we'd be in in trouble –

AK: Universalizability!

FN: Although he knows absolutely nothing about Kant, but yes. I was about to object on the floor but I decided to keep quiet.

AK: I've written that Rav Yonasan Eibeschuetz seems to have developed an idea of universalizability contemporaneously with Kant. But I think the Rambam disagrees - Rambam's category of the *hasid* is a protest against universalizability, as opposed to Rav Eibeschuetz who claims that *kedoshim tihyu* has to be universalizable.

But what I want to say here, bracketing that issue, is that the last thing you said is really powerful. You said that you saw no difference in terms of the evaluation of kavod haberiot, didn't see why there should be a difference between somebody who is fully inside the observant community and somebody who is not at all inside. I'm going to put words in your mouth - you'll tell me if you agree with them – and say that kavod haberiot relates intrinsically to who they are as human beings.

That's not an obvious statement to me within the framework of halacha, because there are all sorts of ways in which people can forfeit their rights - somebody who's moridin velo maalin, for example. If there's somebody that in principle you can kill, so kal vachomer you can cause them lesser harms (although we might see humiliation as a greater harm, at least according to those who hold that we Jew must allow ourselves to be killed rather than cause somebody else to be humiliated).

I hear you saying that halakhic observance or non-observance, including membership in communities that don't identify with halakhah, including even leadership of religious communities that don't identify with halakhah, doesn't fundamentally change what in American discourse we would call your rights, and in traditional discourse we might say doesn't change others' obligations towards towards you.

I want to check if you would agree with an articulation that strong, which would be very much where I want to go, meaning that there's a very strong default setting of obligations towards Jews as Jews and human beings as human beings. (We can talk some other time about the extent to which those are differentiable categories.) In the modern era, how you identify within the Jewish community doesn't affect the fundamental nature of halakhic obligations towards you. Orthodox Jews can't say "Well, you're not as much a citizen, and therefore you don't impose the same obligations on us." Is that in fact what you were saying?

FN: I think so. In terms of categories that exist in Chazal, the Chazon Ish's famous position about the *tinok shenishbah* was in my mind an intuitive understanding that the categories of the past simply didn't work. The *tinok shenishbah* is also a category of the past, but he applied it in a way that normally would not have been considered appropriate, certainly not literally but even conceptually, to the contemporary non-observant Jew. So I think I'm not charting new territory so much as simply spelling out what I think should be - but I think it is normative. The reasons we think it less normative are historical or cultural – again, I think they have a lot to do with the concept of *austritt*. Many assumptions that we make about the non-orthodox are based more on those factors than on a rigorous reading of halacha. Granted that you could be very exacting in halakhic categories and assume that non-observant jews are *kofrim* or what have you, but I think a careful examination of the scenery shows otherwise.

AK: At some point we should talk about the Chazon Ish, because I think he says something more radical than just applying *tinok shenishbah*. He has at least two relevant comments, but the one that most interests me is that interference with someone else's religious life only makes sense in a world where there is collective Divine punishment and revealed *hashgachah*. Otherwise, even if somebody else is deliberately transgressing *bein adam laMakom*, we should not impose on them. It's a really radical affirmation of autonomy in an unexpected context.

But for this conversation, the "default" idea is where I wanted to go.

Rabbi Francis Nataf is a Jerusalem based writer, translator and educator. He is the author of the Redeeming Relevance in the Torah *series and of many articles on comparative religious thought, biblical studies, and education.*

SBM 2020 Sh'eilah

Dear …,

You may not remember me, but I was a student in your 11th grade Talmud class in Rabbi D.Z. Hoffman High School in 2012. Some of the things we learned in that class have stayed with me throughout, and I'm turning to you because of them, and because I know that you have a reputation as deeply learned, profoundly sensitive, and unswervingly ethical.

I remember your telling me about your grandfather, a German Holocaust survivor, overpaying his taxes each year to express his gratitude to America. You argued that *dina demalkhuta dina* was more than a grudging accommodation to the reality of exile; in America at least, it was an expression of our responsibility to be the best of citizens. We spent several periods researching and then discussing whether speeding was a halakhic violation, and I argued very strongly that it was, which led to pretty serious family conflicts on the way up to the Catskills on Friday afternoons.

But I also remember that you brought in Rabbi Saul Berman on Martin Luther King Day to tell us about his experience being jailed in Selma, and that you introduced him as a halakhic hero. So you must think that there are times when disobeying American law is ok, or even necessary. It actually wouldn't surprise me to learn that you were among those trying to form a barrier between police and Black Lives Matters protesters, even though that technically involves standing in places that have been made legally off-limits.

Here's the thing – you may not know that I was adopted from abroad (Colombia) and converted as an infant. I didn't know this at the time, but until 2001, adopted children of U.S. citizens did not automatically receive citizenship, and my parents never arranged for me to become a citizen, so I am in fact "undocumented." This means that unless I buy fake ids, it will be hard for me to get hired, to get a driver's license, to get on airplanes, and certainly to leave the country and come back. Do you think maybe that I'm allowed to buy these fake IDs *davka* because I'm not a citizen? Or do I have to leave as soon as I can, and apply for citizenship from abroad (which I'm unlikely to get), because it's illegal for me to be here? I intend to pay all the taxes I owe, at least as long as the US maintains its rule that the IRS can't share its records with immigration agencies. I think that in a rational world everyone would realize that I should have citizenship; this is the only home I've known, and my parents are citizens, and the law has even been changed so that people never face my situation. But the controversy about Dreamers and DACA makes clear to me that I'm not living in a rational world.

Please tell me what I must do. Please also note that my mom's lawyers told her that if anything positive is to happen, I need both my parents' support and cooperation. We had a long conversation and we all agreed to follow your psak. I'm enclosing their letters. Please respond to all of us together.

Your student,
Yonatan Yaakov Rose

Dear …,

I am Y.Y. Rose's adoptive mother. I know that he has reached out to you about his immigration status, and I wanted to make sure that you know where I stand. You should know that Y.Y.'s father and I have divorced, and I have since remarried.

In the young, affluent Modern Orthodox community that I live in, almost everybody hires undocumented workers. The nannies, the construction workers, and so forth – all undocumented, and everybody knows it. I think most people pay cash and don't withhold FICA taxes, but of course I can't know that for sure. But it seems ridiculous to me to say that our community holds that immigration law is halakhically binding, especially when the law is immoral. We certainly didn't think that about British Mandate law in Palestine!

So please just tell Y.Y. that he can do whatever he needs to do to live a normal life here while my husband and I hire lawyers to straighten this out, which I'm sure we can do. Please tell him that he needs to cooperate with whatever the lawyers advise. This is still the United States of America, and I'm sure everything will work out just fine if we have a little time and don't do anything precipitous.

Sincerely,
Zoe Wood

State Authority and Religious Obligation – An Introduction

It is a given in Modern Orthodox Torah discussions that Jewish citizens of the United States residing within its borders are bound by US law. Yes, we all understand that there are theoretically heroic exceptions, such as if the state were to compel us to engage in idolatry. But it is hard for most of us to imagine that as a possibility under the Constitution. Our instinctive image of Orthodox-identifying lawbreakers relates instead to self-interested white-collar criminality, or more recently, to irresponsible and dangerous flouting of public health regulations (although some flouters portray themselves as heroic).

Like many positions that carry almost universal assent, our deference to secular law is undertheorized and often honored only in the breach, or in the censure of others who breach. We don't know why it's so, and our behavior proves that we don't believe it to always be so, but our rhetoric often assumes it.

However, in discussions and classes not explicitly bounded by Torah, Modern Orthodox Jews find inspiration in stories of civil disobedience from the civil rights movement. Many read and are influenced by Thoreau's powerful notion of serving the State with one's conscience:

> THE MASS of men serve the State thus, not as men mainly, but as machines, with their bodies. They are the standing army, and the militia, gaolers, constables, posse comitatus, etc. In most cases there is no free exercise whatever of the judgment or of the moral sense; but they put themselves on a level with wood and earth and stones; and wooden men can perhaps be manufactured that will serve the purpose as well. Such command no more respect than men of straw or a lump of dirt. They have the same sort of worth only as horses and dogs. Yet such as these even are commonly esteemed good citizens.
>
> Others—as most legislators, politicians, lawyers, ministers, and office-holders—serve the State chiefly with their heads; and, as they rarely make any moral distinctions, they are as likely to serve the devil, without *intending it, as God.*
>
> A very few, as heroes, patriots, martyrs, reformers in the great sense, and *men,* serve the State with their consciences also, and so necessarily resist it for the most part; and they are commonly treated as enemies by it.

The moral worlds of "Torah" and "Mada" sometimes merge, as when listening to Rabbi Saul Berman speak about being jailed in Selma. But not often, and I think, not often enough.

A clearer formulation of the religious bounds of government authority is plainly needed if we are to seriously address the situation posed to SBM 2020. The consensus position requiring obedience to civil law applies to citizens. Yonatan, the protagonist of our situation, is not a legal citizen, even though he always thought of himself as one, has never wanted to be anything else, and under just about any substantive concept of justice would be legally naturalized at once.

(This is a situation that Orthodox Jews are very familiar with, because it happens all the time with regard to halakhic Jewish identity. I don't think we have handled such situations well at all. But plainly we could be doing worse, as if the United States gave Yonatan an option equivalent to what is popularly if inaccurately called "giyyur lechumra," that would be a fine solution.)

Let's begin from the phrase most often employed to create a religious justification for mandating civil obedience: דינא דמלכותא דינא (*dina demalkhuta dina*, henceforth "DMD").

As used in the Talmud, always with attribution to the amora Shmuel, DMD is, as Professor Chaim Saiman puts it, mostly a defense against the charge of גזילה (robbery), for example when tax collectors seize the property of defaulters. Governments have the right to raise revenue, exploit resources, and regulate financial affairs, when necessary by force.

It's not clear from the Talmud whether DMD has any applicability outside of property issues, such as immigration. We'll have to first understand how it works, and then see how far it applies.

DMD may mean that, within the rule of law, all property within the territory of a sovereign is held at the sovereign's will, and can be transferred whenever and by whatever means the sovereign sees fit. This approach requires us to define what constitutes the "rule of law."

The sovereign's power may also be limited with regard to means. For example, some forms of taxation may be considered robbery even if they are legislated and enforced under due process of law. (Alternatively, halakhah may have a concept of "substantive due process," meaning that some outcomes per se violate due process).

The Talmud provides no source or justification for DMD. The two most-cited rationales are those of RAN in the name of Tosafot (Nedarim 28a) and RASHBAM (Bava Batra 54b), so let's turn to them.

RAN:

וכתבו בתוספות
דדוקא במלכי עובדי כוכבים אמר דדינא דמלכותא דינא
מפני שהארץ שלו, ויכול לומר להם:
'אם לא תעשו מצותי - אגרש אתכם מן הארץ'
אבל במלכי ישראל – לא,
לפי שא"י - כל ישראל שותפין בה
They wrote in the Tosafot
that DMD was said specifically regarding idolatrous kings
because the land is (the king's) and he can say to them:
'If you don't fulfill my commands – I will expel you from the land'.
But with regard to Jewish kings – this is not so
because the Land of Israel - all Israel are partners in it

RAN appears to ground DMD in power. The king owns all the land, and therefore has the right to tell anyone: "Obey my rules, or I will expel you." But why does might make right?

Rabbi Yekutiel Cohen, Av Beit Din of Ashdod, suggests (פסקי דין רבניים מתוך המאגר המקוון פס"ד רלה) that RAN constructs consent, even if it is consent under threat of exile. This builds on the halakhic principle תליוהו וזבין זביניה זבינא (Bava Batra 48a; lit. "If they hung him up and then he sold – the sale is a sale"), meaning that a coerced sale is legally valid if the seller received full value for the goods. However, the analogy is imperfect. In תליוהו וזבין, the intimidator threatens to take the goods and pay for them in full even if the seller refuses; thus in terms of objective value the seller cannot lose. Here, the sovereign threatens to remove the right of residence unless the subject agrees.

Moreover, under any theory, RAN's exclusion of the land of Israel seems incoherent. The partnership of all Jews in Israel is a theoretical construct; in practice, the Roman Empire, or whichever empire held sway in the Land of Israel in RAN's time, had the same power of expulsion there as it did elsewhere. So if power is the basis of DMD, why shouldn't it apply in Israel the same way it does everywhere else? Even if we accept Rabbi Cohen's understanding of RAN, Jews in Israel would proffer their "consent" under the same threat.

The answer must be that RAN's DMD is not grounded in power per se, but rather in **legitimate** power. Because the sovereign has the **right** to expel, therefore the sovereign has the **right** to set conditions for non-expulsion. If the sovereign has no right to expel, any conditions it sets for non-expulsion are simple extortion.

This understanding generates three new questions. First, what gives the sovereign the right to expel? Second, is that right unlimited and arbitrary, or bounded in some way? Third, does the right to set conditions create a duty of obedience to those conditions?

Astonishingly, there seems to be little if any discussion in our tradition of the first question.

I suggest that RAN must believe that property rights in Israel **precede** the establishment of government authority, whereas property rights elsewhere are **subsequent** to that establishment.

Outside of Israel, he adopts a Hobbesian approach in which all property rights are conceded to the Leviathan state at its formation, in exchange for the state's prevention of the otherwise inevitable "war of all against all." Individuals who live in the territory of a sovereign only have such property rights that the sovereign chooses to allot them.

For Jews in Israel, land-ownership and the right of residence are granted by the Torah/Constitution, and therefore, a sovereign state constituted by the Torah is bound to honor that right. (However, RAN might apply DMD to a non-Torah state with practical sovereignty over the Land of Israel, unless he believed that non-Torah sovereignty in the Land is by definition impossible.)

An alternative reading of RAN is that his purpose here is only to explain why DMD applies to Jews when they are voluntary noncitizen residents in the territory of a sovereign outside the Land of Israel, not to explain why it applies to governments generally. He may have an entirely different basis for the authority of government over citizens, under which all citizens in all countries have property rights that precede that authority.

RASHBAM:

כל מסים וארנוניות ומנהגות של משפטי מלכים
שרגילים להנהיג במלכותם –
דינא הוא
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא
ואין למחזיק בממון חבירו ע"פ חוק המלך הנהוג בעיר משום גזל.

All the taxes and levies and standard practices of the mishpatei melakhim
that they are accustomed to enact in their kingdoms –
are law
because all the bnei hamalkhut *willingly accept upon themselves the* chukim *and* mishpatim *of the king so that taking possession of someone else's money on the basis of the king's chok practiced in that city is not an issue of robbery*

This is sometimes read as an endorsement of democracy. But RASHBAM knew perfectly well that the Persian Empire of Shmuel's time and place was not a democracy, and therefore he cannot have read Shmuel's statement as applying only in democracies.

Rather, RASHBAM must also be endorsing a social contract model of constructive consent (assuming that he paskens like the position that he is explaining). However, his limitation of DMD to the bounds of "*mishpetei hamelakhim*" and "standard practices" show that his social contract is not an absolute surrender of individual rights, but rather that the sovereign's powers are bounded by consent. So he is more Locke than Hobbes. (Note that RAMBAM's formulation of consent theory in Hilkhot Gezeilah 5:18 requires separate analysis.)

The upshot is that both standard approaches to DMD ultimately rest on a social contract theory of government authority. The positions of rishonim roughly correspond to the options developed by philosophers as to whether there are rights that all sovereigns must respect even if a majority of their subjects agrees to cede them. The universally accepted "rule of law" condition for DMD means that the state must regardless respect all rights enshrined in its own constituting. (Where there is no formal constitution, the scope of such rights, if any, are determined by criteria such as "*mishpetei hamelakhim*.")

Social contract theories naturally apply outside the realm of property, so DMD should as well, even though the Talmud only cited it in property contexts. RASHBAM and RAN's formulations offer no basis for limiting DMD to financial affairs. See also for example Terumat HaDeshen 341, who explicitly extends DMD to אנגריא, or impressment.

Note that Rav Shaul Yisraeli ("Maaseh K'biya"; see also Amud HaYemini 32) held that nonJews – but not Jews – can cede all their rights to the state, including their right to life, and therefore that DMD can justify the secular state in sending soldiers to die and in carrying out capital punishment. Rav Shlomo Yosef

Zevin ("Maaseh Shylock") disagreed, holding that all human lives belong to G-d and may not be voluntarily sacrificed except in fulfillment of His will.

Rav Yisraeli's approach is untenable in a pluralistic state. But there is room to discuss whether Rav Zevin is the only alternative, or whether we ought instead to extend Rav Yisraeli's approach to Jews as well.

All social contract approaches raise the question of why social contracts are binding on subsequent generations.

One possible answer is that they aren't, at least not fully; they create legitimacy for the state, but not duties for individuals. For example, a tax collector who seizes hidden property under due process of law is not a robber, but the taxpayer's attempt to hide the property was not theft. Taking it one step further, the gaoler who imprisons the tax cheat is not a kidnapper, but the cheat has no obligation to surrender, and is not forbidden to escape. However, it is in our collective self-interest to uphold and support the government's legitimate authority.

A second answer is to posit an a priori basis for the bindingness of contracts, even across generations. Many rishonim defend the authority of Torah on such a basis.

A third answer is that the social contract within any given sovereign is renewed by default until a majority of the population actively rebels.

A fourth answer is that enabling effective political sovereignty is an ethical duty, because the alternative is איש את רעהו חיים בלעו. This is suggested, in different ways, by Rav Cohen and by Rav Asher Weiss.

Some of these answers may grant the state halakhic authority, or create halakhic duties to the state, in ways that are independent of DMD.

From a religious perspective, it may make an enormous difference whether obedience to government authority is a matter of pragmatism, or of religious duty.

To this point, we've functioned as if the only issue for individuals is whether or not to obey. But there might in some cases be a third option, namely a duty to disobey. Even in a Hobbesian approach, the right to defy the sovereign's will on matters of conscience may remain, because one cannot waive one's obligations to a higher Sovereign. So the nature and basis of a religious duty to obey also matters greatly, because we need to weigh it against other such duties.

We also need to make clear that DMD may not be the only halakhic basis for governmental authority. In a democracy, for example, it may be that all citizens (at least) are considered partners (as RAN suggests regarding Jews in the Land of Israel). In some democracies, as Deborah Klapper suggests, all citizens may be co-sovereigns. See in this regard Sukkah 30a, where Rav Yochanan in the name of Rabbi Shimon bar Yochai explains that G-d hates stolen sacrifices, even though all property really belongs to Him, because the king must set the example of obedience to the law.

Teshuvah Excerpt - Bracha Weinberger

Dear Y.Y.,

The commandment to love the *ger* (stranger) is mentioned 36 times in the Torah (according to Rambam). Our forefathers were "strangers in a land not their own," and this experience should lead us to understand the importance of kind treatment and providing for *gerim*. You too are a *ger*-- a person who inhabits a land that is not legally recognized as your homeland. In this painful ordeal, perhaps you can take some comfort in the fact that you are not the first Jew who has taken this path, rather you are walking in the history of thousands of years of ancestors.

Fully addressing your situation requires analysis of a number of discrete halakhic issues:

1) whether *dina dimalchusa dina* (DMD) applies to your case.
2) whether, if it applies, it generates not just a right of enforcement but also an obligation of obedience
3) If an obligation of obedience, whether that obligation prohibits only active disobedience, or even passive failure to self-report
4) the morality of immigration law, and whether that affects DMD
5) halachic factors outside of DMD

The central sugya about DMD (Bava Batra 54b) does not explicitly state why governments have the power to make laws that are binding on Jews. However, many *Rishonim* provide explanations.

a) Ran (to Nedarim 28a) writes:

מפני שהארץ שלו, ויכול לומר להם:
"אם לא תעשו מצותי - אגרש אתכם מן הארץ"
because the land is (the king's) and he can say to them:
"If you don't fulfill my commands – I will expel you from the land"

Ran assumes that the power of DMD is derived from ownership and power over the land, which generates the right and power to expel someone if they wish. The United States government also has this power under The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). **Even though *Ran*'s abstract government has the power to remove anyone, while IIRAIRA allows the deportation only of illegal immigrants, the *Ran's* understanding of DMD is applicable to you because you are subject to deportation under IIRAIRA.**[4]

b) Rashbam (to Bava Batra 54b) writes:

כל המסים וארנוניות ומנהגות של משפטי מלכים
שרגילים להנהיג במלכותם –
דינא הוא,
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא
All the taxes and levies and standard practices of the mishpatei melakhim
that they are accustomed to enact in their kingdoms –
are law
because all members of the kingdom willingly accept upon themselves the king's laws and regulations –
therefore they are absolute law

Rashbam explains that the laws and customs of governments are binding because the people accept them upon themselves. This might lead you to the conclusion that law is binding only on citizens, (and perhaps only in democracies). However, Rashbam does not differentiate between citizens and residents. Therefore, it seems that he is not referring to what we call "consent of the governed" in 21st century democracies, but

[4] RABBI KLAPPER NOTE: This may generate the counterintuitive conclusion that according to RAN, illegal aliens in the US are bound by DMD, but citizens are not.

rather to a coerced form of consent - the choice to live in any governed land automatically entails consent to the laws of its government. It follows that anyone who lives within the geographic jurisdiction of a government, including illegal immigrants, is bound by its laws.

Note that Jews in Europe were non-citizens before Emancipation. Nonetheless, they viewed *dina dimalchusa* as binding. Therefore, I do not believe it is logical to differentiate within Rashbam's reasoning between citizens and non-citizens. Rather, halacha deems voluntary presence in a country to bet consent. Therefore, since you remain here willingly, the government has the right to enforce American law on you.

Ran and *Rashbam* each provide a source for governments' right to make laws, but do not explicitly address the extent to which people are obligated to follow those laws. **However, I believe that we must be prohibited to actively transgress any law that the government has the halakhic right to enforce, because otherwise we would have anarchy or violence. Similarly, we must fulfill any active obligation that the law imposes, such as paying taxes. However, passive failure to obey a law that imposes no active obligation is not a violation of DMD.**

Since remaining in the country is only a passive violation of the law, you are not violating *dina dimalchusa* according to RAN and RASHBAM. However, you would not be permitted to obtain false identification, as that would be an active violation of the law.

Teshuvah Excerpt - Talia Weisberg

Regardless of what I may have taught you in high school, I am not at this point in my life convinced that the halakhic principle of dina d'malchusa dina applies in modern democracies. I am compelled by the school of thought advocated by the Rashba and Ran, both of whom believe that dina d'malchusa dina only applies in countries when the king owns the land itself. This is obviously not the case in the US.

However, it is worth noting the divergent opinion of the Rambam and Rashbam, that dina d'malchusa dina applies in countries where the king derives his power from the consent of the people. Although the US is an indirect democracy, and it could be argued that the people only indirectly consent to the president (especially in an election where the winner lost by three million popular votes), I think it is fair to say that a democratically elected president rules via the consent of the people, and thus by this logic, dina d'malchusa dina applies.

Assuming that we hold like Rambam and Rashbam, does dina d'malchusa dina make US immigration law halakhically binding? Some opinions hold that it covers only financial, land-, or tax-related laws, and it would be a stretch to include immigration law under any of those rubrics. Rav Asher Weiss however seems to conclude that the president has the halachic authority to enforce all of the laws of the country. That would obviously include immigration law. This would mean that the public has the halachic obligation to abide by US law on immigration status, absent a serious conflict with other halachic principles or with a moral code.

If we hold by Rav Weiss, the next question is whether the public is halachically required to adhere to a law that is clearly absurd and/or immoral. To take this from the abstract to the concrete, I believe that any thinking person would agree that your legal situation is both absurd and immoral. It is just unthinkable to deport someone to a country where they have no social or familial connections and they do not have any knowledge of the language or culture, and also unthinkable to rip someone apart from the only life they have ever known, especially when they are living an upstanding and respectable life. And especially when laws have since been passed that would obviate your situation!

I argue that the public is not halachically obligated to uphold absurd and/or immoral laws. Given how shaky the halachic grounds of dina d'malchusa dina are in the governmental context in which we live, and how many meta-halachic principles we have about creating a just society and a world which is fair and kind, I do not think there is any space for absurdity or immorality in this halachic world. So, I do not believe that you have any sort of obligation to self-deport, nor do you need to believe that you are living in a state of sin as long as you live here without holding citizenship. You were thrust into this situation due to no fault of your own, and I don't think you have any halachic obligation to pursue citizenship in any specific way.

Teshuvah Excerpt - Avi Sommer

(Translated from Hebrew by Rabbi Klapper)

The two standard approaches to DMD are as follows:

a) RASHBAM to Bava Batra 54a writes that the rationale behind DMD is that "all the *bnei hamalkhut* willingly accept upon themselves the *chukim* of the king and his *mishpatim*; therefore it is absolute *din*."

b) RAN there writes that the rationale of DMD is that the land is the king's and "he is able to tell them: 'if you do not do my *mitzvot* – I will expel you from the land'.

In an opinion written as a member of the Beit Din Rabbani of Ashdod (insert cite), R. Mordekhai Ralbag writes:

"The reason that RAN and those with him offer a rationale that disagrees with the rationale offered by RASHBAM is that in countries where one cannot say that they have accepted upon themselves the *dinim* of the *malkhut*, meaning that the government is not democratic and chosen by the people, but rather, as is the practice in many states, the king governs the land on the basis of his being a descendant of the royal family, and the monarchy is dictatorial, it follows (from Rashbam) that the people never accepted upon themselves the *dinim* of the *malkhut* – that is why RAN and those with him chose as the rationale for DMD that he can expel them from his land. (From here we learn, as we argued above, that in such (non-democratic) circumstances one cannot say that they have accepted upon themselves the *dinim* of the *malkhut*)."

Since Yonatan is not a citizen and is not permitted to vote, and therefore does not participate in the democratic governance of the US – one cannot say that he willingly accepted upon himself the *chukim* of the US. Therefore, if we understand RASHBAM as R. Ralbag claims that RAN understood him, DMD does not obligate Yonatan to obey the *chukim* of the US.

However, R. Ralbag's interpretation is not at all consistent with the historical context of RASHBAM's opinion. RASHBAM was attempting to explain why DMD applied to the *chukim* of the states where most Jews of their times lived. Therefore, since most such states were not democracies, it is impossible to say that RASHBAM thought both that DMD requires the consent of the populace **and** that consent of the populace exists only in democracies. Therefore, we cannot exempt Yonatan from DMD on the basis of this line of reasoning.

However, perhaps we can exempt Yonatan on the basis of a different line of reasoning that arises out of RAN. According to RAN, the rationale for DMD is that the government can say "If you don't do my *mitzvot*, I will expel you from the land." The obligation to obey the law is transactional, an exchange for permission to stay in the government's territory. But in our case, the government will expel Yonatan regardless of whether he keeps its mitzvot! Therefore, he is exempt according to RAN.

However, I do not wish to base my conclusion entirely on RAN, as perhaps the Halakhah follows RASHBAM.

Several reasons for exempting Yonatan emerge from other opinions written by members of the Ashdod Beit Din in the same case.

1) RAMO Choshen Mishpat 369:11 writes:

"We don't say DMD except with regard to matters that provide the king with a benefit or that perfects things for the populace."

How does one determine whether a particular law meets those criteria? Dayyan Mikhael Tzadok cites a decision of the High Rabbinic Court which excludes the entire framework of Israeli labor law from DMD:

"It seems that of all the legal frameworks in the state, the framework of labor law is the one that most expresses the ideology of its legislators, and it follows naturally, the ideology of those who judge according to it. True, the extent to which the laborer is protected in Israel is less than that which exists in actually communist or socialist states, but certainly it also differs from that in a capitalist state. The fact of differences among states teaches that the source of these laws is more in outlook than in perfection for the populace."

"Perfection for the populace" here refers to RAMO's "perfects things for the populace." According to this opinion, a law made for ideological reasons is not considered to be made for the perfection of the population, and therefore is not included within DMD.

If any collection of laws in our society is more ideological than the framework of labor laws in Israel, it is certainly the framework of immigration and customs law. It follows that this opinion excludes these laws from DMD even for citizens, let alone for Yonatan.

However, the exclusion of ideological laws from DMD does not seem correct to me. If we adopt this standard, how can we reliably know whether or not any specific law is included within DMD? Legislators generally don't acknowledge that the basis of their legislation is pure ideology, rather they claim that their purpose **is** the perfection of things for the populace, and how can we know their true intention?! Moreover, in democratic countries, laws are made by a legislature with many people in it, and those voting for it can have differing motivations, some ideological and some not, so whose intentions are controlling for the purpose of DMD?!

Therefore, this rationale is not a sound basis for excluding immigration and customs laws from DMD.

2) Chief Judge R. Yekutiel Cohen's opinion for the Ashdod Beit Din states:

"Now, as I evaluate this, it seems to me that our issue is not at all connected to everything said about DMD, since all the *dinim* stated in Shulchan Arukh about DMD relate to matters regarding which "the government insists on" implementing "the government will" via the government's "executive component," and that are in fact the way that government's populace behaves, which explicitly indicates their acceptance, so that no individual is permitted to separate from the collective and create a separate *din* for themselves, and therefore they are absolutely obligated to the DM."

R. Cohen contends that DMD does not obligate obedience to laws that the government is not enforcing. On this basis, he concludes that the Charedi sector has no obligation to obey the framework of labor laws in Israel, because the government does not enforce those laws on that sector.

It therefore seems that R. Cohen holds that DMD does not obligate any sector of society to obey laws that the government is not enforcing **on its members**. We can therefore raise the possibility that because the US has not so far tried to deport Yonatan, it is not enforcing immigration law on him, and he is therefore not obligated by DMD to self deport.

But this conclusion would be incorrect, for two reasons. First, it is not clear that R, Cohen intended to go so far as to say that if the government chooses not to enforce a law on an **individual**, that individual is not bound to obey it. Also, perhaps the US is simply unaware of Yonatan's presence, and would deport him immediately if it became aware.

3) In Choshen Mishpat 369:8, Mechaber writes:

"The general principle of the matter is:

Any *din* that the person with authority legislates for all, rather than for an individual alone, is not robbery; but anytime (the person with authority) takes from a specific individual, not in accordance with a publicly known law etc' – is robbery.

RAMO adds:

“if the king made a law for those of one craft, e.g. he made a law for usurers – some say that we do not include this within DMD, since it is not legislated for all.”

From this it appears that DMD gives authority only to laws that apply equally to all. It seems to me that US immigration and customs law are not equally applied in the necessary sense, because their enforcement is affected by racism. (For the facts of racism in the enforcement of these laws see https://projects.iq.harvard.edu/files/deib-explorer/files/aranda_and_vaquera.pdf.) Because the enforcement of both immigration and customs is harsher for nonwhites than for whites, DMD does not apply to them, and it follows that Yonatan is not halakhically obligated to self-deport.

RAMO introduces this position as “some say," but Rabbi Cohen writes:

“Although RAMO wrote this in the name of “Some say," he brought no conflicting position, and his meaning is that it is the consensus halakhah.”

This seems correct to me. Moreover, even if RAMO’s statement regarding crafts cannot be generalized to other subsections of society, let alone to individuals, one can rely on Mechaber’s formulation that only “a *din* that the person with authority legislates for all” is included within DMD, since the Mechaber wrote this as his own position.

One could challenge this by saying that despite the racist enforcement of immigration and customs law, these laws are not **written** in a form that explicitly discriminates, and it is the written form that matters for DMD. These laws as written don’t relate to race at all, and therefore, they can be considered ‘laws that apply equally to all’ and included within DMD. After all, the language of Mechaber is “Any *din* that the person with authority legislates for all," and not “any *din* that the person with authority enforces in a manner completely equal for all.”

We can reply that in Mechaber’s time there was no clear distinction between the legislative and executive arms of government. This distinction is a type of Separation of Powers, and the idea of separation of powers is the creative contribution of Montesquieu, who lived after Mechaber. Therefore, the law as written, executed, and enforced are all ‘law’ in the framework of Mechaber, and the unequal enforcement of US Immigration and Customs law suffices to exclude it from DMD.

4) RAMO (cited above) writes in 369:11 that:

“We don’t say DMD except with regard to matters that provide the king with a benefit or that perfect things for the populace."

I wrote above that we should not exclude ideological laws from DMD on the basis of this RAMO, because we cannot know the motivations of any particular legislator. The same logic indicates that when RAMO writes “perfects things for the populace," he means to judge not the intent of the legislator but rather the effect of the legislation. This also fits well with his language, which speaks of effect rather than intent.

But US Immigration and Customs law does not lead to good for the citizenry of the US. On the contrary, undocumented aliens, who enter the US illegally, cause economic growth. For the facts on this, see https://www.unidosus.org/issues/immigration/resources/facts and https://phys.org/news/2020-05-economic-benefits-illegal-immigration-outweigh.html.

If you were to claim that they are to perfect things for the populace and profit the US, because the present situation benefits the US, we can respond that the proper criterion is not whether they have a positive impact currently, but rather whether they would have a positive impact and perfect things for the populace **if everyone were to follow them consistently**. It’s true that the partial enforcement that the US currently engages in leads to economic growth, but universally effective enforcement would be economically damaging, Therefore, these laws should not be considered as “perfecting things for the populace. Therefore, they are not included within DMD.

On the basis of these four arguments, I conclude that Yonatan need not self-deport.

Teshuvah Excerpt - Zack Orenshein

Following secular law is a serious and far-reaching Jewish obligation. While the Talmudic *phrase dina demalkhuta dina* ("the law of the government is law', or "DMD") can be interpreted as referring exclusively to taxation, some of the most prominent voices in Jewish law over the past few centuries have clarified that Jewish law obligates Jews to follow various other types of secular law that enhance society, including copyright laws, traffic laws, sanitation laws, and many others.[5]

There are at least two reasons for this. First, government policy can elevate a society in ways that are more than the sum of individual choices. That's what allows for our modern day infrastructure, economy, and general sense of security. This is why the Torah legitimizes the power of kings. Some leading rabbis went so far as obligating paying taxes fully even when Jews were being taxed more than those around them.

Second, the Torah may have a general interest in encouraging respect for human authority as a model for our relationship with God.

However, our obedience to human authority cannot be allowed to compromise our obedience to Divine authority. For example, a child is not supposed to obey a parent when the parent's demand would compromise the child's observance of another Jewish law. Similarly, secular law is not binding when it contradicts a Jewish law.[6] Throughout our history, Jews have risked their lives to defy governments that banned circumcision, Shabbat observance, and the like. Following authority is only a value if it can claim some sort of Godly semblance.[7]

I believe it is clear that in our case, we should assist Yonatan in evading the law until his status is properly settled. Following the law would cause him to leave his home against his wishes and force him to live in a specific alternative location. That is tantamount to kidnapping and is absolutely prohibited according to Torah law.[8] It is thus likely that we do not view such a law as within the proper sphere of government. Even if government has a right to make this law, I am confident that we do not have an obligation to obey it with regard to Yonatan. Furthermore, if someone is kidnapped, there is a Jewish obligation to save that person.[9] We must therefore do everything we can to prevent Yonatan from being deported by the

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[5] See התעוררות תשובה ד:כד and Rav Asher Weiss "וישב ממנו שבי': דינר דמלכותא דינא"

[6] שך על שולחן ערוך חושן משפט הלכות גניבה סימן שנו סעיף ז ס"ק י: "דלא אמרינן דינא דמלכותא מה שהוא נגד דין תורתינו";
התעוררות תשובה ד:כד: "ונראה הגם אם חק המלכות נגד דין התורה - אין אנו פוסקים דינא דמלכותא"
Also see רשבא as cited by טור חושן משפט סימן כו, where he says regarding following secular law when it contradicts Torah law: נ"ל דאסור לפי שהוא מחקה את העכו"ם וזהו שהזהירה התורה."

[7] Although the Rambam rules in Hilkhot Melakhim Chapter 3 that the king cannot tell people it is forbidden to do a mitzvah, the Rambam also rules there that the king himself can do severe issurim such as killing. He also says that the king can tell an individual to go to a specific place, which seems to contradict my argument that deporting Yonatan would violate לא תגנוב. However, this allowance seems to be limited by their logic which the Rambam provides. He says the king can do these things for the purposes of: "לְתַקֵּן הָעוֹלָם כְּפִי מַה שֶּׁהַשָּׁעָה צְרִיכָה"(to improve the world according to what the time requires) and "לְהָטִיל אֵימָה וּלְשַׁבֵּר יַד רִשְׁעֵי הָעוֹלָם (to instill fear and the break the hand of the wicked people of the world.)" While these would both apply to many other cases of deportation and incarceration, neither goal is accomplished by deporting Yonatan, and thus the government should not have the right to do so.
This is reinforced by Meyuchas LiRitva's formulation that DMD applies only to laws that were "accepted as the law of kings from the first kings." This seems to mean that a law has to have a certain level of universal acceptance for Jewish law to give it weight. The specific law which concerns us now is a fluke of the system and it would likely seem absurd to most of the world. Thus, it would not be binding even though other cases of deportation would.

[8] The law of kidnapping (Lo Tignov) can be violated even without a sale of the victim. This is clear in the Rambam who presents it as a prohibition separate from that of selling a person:
כל הגונב נפש מישראל, עובר בלא תעשה: שנאמר "לא תגנוב" (שמות כ:יב_דברים ה:טז). פסוק זה, האמור בעשרת הדברים, הוא אזהרה לגונב נפשות. וכן המוכרו - עובר בלא תעשה, שזה בכלל "לא יימכרו ממכרת עבד" (ויקרא כה:מב). ואין לוקין על שני לאוין אלו, מפני שהוא לאו שניתן לאזהרת מיתת בית דין, שנאמר: "כי ימצא איש גונב נפש" (דברים כד:ז), ומיתתו בחנק.

[9] Rambam in Mishneh Torah Matnot Aniyim 8:13 teaches that this commandment applies even if the captive's life is not obviously in danger
פָּעַם רִאשׁוֹנָה וּשְׁנִיָּה - מְצָוָה לִפְדּוֹתָן; שְׁלִישִׁית - אֵין פּוֹדִין אוֹתָן, אֲבָל פּוֹדִין אֶת הַבָּנִים לְאַחַר מִיתַת אֲבִיהֶן.
וְאִם בִּקְּשׁוּהוּ לְהָרְגוֹ - פּוֹדִין אוֹתוֹ מִיָּדָם אֲפִלּוּ אַחַר כַּמָּה פְּעָמִים.
However, it seems that this mitzvah classically applied in circumstances where at least the captive's quality of life would be severely compromised, such as when their captors had complete control over the clothes they wore and the food they ate. Therefore, I do not think we should view Yonatan's situation as a formal mitzvah of pidyon shivuyim. However, we should rather learn from pidyon shivuyim that Jewish Law expects us to help fellow Jews avoid being taken away against their will. We should feel a responsibility to help members of our community in those kinds of situations. Following the law is an important value, but so is protecting the autonomy and quality of life of others.

government, even by means of obtaining a fake ID for him (so long as it is obtained in a way which does not harm others or put Yonatan at greater risk if he is caught).[10]

[10] While Rav Sheishet in the Talmud Tractate Bava Metziah 73b implies that kings own their citizens as if they were slaves, this does not seem to give the government the right to deport people who do not pose a threat to society. The law of servants in the Shulchan Aruch Yoreh Deah 267:80 states that slaves who are sold to non Jews are automatically considered free.

הַמּוֹכֵר עַבְדּוֹ לְעוֹבֵד כּוֹכָבִים אוֹ לְגֵר תּוֹשָׁב - יֵצֵא לְחֵרוּת' שֶׁאִם בָּרַח מֵהַגּוֹי - אֵין רַבּוֹ יָכוֹל לְהַשְׁתַּעְבֵּד בּוֹ עוֹד/ וְאִם לֹא בָּרַח, קוֹנְסִים אֶת הָאָדוֹן לְפִדּוֹתוֹ עַד עֲשָׂרָה בְּדָמָיו וְלִכְתֹּב לוֹ גֵּט שִׁחְרוּר לְהַתִּירוֹ בְּבַת חוֹרִין.

Therefore, even for the Ritva who considers the king as actually owning the people of his land as slaves, it seems that deportation of a person to a foreign government would obligate the Jewish community to intervene.

Furthermore, Meyuchas LiRitva says that the government's right to enslave one person to another comes from the fact that it is considered generally reasonable for a king to do that, for example where someone failed to pay their taxes. That criterion is not met here. The Meiri similarly seems to view it this way, since he describes this interaction as similar to that of a boss and employee ("ולהשתעבד בהם עד שיפרעו מהם מצד שכירות מלאכתם") rather than owner and slave. This is much less compatible with a claim that the government owns people to the extent that it can deport them without necessity.

Teshuvah Excerpt - Sara Schatz

1. Does this specific immigration law fall under both *takanat hamedinah* and the Rashbam's 'implied consent' theory?
2. Is false identification *halachically* permissible in general?

From what I understand about this law, I have a hard time saying that it is considered "*takanat hamedinah*"; rather, the Child Citizenship Act of 2001, which was intended to prevent and correct situations such as yours, is much more *takanat hamedinah*.

However, Rashbam's 'implied consent' thesis is a compelling argument to state that in normal circumstances, you cannot simply lie to the government and administer false papers. A democratically elected government enacted this rule, and therefore it has validity**.** Such deceptive behavior may also violate it is *genevat da'at, Chilul Hashem*, and other prohibitions beyond the scope of *dina d'malchuta*.

Therefore, the only ground for permitting YY to obtain and use false identification would be if we considered your situation to be one of "*pikuach nefesh*." Sanhedrin 74a identifies three primary exceptions to *pikuach nefesh*: idol worship, forbidden relations, and murder. While you are no under a specific and immediate threat, the Chazon Ish rules that we generally err towards the side of caution in the case of epidemic or war, and perhaps we can regard deportation Colombia as the equivalent because of its high violent crime rates, especially as you would be an utter stranger there.

However, the Shulchan Aruch rules that though one may damage property or steal to save one's life, one must compensate the owners. If your deceptions cause an individual or the government losses, you must do your best to compensate them for those losses. However, *Shulchan Aruch HaRav* states that the compensation must be paid "whenever he will have the capacity to do so," and *Shut Maharam Schick* notes that one is **allowed** to steal to save one's life even if one may never be able to pay the compensation.

Regardless, **you should wait to obtain false papers until there is absolutely no other option**. From what I understand, you just found out about your status. There are honest way to live in the US as an undocumented resident; for example, you can obtain a special driver's license. If you continue to be conscientiously law-abiding, it seems highly unlikely that you will be deported anytime soon. In my opinion, you are not yet in a status that can be considered *safeik pikuach nefesh*.

Teshuvah Excerpt - Batsheva Leah Weinstein

Dear Yonatan,

Thank you for reaching out to me. I cannot begin to express the pain that I felt for you while reading your and your mother's letters. Of course I remember you well from high school, and I remember your passion and love for America. It must have been a terrible shock for you to discover this. It is a testament to your religious caliber that you decided to ask a *shayla* about the matter instead of just doing what the lawyers tell you to do. *Dina demalchusa dina* is an issue that, unfortunately, many people often overlook. I am humbled that you chose to share your struggles with me. I ask that you share my response with your parents. I will *b'ezras* Hashem answer all of you together, addressing specific points that you or your parents made individually.

Dina demalchusa dina (henceforth DMD) is among the Torah concepts that have taken on new meaning in modern times. Throughout most of our history, Jews were considered second class citizens wherever we lived. We lived mostly mostly in semi-autonomous communities and dealt with the government as individuals only when necessary. We were taxed unfairly and in other ways treated differently, but were also mostly left to our own devices within our close knit, insular communities. DMD was a concession. It was a *halacha* that required obedience to certain government rules even when the government hated us, tried its best to keep us downtrodden, or perhaps even to destroy us.

In the United States, Jews are treated as equal citizens and are politically integrated into general society. We regard most laws that the American government makes as benefitting not only society in general, but also us as Jews in particular.

If I understand correctly, your question has two parts. The first is if you are obligated to turn yourself in to the government as an undocumented citizen. The second is if you are allowed to purchase fake documents that say you are a citizen.

Your first question depends on four core issues:

1. Does the rule of DMD apply in America?
2. Are you, as a non citizen, obligated by DMD to obey government laws?
3. Does DMD give the government the authority to enforce laws unrelated to monetary matters?
4. Does DMD obligate citizens to actively obey laws, or rather only give the government the right to enforce them? Or in other words, does DMD allow for "civil disobedience" (a term which we will have to define later)?

The Talmud cites DMD in four places, each time in the name of the *Amora* Shmuel. Since it is not challenged, the *poskim* regard it as a halachically binding principle.

The four in short:

1. Nedarim 28a - DMD means that certain government taxes are valid, and it forbids lying to someone collecting these taxes, unless they are collecting an unlimited amount and/or are not government-authorized collectors.

2. Bava Kama 119a - adds a third modifier to the above case - one may to a non-Jewish tax collector (on the assumption that his assessment of your liability will be unjust or corrupt, since he is not part of your community.). The Gemara then brings a number of other examples relating to the king's right to tax, stating that a tax that the king, or one of his messengers, collects, is not considered theft, at least to the extent that a Jew who then took possession of the tax is not considered to be in possession of stolen property.

3. Bava Basra 54b – DMD gives halakhic validity to the government's regulation of real estate sales, according to Abaye. Rav Yosef seems to disagree.

4. Gittin 10b – DMD validates documents produced by government courts in financial matters.

Why should the government have a right to tax? The two main schools of thought are the Ran and Rashba on one hand, and Rashbam and Rambam on the other. The latter position is codified in Shulchan Arukh.

I suggest that according to both opinions, DMD would apply in the United States of America. Regarding the consent theory, American citizens clearly accept the authority of their government and its laws. Regarding the expulsion theory, as a general rule the American government cannot expel citizens. They can, however, force one to sell them land through a law called eminent domain. Thus the government does to some extent own the land.

I acknowledge that this explanation is somewhat of a stretch, and I will therefore explain what I believe is my underlying rationale. The Mishnah in Avos says that we should *daven* for the welfare of the government because "אלמלא מוראה של מלכות איש את רעהו חיים בלעו" - if not for the fear of government, each man would devour his friend. Without government there would be no order in the world. Having an authoritative government is in the best interest of all people of a land who wish to live a peaceful life. I cannot imagine that any of the Rishonim would say that any form of government is per se not authoritative. Therefore, even though I recognize one can explain the Ran so that DMD doesn't apply), I believe it is more honest to explain it in the way that I did. Regardless, I think that certainly according to the consent theory DMD would apply in America.

2. Are you, Yonatan, as a non citizen, obligated under the principle of DMD to obey government laws?

This is a complicated question, as the concept of citizenship does not really exist in *halacha*. However, we see in practice that even non-citizens are expected to follow the law of the country they are in. Furthermore, in the times of the Gemara and Rishonim Jews were never citizens, and yet DMD still applied. Thus the law of DMD seems to apply to residents of a land and not only to those with official citizenship.

Let us now examine the law regarding illegal immigrants to determine its specific ramifications. The law states that one is not allowed to illegally immigrate to the United States. What happens once one has already done so is unclear to me. All that the law has done is establish you as an illegal immigrant. Specifically, DMD enables the government to create immigration laws and establishes them as binding. It is, however, unclear to me exactly what the law does practically. It seems to do no more than establish certain people as being illegal immigrants with no particular ramifications in terms of their obligations to the government.

Therefore, I think that it is *halachically* allowed for you to remain in the United States, as DMD does not require you to leave.

However, there are certain monetary issues that we must take into account. You said that you plan to continue to pay taxes; I believe that this is essential, as not doing so would constitute stealing from the government.

I will now address your second question: are you allowed to purchase false documents claiming that you are a citizen?

Here there are a number of moral issues that come into play aside from DMD. You might on some occasions receive a benefit to which you are not entitled, or receive money under false pretenses. You might violate *geneivas da'as*, causing someone to think something is so when it is not, which Rambam rules applies to both Jews and non Jews. You might unfairly place an employer in a compromised position.

None of this qualifies as civil disobedience. Civil disobedience is publicly showing that you think the government policy is wrong, in hopes of forcing the government to change their laws for the betterment of society as a whole. In this case you would be doing something illegal secretly and for you specifically.

Mrs. Wood, you mentioned that many people in our community hire illegal immigrants and pay them under the table. I recognize that this is true, and it very much upsets me. By doing so people are literally evading taxes, which is stealing from the government and certainly not allowed under DMD.

You also mentioned that this law is immoral. I am not convinced that this matters; the government still has the ability to make the law. The ramifications of the situation might be immoral, but the law itself does not seem to me to be immoral. Every country has a right to protect its boundaries.

In addition, I think we must consider the issue of *chillul* Hashem. You, Yonatan, represent the Jewish people. To disobey American law in 2020 would cause Jews to be looked upon as dishonest and ingrateful to America.

Were this a life threatening case, perhaps I would rule differently. In this case, however, there are still ways to live. If making *aliyah* is something you've wanted to do, this is a good reason to do so. Assuming that you would like to remain in America, there are paths for you to become a citizen. To become a US citizen you must first have a green card. If you are planning to get married in the near future, you can apply for a green card as the spouse of a US citizen. If not, you can apply as an unmarried child of a U.S. citizen. Alternatively, you can apply to college and then obtain a student visa.

I understand that my answer is probably not the one that you wanted to hear. My heart truly goes out to you. Please be in touch and let me know if I can help you through the process in any way.

Sincerely,
Batsheva Leah Weinstein

Teshuvah Excerpt - Joshua Skootsky

Rashba, Ran, and Or Zarua base the principle *dina demalkhuta dina* (DMD) on the ground that the governing authority can say

אם לא תעשו מצותי **אגרש אתכם מן הארץ**[11]
*"If you do not follow my commands, **I will remove you from my lands**"*

Does this grant a King or government the right to evict anyone from lands that they control? Some believe that right makes might, but we believe "Not by might, not by power, but by My Spirit, sayeth the LORD of Hosts" (Zecharia 4:6).

It is true that a King or government can remove people from their country, in the sense that they possess the might or power to do so. Countries have expelled Jews, or in some cases, the Jews, in the course of human history. Kings and governments have done this. This does not make that right.

The true explanation of the Ran, Rashba, and the Or Zarua is that **all monetary matters related to land** must be paid to the government, such as a head tax for living on the land, and this is justified by explaining that the government has **the *halakhically* recognized authority to regulate monetary matters**. But there is no obligation to actually leave the land at the command of the King, because **such an obligation to follow secular law does not exist** as a *halakhic* or religious imperative.

The upshot is that *dina de-Malchuta* does not apply to the topic of illegal immigration. It's like asking the bowling alley if you can drive your Zamboni to Kansas. There's no application or relevance. The government certainly has the power, potentially, to enforce its laws and its own procedures of who is a citizen and who is a legal resident, but that isn't *dina de-Malchuta*. It may be prudent to follow the law, or to find a different *modus vivendi*, but ***no halakhic obligation*** to follow "the law" as written can be derived without rewriting Shulchan Arukh. Halakhah forbids speeding down a highway with disregard for human life. However, it is not halakhically forbidden to break the speed limit. It may be unwise. If ticketed, you would certainly have a *halakhic* obligation to follow the legal procedure of either paying the fine or contesting it in court. ***Halakhah* does not compel compliance ahead of government enforcement of its own laws** once we leave the realm of monetary laws, unless those laws have separate validity under Torah, for example if they save lives. I don't believe that if you break the speed limit, you should mail in the monetary value of a ticket to your local law enforcement, **and such a conclusion would be absurd**, although if a halakhic legal theory of *dina de-malchuta* is not carefully constructed, it could lead to exactly that absurd conclusion.

We cannot hand Jews over to a secular court to be judged for things that **the Torah has no concept of as a crime**, such as being an illegal immigrant. Moreover, the Torah tells us not to oppress the stranger, the *ger*, who is not like the *ezrach*, the citizen. So laws that oppress people who are in a country without citizenship are against what is explicitly written in the Torah, and ipso facto invalid.

Furthermore, as an "illegal immigrant," it is not clear to me what laws you violate by simply being here. It may be a violation of the civil law code, and in theory the government could choose to enforce that law by deporting such a person. If it were a felony, it could be construed as theoretically a crime against the public safety, and perhaps *halakha* or good judgement would treat the crime differently.

I contend that there is nothing against *halakha* about trying to live a normal life wherever you find yourself. This seems to be a bit surprising as a claim. Does *halakha* recognize "normal" as a value, and if

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[11] Ran to Nedarim 28a; see also Rashba to Nedarim 28a:
ופירשו בשם ה"ר אליעזר דדוקא במלכי אומות העולם אמרו דינא דמלכותא דינא ומשום דמצי לומר להו אם לא תעשו מצוותי אגרש אתכם, שהארץ שלו הוא.
and Or Zarua 447 to Bava Kamma, quoted by Beit Yosef CM 369:
"לא אמרינן דדינא דמלכותא **אלא בקרקע ובמשפטים התלויים בקרקעות כגון מכס**, שאומר לא יעמוד אדם בארצו, אם לא יתן מכס, וכדאמר בחזקת הבתים (ב"ב נה,ע"א) דאריסתא דפרסאי עד מ' שנין ואמר נמי דמלכא אמר דיהיב טסקא ליכול ארעא וגם כרגא דאקרקף דגברא, **שאמר לא יהא בארצי אם לא יתן כך, וכך והיינו טעמא דדיניה דינא**, שהארץ שלו הוא ואינו רשאי אדם שיעבור בארצו אם לא כמצוותו" (אור זרוע בב"ק ס' תמז,
וראה גם בב"י חו"מ שסט
ורמ"א שם סעיף ח

so, in what areas? I would like to provide detailed evidence that *halakha* answers "yes," and that the evidence directly related to economic activity ought to quiet any doubts.

The Gemara in Bava Metzia 112a notes that people endanger themselves to earn a living, climbing ramps and trees to engage in "normal" agricultural work.

"ואליו הוא נושא את נפשו" (דברים כד, טו)
מפני מה עלה זה בכבש ונתלה באילן ומסר את עצמו למיתה? לא על שכרו!?

Shulchan Aruch 248:4 notes that for three days before Shabbat, it is forbidden to join a camel caravan that will necessarily violate Shabbat as part of the *pikuach nefesh* situation of being in a desert. So it's ordinarily supposed to be avoided being in a situation where you will end up permitted to break Shabbat. But RAMO notes:

יש אומרים שכל מקום שאדם הולך לסחורה או לראות פני חבירו חשוב הכל דבר מצוה
Some say that in any case that a person is going for business, or to see his fellow – all these are considered "mitzvah activity," (and therefore it is permitted to join a camel caravan even within three days of Shabbat)

So normal participation in economic life is a *dvar mitzvah*, and there are even certain heterim or understandings that go along with that aspect of "being normal" or "living a normal life" that *halakha* recognizes.

Now, I could not help but notice the claim that sometimes people pay illegal immigrants in ways that avoid taxes. According to everything I have written, that is *asur*, and the people who do it are literally stealing from the government. As literal thieves, they have the halakhic status of *reshaim* and are forbidden to give testimony or serve as witnesses, including witnesses at a Jewish wedding, as the *passuk* says,

"אל תשת רשע עד."

Other issues, such as whether you would be safe in the country you would be deported to, must also be taken into account, especially during a global pandemic. It would be terrible to risk depression or danger in a foreign country that one was not prepared for unless there were no choice at all, and to travel now on the basis of an imagined *halakhic* obligation to follow non-monetary laws "as written," as imagined by non-lawyers and non-judges, would be the definition of *chasid shoteh*.

My answer: it is obvious that it is permissible halakhically to remain in America and try to live a normal life, and to the greatest extent possible find a *modus vivendi* that will be sustainable and workable.

Teshuvah Excerpt - Eliana Yashgur

כיצד אנו יכולים להתמודד עם האתגר של השגת הסכמה מושלמת? הבעיה נובעת מהקושי לגרום לכולם להסכים, ואפילו להבין מהי הסכמה. האם להיוולד במדינה באמת סימן שאתה מסכים לחוקיה?

כמה פתרונות אפשריים. יש עיקרון של זכין אדם שלא בפניו. הרב אשר וייס מעיר בדעת הרשב"ם: "אלא יסוד שיטתו בדרכו של הרשב"ם, דיסוד הלכה זו בהסכמת בני המדינה, ולא מהני אלא בחקים המקובלים במשפחת העמים ורוב בני המדינה דעתם מסכמת עליהם, ולא בכל חק שעלה על דעתו של כל מלך ומושל." **ניתן לטעון כי הסכמה היא לא על חוקים פרטניים אלא על הבנות מקובלות שיש לאנשים על מה רצוי בחברה שלהם.**

זה עשוי לתת לממשלות מרחב פעולה לקבוע חוקים לפי האינטואיציות שלהן התואמות את ההבנה הכללית הזו – במיוחד בדמוקרטיה ששם הממשלה מייצגת את העם.

(יש בתיאוריה פוליטית כמה כללים הבאים מתחום תורת המשחקים, כמו:

משפט האי-אפשרות של ארו, שאי אפשר לבוא להסכמה בחברה מבלי להפר לפחות עיקרון אחד מבין: קונצנזוס מושלם, אי-תלות באפשרויות מאחד שני, ושום מחליט אינו נכון יותר מהאחרים.

הכלל של קונדורסה מציינת שככל שגודל הקבוצה עולה, הסיכוי שהחלטת הרוב נכונה מתקרב למאה אחוז, במקרה שכל משתתף צודק בהסתברות גבוהה מחמישים אחוז, ודעותיהם בלתי תלויות.

קשה למצוא מצב שבאמת הדעות של אנשים יהיו בלתי–תלויות ואין השפעה בכלל מן החברה. ההסתברות לאזרח להיות צודק לגבי עניין לאומי היא קשה למדוד במדינה ששם לכל אחד באוכלוסיה יש אורח חיים ונקודת מבט קצת אחרת. אולי עלינו לבנות חברה ששם תהיה לכל האזרחים קול, וללמוד איך לפטור את המחלוקות שלנו לטובת הנזקקים.

כתוצאה מכך, עלינו למצוא דרך הטובה ביותר לקחת בחשבון את העדפות של כל אחד.

למשל, נקח את המסך של בערות של ג'ון רולס:

> ראוי ליצור חוק כדי להועיל לחבר החלש ביותר בחברה. יותר כללי, מומלץ לחברה לנסות להתגבר על ההטיות העלולות לגרום לאמוד בצורה לא–נכונה את הסבירות לקבוצה להיות נכונה, העדפת רצונות מסוימים על פני אחרים, להגביר את רמות האמון בין החברים כדי שיוכלו להגיע להסכמה כנה יותר, ועוד. לפיכך, תפיסתם של אותם פוסקים האומרים כי חוסר יכולת להשיג הסכמה מושלמת של הנשלטים היא מניעה לדמוקרטיה נדחית כאן...

בנידון דידן, יונתן חי בארה"ב, שהיא דמוקרטיה עם תחושה חזקה של שלטון חוק ומסורת של שמירה על מדיניות המאפשרת למפלגות שונות להשמיע את האינטרסים שלהן (דמוקרטים ורפובליקנים מתקיימים יחד באותו ממשל וכו'). אזרחות והצבעה נוטים ללכת יד ביד - מי שנחשב אזרח מסוגל להצביע בעד העדפותיהם ומוצג באופן דמוקרטי על ידי נציגיהם שבחרו, אשר ניתן לטעון כי אז יש להם את המומחיות להעמיד את החוקים האידיאליים, כאשר הם משולבים במספרים הנכונים. והאזרחים המצביעים יכולים להזמין את העדפתם כרצונם, כל הבוחרים וההעדפות מתחשבים וכו'. יונתן אינו מתחשב בשום דבר מכיוון שהוא אינו יכול להשמיע את הצבעתו בדרכים רגילות, אולם החוק עדיין טוען כי הוא מסוגל "לזרוק אותו מהארץ." אין לו שום אמירה בחוק זה. ההלכה ממסגרת את הסה"נ כמה שאנשים היו רוצים, בהתבסס על מה שאנשים ממשלתיים רוצים בדרך כלל, מה הם הציעו שהם רוצים, על מה הם הצביעו, או אפשרויות אחרות. אף אחד מאלה אינו מתייחס ליונתן ולא לאנשים במצבו. מעצם הגדרתו, חוק זה משפיע על אנשים שאינם יכולים להצביע עליו. היא מתנגדת להבנה ההלכתית של ההסכמה הנדרשת להחלת דינא דמלכותא. זו עילה עבורו שלא לציית לחוק זה.

כמובן, חשוב שחוק יהיה מוסרי – גם לפי דד"מ. יונתן אומר, "אבל המחלוקת על דרימרס ודק"א מבהירה לי שאני לא חי בעולם רציונלי." עלינו להבין שחייבת להיות איזושהי רציונליות בחוק.

המלך שהיה לא הוגן (חמסנותא) איבד את הלגיטימיות שלו. כאן הצורך להסה"נ מציע את הדרישה מהחוק להיות סביר ומוסרי. אנשים לא נרשמו לחוק קשה ובלתי סביר גם אם הם גרים במדינה. לדד"מ יש פונקציה חשובה של ארגון חברתי.תפיסת הרמב"ן היא שבני נח מבוססים על דינים – זאת אומרת שהם צריכים להקים מערכת שיפוטית. על פי דעת הרמב"ן, דד"מ כעקרון הלכתי הוא בעל ערך בפני עצמו. לפי רב אשר וייס "ובכל מלכי עולם הלא כתיב (משלי כ"ט צ ') ׳מלך במשפט יעמיד ארץ׳. ועוד, דגם מצד הסברא בהכרח שיש מוראה של מלכות, ד׳אלמלא מוראה - איש את רעהו חיים בלעו׳ (אבות ג: ב). והוא שקראו חז"ל דינא דמלכותא דינא" עכ״ל. החוק צריך להיות הגיוני ולממש באמת את פונקציית הארגון, והאתיקה היא חלק בלתי נפרד מהחוק. החברה לא תשרוד אלא באמצעות חוקים אתיים.

חוק שייקח בחור צעיר כמו יונתן ויחזיר אותו למדינה כמו קולומביה, ששם משפחתו הקרובה אינה נוכחת, ועם תנאי המחיה שעשויים להיות בלתי צפויים- זה אינו אנושי. זה מפר את הנחת היסוד האתית של דד"מ שנדונה לעיל. אביו של יונתן עשוי

להיות משוכנע מכך כי חוסר–הציות האזרחי של בנו תקף מכיוון שהוא לא מציית לחוק שאינו מוסרי, שהוא סוג של חוסר–ציות אזרחי שאביו חושב שהוא "מקובל."

במקרה של יונתן, הוא לכוד על ידי חוק אמריקאי מטריד. יש סיבה להגיד שהחוק הנזכר לעיל הוא לא תקף לפי דד"מ בכלל משום שהוא לא עומד בקריטריונים של דד"מ. במערכת דמוקרטית אנו יודעים שקיימים מגוון חוקים שעדיף להיות על ידי החברה, ולתת דין וחשבון למגוון ההשקפות שיש לאנשים ולזכותם של אנשים לחיות, במידת האפשר, בהתאמה למערכת החוקים האידיאלית שלהם (אם סביר). יש דרכים לכל אדם להכניס את קולו ולפחות בחלק מהזמן החוק תואם עם רצונותיו. אז ברגע שאפילו דרכים אלה לא עובדות, אפשר להתחיל לעסוק מבחינה אתית באי–ציות אזרחי. אי ציות אזרחי מעיד כי יש אתיקה מעל לחוק, שהיא אמת העולם ויש לקדם אותה כאשר זה ראוי להמצב. במקרה של יונתן, הוא אפילו לא אזרח ובכך אינו יכול לייצג את צרכיו בזמן שהוא חי על פי אותו החוק כמו כל האחרים במדינתו ואף אומר שישלם את מסיו אם הוא יכול. זה מציב עליו תקן כפול וכתוצאה מכך, לבנות את החיים שלו כאזרח הוא הגיוני ביותר.

Teshuvah Excerpt - Eli Putterman

Dear Yonatan and Zoe,

Thank you for bringing this sensitive and difficult question to me. Yonatan, I can only try to imagine the shock you must have felt when you discovered that you do not have American citizenship, and the stress of leading a life under the threat of deportation that you face every day. As you say, in a "rational world," you would not have to face these problems, but it is a broken world we live in, and a broken world we are called to heal.

Your case touches upon our deepest commitments as halakhically-committed Jews, as proud Americans – and I hope you still see yourself as one, for all that the law does not – and as human beings. It also turns out to be a "hard case" from the standpoint of technical Halakhah, so that treating it properly will be intellectually as well as morally and emotionally taxing.

Unfortunately, the difficulty is compounded by the fact that in recent years, the subject of immigration has been at the forefront of partisan politics. The rancor and reflexive judgments characteristic of partisanship are the farthest thing possible from the thoughtful and principled reflection which is a *sine qua non* for either halakhic or ethical discussion, both in the abstract and certainly when faced with a concrete and painful case such as yours. Far be it from me to claim that I am immune from the biases endemic to our current discourse, but we must strive to view our current dilemmas not from the perspective of the current news cycle, but *sub specie aeternatis*.

You have asked me, Yonatan, to tell you what you must do. I can lay out the Halakhic issues at hand, and delineate the course of action which seems to me to be best from a Halakhic and moral standpoint. But I will not tell you what to do, both because a knowledge of the limits of my own Halakhic competence prevents me from assuming such authority, and because I conceive of the practice of *pesaq* not as a judicial decision, but as a dialogue between the *sho'el* and the *meishiv* – a Gadamerian "fusion of horizons," if you will. Though you may choose to follow my guidance in the realm of Halakhah, I cannot replace your conscience; you alone must examine the Halakhic options in light of your own moral commitments.

Our first loyalty is to the Torah, and though we do not *pasken* from Scripture, we would be equally remiss in undertaking a dry Halakhic analysis without Torah values informing the discussion. And what the Torah has to say on this matter cannot be clearer: "Do not mistreat or oppress a *ger*, for you were *gerim* in the land of Egypt" (Ex. 22:21); "When a *ger* resides among you in your land, do not mistreat them. The *ger* residing among you must be treated as your native-born. Love them as yourself, for you were *gerim* in Egypt. I am the Lord your God" (Lev 19:33-34); and such examples could easily be multiplied. According to R. Eliezer, who knew something about oppression by a majority, the Torah warns us not to oppress the *ger* no fewer than thirty-six times (Bava Metzia 59b)! Of course, the Halakha sets out different categories of *gerim*, the *ger toshav* or "resident alien" and the *ger tzedek* or proselyte, and some of the Torah's references of the *ger* are interpreted by our tradition as referring to one category, some to the other. But the fact remains that the Torah has made clear, in the most unambiguous way possible, that the oppression of foreigners is fundamentally antithetical to its vision for society.

Again, *pesuqim* do not equal *pesaq*; still less can the Torah be used to argue for a particular immigration policy. But our *pesaq* must be guided by the Torah's sensitivities.

I.

The main Halakhic principle operative in your case, Yonatan, is *dina d'malkhuta dina*, "the law of the government is the law.," or DMD. By means of this principle, secular law is recognized in certain circumstances as having Halakhic force. Owing to the fundamental and wide-ranging disagreements among authorities both medieval and contemporary with regard to the grounds, scope, and function of *dina d'malkhuta dina*, it is almost impossible to make any more specific statement than this about DMD which would be agreed upon by all halakhists. Moreover, these disagreements are not merely technical, but reflect different approaches to core questions of political philosophy relating to the underpinnings of

the state and the Jewish community's relations with it. As your case touches upon several of these fundamental disputes, Halakhah provides you not with one clear path to tread but with a range of approaches, each having its advantages and disadvantages in terms of faithfulness to Halakhic tradition and coherence with our own philosophical and ethical views of the state. I will state at the outset that the vast majority of these approaches do accord with your moral intuition that you should be allowed to stay here.

The primary point of dispute with regard to *dina d'malkhuta dina*, which bears upon all as to the limits of its applicability, is the source or grounding for this principle. After all, one will not find "obeying the secular authority" on any list of the 613 *mitzvot*. The two most prominent legal theories of *dina d'malkhuta* are Rashbam's theory that validity of secular law derives from the consent of the governed[12] and Ran's theory that the king's law is the law of the land because, very simply, the king owns the land, and can condition the right to live in his territory on adherence to his law.[13] (It may be difficult to read about the theoretical possibility of deportation brought into the discussion so drily to solve an analytical problem, when for you it is an all-too-real peril. I apologize.) A third possibility, going back to Meiri, views the obligation to obey a secular authority as deriving from the same source as the obligation to obey a Jewish king appointed according to Halakha.[14] Other groundings for *dina d'malkhuta* have been found (or read into) the Rishonim, but these will suffice to illustrate the complexity of applying *dina d'malkhuta* to your case.

These different understandings of the grounds for *dina d'malkhuta* served as a basis for discussions in the Rishonim about the scope of *dina d'malkhuta*.[15] However, applications of *dina d'malkhuta* in the Talmud and Rishonim almost never venture outside the boundaries of *dinei mamonot*: in the Talmud, *dina d'malkhuta* is applied to assert a broad though not unlimited legitimation of taxation by the secular government,[16] and, more equivocally, to grant certain aspects of secular civil law recognition by Halakha.[17] The situation does not change much in the Rishonim.[18]

Hence, the Rishonim did not address a question which from our contemporary perspective seems to be fundamental: does *dina d'malkhuta* impose an independent Halakhic obligation to follow the laws of the secular government, or merely cause pecuniary obligations imposed by the secular law to be seen as valid in Halakha as well? This question has fundamental ramifications not only for heartbreaking cases of immigration law such as yours, but for prosaic questions arising in a modern administrative state, such as whether Halakha prohibits speeding or jaywalking.[19]

It seems that the answer would depend on one's legal theory of the basis for *dina d'malkhuta*: under the theory attributed to Meiri that the authority of a secular government derives from the same source as that of a Jewish king, one has a positive obligation to obey secular law just as one must obey a Jewish king. However, both of the prominent theories of *dina d'malkhuta* – Rashbam's consent theory and Ran's

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[12] Rashbam, Bava Batra 54b, s.v. *ve-ha'amar Shemu'el dina de-malkhuta dina*. The other prominent exponent of this theory is Rambam, *Hilkhot Gezelah* 5:18.
[13] Ran, Nedarim 28a, s.v. *be-mokhes ha-omed me-elav*, citing Tosafot. See also Rashba, ibid., s.v. *be-mokhes she-ein lo qiẓba*.
[14] Meiri, Bava Kamma 113b, s.v. *kol mah she-amarnu*; Nedarim 28a, s.v. *kevar be'arnu*. It is possible to read the Meiri differently, but in any case, a clear statement of this position is found in Mabit, *Kiryat Sefer* to *Hilkhot Gezelah* 5. A recent treatment of *dina d'malkhuta* which arrives at this theory, though ignoring these earlier precedents, is R. Asher Weiss, "Dina de-Malkhuta Dina," http://www.torahbase.org/פרשת-חוקת-דינא-דמלכותא-דינא/, also printed as *Minḥat Asher* 2:121.
[15] For instance, one of the major disputes in the Rishonim with regard to *dina d'malkhuta* concerns whether the principle applies to "new laws" promulgated by a king or only to customary forms of royal power. Rambam, *Hilkhot Gezelah* 5:14 takes the position that *dina d'malkhuta* applies to new legislation, whereas Ramban, Bava Batra 55a, s.v. *im ken bitalta* and Meiri, Bava Kamma 113b, s.v. *kol mah she-amarnu*, limit the application of דינא דמלכותא to customary law. The dispute was mostly resolved by the time of the *Shulḥan Arukh* in favor of the former side; see *Beit Yosef*, *Ḥoshen Mishpat* 369, s.v. *umah she-katav bameh devarim amurim bedin kelali*.
[16] Nedarim 28a; Bava Kamma 113a-b.
[17] Bava Batra 54b-55a; Gittin 10b.
[18] Gil Graff, *Separation of Church and State - Dina D'Malkhuta Dina in Jewish Law, 1750-1848* (Tuscaloosa: University of Alabama Press, 1985), 28: "During the long span of years between the third and eighteenth centuries, there was a remarkable uniformity in the range of issues arising in connection with the definition of *dina d'malkhuta dina*. The applications of the principle cited in the few Talmudic references to it - taxes, confiscations, and bills executed in non-Jewish courts - were the primary issues that arose in further interpretation during the following one and one-half millennia."
[19] Unfortunately, when reading the (admittedly scant) literature on these questions one does not get the sense that they are purely academic.

feudal theory – are tailored towards justifying Halakhic recognition of secular law in the realm of *mamonot*, rather than rendering obedience to secular law Halakhically obligatory.[20] It is unsurprising that such legal theories do not address the question of obedience to the state in general, as they were formulated in a period when the state played a much more limited role in the lives of its subjects.

Contemporary decisors who have considered the issue of obedience have come out on opposing sides of this question. On the one hand, R. Zalman Nehemiah Goldberg convincingly proved from the language of Ran that *dina d'malkhuta* only "creates a legal situation" as to the ownership of property rather than imposing obligations to act in a certain way.[21] On the other hand, a responsum of R. Moshe Feinstein seems to take as given that *dina d'malkhuta* creates a substantive obligation to obey American law, and several other decisors, particularly in the Religious Zionist sector in Israel, have taken this position as well.[22]

Given the range of Halakhic opinion on this matter and the lack of clear statements in the Rishonim, I believe that as a matter of technical Halakha, it is perfectly legitimate to take the position that *dina d'malkhuta* does not create an obligation to obey secular law. In particular, under this view Halakha does not obligate you to follow immigration law which views your presence in the country as illegal. Admittedly, even a technically sound Halakhic position may be unsatisfactory from a hashkafic perspective. Relegating *dina d'malkhuta* to civil matters creates a disconnect between our commitment to Halakha and our fealty to America and its laws; our value system becomes divided.[23] But you might not see this a problem at all; perhaps you feel that as an undocumented immigrant, persecuted by the laws of this country through no fault of your own, the American system has betrayed you, and you owe no loyalty to the state beyond the bare minimum Halakha demands. I see nothing worthy of reproach in a person in your situation choosing to take this position.[24]

Nevertheless, since many and distinguished *poseqim* have ruled that *dina d'malkhuta* imposes a general requirement to obey secular law, I will briefly explain why I feel that even according to this approach, there are several reasons to suppose that this principle would not apply in your case, based on the substantive limitations placed on *dina d'malkhuta* by the Rishonim and codified by the *Shulḥan Arukh*. I believe most of these arguments fail, but some of them appear to me to be sufficiently convincing; of course, your judgment as to the strength of each argument may differ from mine.

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[20] Halakhic private law, generally speaking, does not give parties the ability to obligate themselves contractually to perform certain actions in the future (*qinyan devarim*). This would seem to prevent any theory of *dina d'malkhuta* founded on civil law, including those of Rashbam and Ran, from imposing any obligations other than monetary ones under Halakha. (Most of the less-often cited theories of *dina d'malkhuta* have the same limitation.) But as I have not found this argument in any other source, I leave this as a *tsarikh iyyun*.

[21] Zalman Nehemiah Goldberg, "Toqef ha-Hithayvut Limkor be-Zikhron Devarim," *Tehumin* 12 (5751), pp. 279-299, at pp. 292-293. Interestingly, his argument does not rely on the Ran's rationale for *dina d'malkhuta* but on a close reading of a particular ruling of Ran with regard to tax evasion. See below, note 42.

[22] *Igrot Moshe, Hoshen Misphat* 2:30; see R. Asher Weiss, "Dina de-Malkhuta Dina" (above, note 14). Also see *Minḥat Asher* 2:123, which argues that *Tashbetz* 1:158 and *Teshuva me-Ahava* 1:117 implicitly hold this understanding of *dina d'malkhuta* as well; as an argument from silence, however, this is not dispositive.
For Religious Zionist decisors, see R. Uri Sadan, "Avodat Yeladim be-Ḥufshat ha-Qayiẓ," *Emunat Itekha* 97 (Tishrei 5773), pp. 79-87 (available at http://asif.co.il/download/kitvey-et/amon%20a%2095/amon%2097/1%20(10).pdf), mentioning the positions of R. Yaakov Ariel and R. Dov Lior.

[23] The claim that loyalty to (modern, democratic) states is founded in Halakhic tradition is made in a letter of R. Joseph B. Soloveitchik to R. Samuel Belkin printed in Nathaniel Helfgot, ed., *Community, Covenant and Commitment: Selected Letters and Communication* (New York: Toras HaRav Foundation, 2005), pp. 56-60, at p. 57: "We must note that our decision [to send rabbinical students to be chaplains in Vietnam – EP] is not primarily an expression of a pragmatic-utilitarian approach but reflects a halakhic-historic tradition which has always wanted to see the Jew committed to all social and national institutions of the land of his birth or choice which affords to him all the privileges and prerogatives of citizenship." R. Soloveitchik here lapses into his unfortunate habit of assuming his favored position to have been agreed upon by Halakhists of all times and places. It is very difficult to make any blanket generalization about the halakhic tradition which is universally valid, and this case is no exception, though R. Soloveitchik's silencing of alternative voices – e.g., the Haredi community in Israel – is particularly blatant in this instance.

[24] I find the demand for axiological unity unconvincing for a different reason: it is simply not the case that a Jew committed to morality as well as Halakha can avoid the charge of competing loyalties. Even a discriminating and self-critical identification with contemporary Western moral culture places many demands on its adherents which cannot be convincingly represented as deriving in some fashion from Halakha. Indeed, in some cases, such as gender equality, it is difficult enough to defend the position that Halakha does not flatly contradict morality. If it is conceded that morality imposes obligations upon us in areas where Halakha is silent, there is no difficulty in asserting that the responsibility to obey American law derives from our moral rather than Halakhic commitments – but in that case, it is to morality rather than Halakha we must turn to determine whether any particular law should be followed. And as I already stated at the outset, I cannot replace your conscience.

Firstly, *dina d'malkhuta* applies only to laws which are intended to promote the public welfare.[25] Originally, this principle was stated to exclude the application of secular law in purely private matters such as inheritance law.[26] Contemporary judges on Israeli rabbinical courts have used this principle in a wholly different context, to distinguish between laws motivated by concern for the public welfare and ideologically-motivated laws whose goal is to socially engineer society in line with the rulers' worldview.[27] On this basis, one could argue that the immigration laws in their current form derive from nativist ideology rather than a concern for public welfare,[28] and hence are invalid under *dina d'malkhuta*. But this argument suffers from a conceptual problem, namely the lack of an objective criterion for deciding whether a law promotes public welfare or not; after all, from the perspective of the ruling party, it would be best for society if its ideology were implemented in full. Hence, to use the "ideologically-motivated law" test to strike down a given law, one would have to suppose that Halakha intends the *poseq* to substitute his or her own judgment as to the public welfare for that of the legislators (and their voters). Given the inherent subjectivity of this determination, this will lead to Halakhic anarchy.[29]

Another principle used to limit *dina d'malkhuta* is that Halakha does not recognize secular enactments which are "against the Torah." I use this vague phrase because over the course of Halakhic history, this principle appears in many guises. Firstly, it is agreed upon by all decisors (at least until the rise of the Reform movement) that *dina d'malkhuta* cannot be used to permit what Halakha forbids.[30] Next, the Rishonim deployed the principle to prevent secular law from preempting various areas of Halakhic private law, from inheritance[31] to the law of legal instruments (*shtarot*),[32] and so on. Ahronim who were sensitive to inconsistencies in earlier authorities' application of this exception argued that this principle preempted secular enactments from overriding laws which are "clear in our law,"[33] or "written explicitly in the Torah"[34] but this criterion never received a rigorous formulation and seemed to be deployed *ad hoc* to resolve difficulties.

Above, I argued that fair treatment of the *ger* – stranger, foreigner, proselyte, however one translates it – is a fundamental Torah value. Accordingly, one might claim that this value prevents Halakha from recognizing immigration law, which is based on a diametrically opposed conception allowing citizens control over the residency rights of noncitizens.[35] However, it cannot be ignored that Jewish tradition did not interpret the Torah's injunctions against oppression of foreigners as guaranteeing any sort of freedom of movement in practice. In fact, Ashkenazi communities in the medieval period operated under a strict regime of internal "immigration controls," under which a Jew wishing to settle in a town had to obtain the unanimous consent of the existing members of the local Jewish community in order to do so.[36] Hence, it is

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[25] Rashba, responsum 6:254; Maharik, 187; *Shulḥan Arukh*, *Ḥoshen Mishpat* 369:11.
[26] The argument for the limitation of *dina d'malkhuta* to the public sphere (see Rashba's responsum cited in the previous note) is that if not for this limitation, Halakhic civil law would otherwise completely be preempted by secular law under *dina d'malkhuta*, which is absurd. In other words, for Rashba this exception is a corollary of the next limitation I discuss. However, other statements of this exception, such as *Maggid Mishneh* to *Hilkhot Malveh ve-Loveh* 27:1, s.v. *aval kol ha-shetarot*, do not give this justification.
[27] Israel Rabbinical Courts, case 1 - 35 - 009063413, opinion of Dayyan A. Sherman; also published as A. Sherman, "Minhag ha-Medinah be-Yaḥasei 'Oved u-Ma'avid," *Teḥumin* 18 (5758), 236-247.
[28] The oft-cited contention that undocumented immigrants benefit the American economy might be used to buttress this argument. On the other hand, some economists have argued that immigration tends to lower wages in the unskilled sector, in which case immigration restrictions could certainly be motivated by a concern for public welfare. The question of the impact of immigration on the labor market is hotly disputed; for a recent review of the research on both sides, see Christian Dustmann, Uta Schönberg and Jan Stuhler, "The Impact of Immigration: Why Do Studies Reach Such Different Results?" *Journal of Economic Perspectives* 30:4 (2016): 31–56.
[29] In this regard, it is noteworthy that the opinion of Dayyan Yaakov Eliazrov in the case cited above, note 16 (also published as Y. Eliazrov, "Ma'avid ha-Ḥoreg mi-Minhag ha-Medina," Teḥumin 20 (5760), 71-77), accepts Dayyan Sherman's distinction between publicly-beneficial and ideologically-motivated laws, but disagrees with Dayyan Sherman as to whether a particular law should be considered ideologically-motivated or not, which leads the author to a different ruling.
[30] E.g., being drafted into the army does not allow one to violate Shabbat (outside of a situation of *piqquah nefesh*, of course) even if one's commander so orders. See *Ḥatam Sofer*, 6 (*Liqqutim*), 29.
[31] *Tashbetz* 1:158.
[32] *Pisqei 'Or Zarua,* Bava Batra*, Get Pashut,* 5:19-20.
[33] *meforash etzlenu*; Shakh, *Hoshen Mishpat* 73:36.
[34] *mah she-katuv ba-torah be-hedya*: *Ḥatam Sofer* 5 (*Hoshen Mishpat*), 44.
[35] In this connection one could also mention Deut. 23:16-17, which explicitly guarantees the freedom of residency of fugitive slaves.
[36] These controls were known as *ḥezqat ha-yishuv* or *ḥerem ha-yishuv*. See the Encyclopedia Talmudit article on *ḥezqat yishuv* for a halakhic overview, and for an explanation of how this practice arose, see Shimon Schwarzfuchs, "Hishtalsheluto shel Ḥerem ha-Yishuv - Re'iyah mi-Zavit Aḥeret," in Aharon Oppenheim et al. ed., *Sefer Yovel le-Shlomo Simonson* (Tel Aviv: Tel Aviv University, 1993), 105-117, available at https://lib.cet.ac.il/pages/item.asp?item=22062&kwd=8638.

difficult to take seriously the argument that immigration law as a whole is so obnoxious to Halakha that *dina d'malkhuta* would not apply to it on those grounds.[37]

A third line of argument proceeds from the undisputed fact that a sizable majority of Americans support allowing those in your situation, who were brought to the United States as children but lack legal status – i.e., Dreamers – to remain in the country; in a recent poll, 61% of respondents expressed support for offering dreamers a path to citizenship, a further 17% said Dreamers should be allowed to remain without a path to citizenship, and only 12% thought they should be deported.[38] Surely, one might contend, the fact that a vast majority of the country supports changing the law implies that Halakha would not compel obedience to the present law.

This intuition can be turned into a Halakhic argument in multiple ways, though I have not found a formulation which is completely convincing. One may straightforwardly argue that according to Rashbam's consent theory of *dina d'malkhuta*, a law which a majority of society opposes cannot be considered binding. The problem is that this understanding of the consent theory in which the subjects consent to individual laws takes consent too literally: after all, few people consent to a law when they find themselves on the wrong side of it, so *dina d'malkhuta* would break down immediately once it comes time to enforce the law upon criminals.[39] Hence, the consent the Rashbam requires must be recognition of the legitimate authority of the sovereign as a whole, rather than consent to individual acts of legislation. But acceptance of a democratic government as the legitimate sovereign also means acceptance of the "rules of the game," under which the law doesn't change until someone manages to get the bill through Congress, however large the majority behind it.

A wholly different approach relies on the novel theory of *dina d'malkhuta* proposed by R. Yosef Eliyahu Henkin.[40] According to R. Henkin, because society changes all the time, no community can function with a static legal system. In the past, Jewish communities were legally autonomous, and they met the need for legal change with binding Halakhic enactments made by the rabbinic and communal leadership. In such a situation there was no need for *dina d'malkhuta*. However, when Jews live in a society with no permanent *batei din* or communal leadership with enforcement authority - as in R. Henkin's time and our own - Halakha looks to the secular legal system, which continually adapts in order to promote public welfare, and obligates Jews to follow its provisions via the principle of *dina d'malkhuta*.

For R. Henkin, then, Halakha recognizes a legal system as legitimate if it adapts to changing conditions. In the current state of partisan gridlock in the United States, Congress has proven incapable of passing common-sense legislation even when a considerable bipartisan majority supports it. Perhaps, then, according to R. Henkin Halakha would withdraw its blanket recognition of *dina d'malkhuta* from American law, or at least from those areas in which there is clear agreement among a vast majority of the voting public that the law needs to change. Theoretically and morally, I find this argument attractive, but it relies too heavily on a unique and novel position of a single authority to stand on its own.

A fourth limitation on *dina d'malkhuta* in Halakhic tradition which may have bearing on your case is the concept of *ḥamsenuta*. Many Rishonim argue that certain forms of state action are to be considered *ḥamsenuta d'malka*, state robbery, rather than *dina d'malkhuta*, and hence are not recognized by Halakha. However, it is difficult to extract a consistent definition of *ḥamsenuta* from the sources. Some authorities use *ḥamsenuta* to refer to unjust laws, such as taxation with the amount taxed left to the discretion of the tax collector.[41] Other authorities, though, seem to limit *ḥamsenuta* to cases in which the secular authorities fail to follow due process of law, and grant legitimacy to any state action, no matter

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[37] Support for this contention, though hardly necessary, can be brought from the fact that *Avnei Nezer*, *Yoreh Deah* 455 explicitly applies *dina d'malkhuta* to Ottoman immigration law.
One could also argue that it is obnoxious to Halakha for Yonatan to suffer due to his parents' negligence, but the existence of the category of *mamzerut* belies this argument.

[38] Politico/Morning Consult, June 2020. See https://www.politico.com/news/2020/06/17/trump-supporters-dreamers-poll-323432.

[39] I'm implicitly assuming here that consent under the Rashbam's theory must be individual, there being no mechanism in Halakhic civil law for a majority's consent to bind a minority.

[40] *Teshuvot Ivra* 96.

[41] *Nimmuqei Yosef* to Rif, Nedarim 10a, s.v. *be-mokhes she-ein lo qiẓbah*.

how harsh, if it has the form of law.[42] At the other extreme, Ramban holds that *dina d'malkhuta* applies only to the traditional legal system of the country, and any new legislation by the ruler, in whatever domain, is considered *ḥamsenuta*.[43]

Given the wide range of state action dubbed *ḥamsenuta* by the Rishonim, it is tempting to read the term broadly as meaning "grave injustice." On this reading, *ḥamsenuta* would serve as a general-purpose tool for the *poseq* to reject laws which offend common-sense morality, even when they fall under none of the other categories of exceptions to *dina d'malkhuta*. Such an understanding certainly has its advantages: if an unjust law need not be obeyed *ipso facto*, a *poseq* could rule in accordance with the dictates of his or her conscience that Halakha permits violating such a law without needing to come up with technical arguments for why *dina d'malkhuta* does not apply.[44] But, as always, allowing *poseqim* to openly exercise power is a double-edged sword. If I do not wish to live in a world where different Halakhic communities consider themselves free to disobey laws which contravene their own ideologies,[45] one might object, I should refrain from relying on such in my own *pesaq*.[46] This meta-halakhic consideration, if you find it convincing, compels us to take the more limited reading of *ḥamsenuta* as referring to exercise of state power without legal justification; i.e., Halakha merely requires that the secular authorities follow due process, but not that the law conform to any external standard of justice or fairness. Such a limitation on *dina d'malkhuta* may be useful in justifying resistance to certain forms of governmental oppression which lack even the veneer of legality,[47] but it seems to be irrelevant to your particular case.

To my mind, the strongest argument against the recognition of American immigration law by *dina d'malkhuta* relies on a widely-accepted principle in Halakhic tradition requiring that a law be nondiscriminatory in order to be recognized by *dina d'malkhuta*.[48] Though there is some dispute about the scope of this exception, which has been interpreted both so broadly that a government regulation applying to a particular sector of the economy was held to be invalid[49] and so narrowly that a tax regime under which Jews pay more than Gentiles was considered legitimate[50] – even more surprisingly, both of these rulings were made by the same authority – it has long been used to place substantive limitations on *dina d'malkhuta*. The fact that this exception dovetails with our contemporary democratic intuitions as to equal protection under the law makes it even more attractive as a tool for the contemporary *poseq*.

I do not intend to argue that Halakha categorically refuses to recognize immigration law because such law necessarily discriminates between people on the basis of immigration status.[51] At least *prima facie*, the control of borders and privileging citizens over noncitizens serves a legitimate state purpose.[52] To borrow American legal terminology, noncitizens as such would not be treated as a protected class under Halakha's antidiscrimination policy. However, the immigration laws may be discriminatory in other ways. R. Hayyim Regensburg, arguing for Jews to support the civil rights movement, argues that *dina d'malkhuta*

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[42] See, e.g., Rambam *Hilkhot Gezelah va-Aveidah* 5:13 (which does not use the term *ḥamsenuta*); *Hiddushei ha-Ran*, Gittin 10b, s.v. *amar Shemu'el*; *Hiddushei ha-Ritva*, Gittin 10b, s.v. *ve-ha de-amrinan*.
[43] *Hiddushei ha-Ramban* to *Bava Batra* 55a; *Teshuvot ha-Ramban*, 46.
[44] As one might suspect that I am attempting to do in this very responsum.
[45] Note that I do not claim that we are not already living in such a world.
[46] I am glossing rather lightly over some very deep questions in the philosophy of law (and of Halakha in particular), which cannot be fully explored here. But I will nonetheless permit myself to take the argument one step further: suppose one takes the legal-realist position that to arrive at their preferred result, jurists will use any legal arguments necessary, whatever their strength (assuming that there is an objective notion of the "strength" of an argument). If so, then the judicial-minimalist argument that jurists should refrain from using powerful legal tools due to their potential for abuse amounts to unilateral disarmament: less high-minded or historically conscious judges or *poseqim* will not be similarly constrained in developing the tools they need to get the rulings they want. Is it fair that a higher degree of historical awareness – the knowledge that judges do not simply interpret but rather make law – should lead, paradoxically, to judicial paralysis?
[47] This may include certain aspects of US immigration enforcement: for instance, at various times – both due to aggressive enforcement action by individual officials, and as a matter of official policy – refugees claiming asylum under American law have been deported without a proper hearing of their claims. The current DHS policy known as Migrant Protection Protocols, under which asylum seekers are required to remain in Mexico while their claims are processed may also violate refugees' rights under US law, and hence, fall under *ḥamsenuta*. Again, though, this does not apply to the case at hand.
[48] Rambam, *Hilkhot Gezelah* 5:14; Rosh, Nedarim 28a; *Or Zarua*, Bava Qamma 447, citing R. Eliezer of Metz.
[49] Maharik, 66; Rama, *Hoshen Mishpat* 369:6.
[50] Maharik, 195; Rama, *Hoshen Mishpat* 369:8.
[51] Indeed, *Ḥokhmat Shlomo* to *Ḥoshen Mishpat* 369:8 specifically states that a law which discriminates between foreigners (*gerim*) and natives (*benei medinato*) does not thereby become invalid under *dina d'malkhuta*.
[52] Opposition to this seemingly self-evident claim has come from economists and moral philosophers alike, but the call for open borders is still extremely marginal in contemporary political discourse.

requires equal treatment under the law not merely in theory but in implementation; hence, a law which is habitually enforced in a discriminatory fashion, no less than a facially discriminatory law, would be invalid.[53]

It is blatantly obvious to an unbiased observer that immigration enforcement in the contemporary United States is far from neutral. Despite a Supreme Court ruling to the contrary,[54] Border Patrol and ICE agents systematically racially and ethnically profile individuals in choosing whom to detain,[55] leading to documented statistical disparities between the ethnic makeup of the population targeted by of immigration enforcement – detainees and deportees – and the total undocumented population.[56] Given the harm immigration enforcement inflicts both on the targets themselves and on the surrounding communities,[57] such disparities cannot be waved away even if one believes that the current immigration enforcement regime is otherwise just. To my mind, Halakha's abhorrence of discrimination provides the grounds for viewing American immigration laws as illegitimate under *dina d'malkhuta*.[58]

I think the arguments above, taken as a whole, militate strongly in favor of the position that adherence to American immigration law is not Halakhically mandated. Before I move on, though, one final remark. It may be of little comfort to you, Yonatan, that with sufficient effort one can advance various legal rationales to justify your choice not to "self-deport." You may feel that Halakha should recognize the needless suffering you as an individual would undergo by doing so as sufficient reason to permit (and perhaps obligate) you to do otherwise, even in the absence of a "principled" legal argument.[59] In fact, Halakha does have internal mechanisms whereby the circumstances of the case at hand can sway the ruling to leniency – *she'at ha-deḥak*, *hefsed merubeh*, *ẓorekh gadol*, etc. Due to the historical accident that the law of *dina d'malkhuta* developed within *dinei mamonot* (in which such arguments are generally unusable, since every *qula* for one party is a *ḥumra* for the other), these mechanisms did not become part of the legal discourse relating to *dina d'malkhuta*,[60] and my halakhic competence is certainly not broad enough for me to feel comfortable introducing them here for the first time.

But I confess that the discomfort with dry legalities when a life is at stake, which I have conjecturally projected onto you, is, in fact, my own.

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[53] *Mishmeret Hayyim* 39, at p. 153 of the 5726 Jerusalem edition. The doctrine of disparate impact in American labor law is based on a similar idea, though it applies to employment practices and not to legislation.
[54] *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
[55] See, e.g., Pat Goldsmith, Mary Romero, Raquel Rubio-Goldsmith, Manuel Escobedo, and Laura Khoury. "Ethno-racial profiling and state violence in a Southwest barrio." *Aztlán: A Journal of Chicano Studies* 34:1 (2009), 93-123.
[56] E.g., Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*. The Chief Justice Earl Warren Institute on Law and Social Policy, 2011; Joanna Dreby, "The Burden of Deportation on Children in Mexican Immigrant Families," *Journal of Marriage and Family* 74 (2012), 829–845.
[57] E.g., Elizabeth Aranda and Elizabeth Vaquera, "Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults," *Sociology of Race and Ethnicity* 1:1 (2015), 88-104.
[58] It also creates an obligation upon those of us who have the unearned privilege of American citizenship to protest the current immigration regime.
[59] The point that inflexible adherence to general rules often leads to clearly undesirable outcomes, of course, could apply to any legal system – not least American law itself, which has put you in this position.
[60] Though, of course, one could argue that some of the exceptions to *dina d'malkhuta* developed by *poseqim* (in particular, *ḥamsenuta*) are essentially disguised substitutes for the principles of *she'at ha-deḥak*, etc., which are used in *issurin*.